

1983 Meeting of Commonwealth Law Ministers

Colombo, Sri Lanka, February 1983

Memoranda



Commonwealth Secretariat

MEETING OF COMMONWEALTH LAW MINISTERS

Colombo, Sri Lanka, 14-18 February 1983

MEMORANDA

Commonwealth Secretariat

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PREFACE

Commonwealth Law Ministers from 39 jurisdictions met in Colombo, Sri Lanka from 14 - 18 February 1983. This volume contains a number of the Memoranda prepared for and during that Meeting. Also included are the Meeting's Agenda and Communiqué. The Minutes of the Meeting, and classified Memoranda, are published separately and are only available to Member Governments. A number of other papers are available separately, as indicated at the end of the Table of Contents.

Commonwealth Law Ministers meet regularly, at approximately three-yearly intervals. They are next to meet in Zimbabwe, in 1986.

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Introductory

1. The Meeting of Law Ministers of the Commonwealth was held at the Bandaranaike Memorial International Conference Hall, Colombo, Sri Lanka, from 14 to 18 February 1983. The Meeting, attended by Law Ministers, Attorneys-General, other law officers and officials from thirty-nine countries, was chaired by the Hon. Dr. Nissanka Wijeyeratne, the Minister of Justice of Sri Lanka. The inauguration ceremony was addressed by His Excellency Mr. J.R. Jayawardene, the President of Sri Lanka and by the Chief Justice of Sri Lanka, the Hon. Neville Samarakoon, as well as by the Minister of Justice.

2. A special welcome was extended to the Republic of the Maldives, and to Belize, who were attending their first Meeting of Commonwealth Law Ministers.

3. Ministers expressed their appreciation of the helpful and carefully prepared papers written for the Meeting by a broad range of Commonwealth lawyers.

4. Ministers recalled that their ties in the law were among the most tangible of the Commonwealth's varied bonds and, with their shared traditions, outlook and approaches, provided opportunities for mutual assistance and support which were unique within the world community.

5. The central theme of their deliberations was the exploration of ways and means to extend and enhance their already high level of mutual legal co-operation for the benefit of the people they served.

Human Rights

6. Ministers congratulated The Gambia for taking and sustaining a Commonwealth initiative in the Human Rights area. This provided them with an opportunity to re-affirm 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.

7. 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.

8. 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.

The Decision to Prosecute

9. Ministers discussed the exercise of discretionary factors in the decision to prosecute. They acknowledged this as being one of the most difficult areas of responsibility of any law officer, but one which lay at the very foundation of their systems of justice. In taking such decisions, the lot of the law officer in question was a lonely one, and the discussions at the Meeting had been most valuable. In years to come, Ministers would look back on these as a source of inspiration, guidance and support.

10. Clearly such considerations as possible political advantage, or the race, origin or religion of the suspected person were wholly irrelevant, but there remained significant areas which could only be resolved by the exercise of independent judgement. For this reason it was essential that in discharging this thankless task, the holder of the office enjoy the confidence of the community at large. Occasional controversy was unavoidable and detailed explanations in particular cases might serve further to inflame any public debate, and on occasions be unfair to individuals not charged.

11. Ministers welcomed the recent publication in two jurisdictions of guidelines on the exercise of this discretion. While there were inevitable differences in emphasis from jurisdiction to jurisdiction, the guidelines would be of substantial help to law officers throughout the Commonwealth. They could only be guidelines, however, and not rigid rules, in order to meet the infinite variety of circumstances with which law officers could be confronted. A paper presented by Professor John Edwards made a significant contribution to clarifying the thinking of law officers, and the Meeting expressed its indebtedness to his insight.

Maintenance of Public Order

12. In Commonwealth countries, as in other countries committed to the Rule of Law, a balance had to be struck between the liberties of the individual and the needs of the community at large in the maintenance of public order. Ministers discussed two aspects: the handling of complaints against the police and compensation for persons wrongfully accused. Each concerned the relationship between the individual and the state.

13. The maintenance of public order depended to a large degree on the public which respected its laws and wished to see them fairly and effectively enforced. One key to achieving this was public confidence in, and respect for, their police. In establishing and maintaining such confidence, the existence of adequate machinery for handling complaints against the police was essential. Ministers, in exchanging their experiences and discussing a most perceptive paper, canvassed the dilemma in balancing the needs of the public against the requirement for the police to be able to act with confidence in the discharge of their duties.

14. Ministers recognised that, inevitably, on occasion and to their regret, miscarriages of justice did occur. In discussing a range of possible approaches, they recognised the prerogative of the state not to pay costs unless it chose by statute to accept a measure of responsibility. The view was expressed that States might consider accepting some responsibility in appropriate cases. However, this was necessarily tempered by competing priorities for scarce resources and, on occasion, by the fact that either a citizen may, by his own actions, have contributed to his misfortune, or had been acquitted on wholly unmeritorious, technical grounds. The Meeting observed that most jurisdictions at present dealt with the matter by providing for compensation to be paid for malicious prosecution as well as on a discretionary, ad hoc basis. Ministers would follow future developments with an interest heightened by their discussions.

Extradition Arrangements

15. Ministers considered and adopted the recommendations of a Meeting of Law Officers and Senior Officials held at Marlborough House, London, from 22 to 26 November 1982, which had conducted a close examination of Commonwealth extradition arrangements. The Meeting had been chaired by the Attorney-General of Singapore, The Hon. Tan Boon Teik, and had been assisted by Professor Ivan Shearer whose consultative document had formed the basis for the deliberations. Ministers expressed their collective indebtedness to them, and acknowledged their outstanding contributions to the advancement of Commonwealth co-operation in a vital area of the law. In so doing Ministers re-affirmed their determination that the Commonwealth Extradition Scheme be, and seen to be, fair as between the individual and the state and that, in making the Scheme more efficient and more effective, they had in no way impaired the essential safeguards on which the Scheme was founded.

16. As a result of agreed changes, extradition would become more widely available. In particular, the changes addressed the challenge to extradition arrangements which was posed by politically-motivated acts of indiscriminate violence. The Scheme now provided that Commonwealth governments may declare by law that certain acts may not be held to be of a political character, including murder, offences against the life or person of a Head of State or Government Minister, or offences against certain categories of multi-lateral international conventions.

17. The deliberations of this Meeting concluded the first review of the Scheme to have been undertaken since its formulation in 1966. While noting that the Scheme had served, and was serving the Commonwealth well, Ministers observed that in future more frequent reviews might be necessary, and that there was a special need to keep the list of returnable offences and the working of the procedures under continuing scrutiny.

Mutual Assistance on Criminal Matters

18. Ministers acknowledged that there were significant problems in the provision of judicial assistance in criminal matters at an international level, both within the Commonwealth and outside. Nevertheless, there was a clear need to facilitate effective co-operation and mutual assistance in this regard. The Meeting invited the Commonwealth Secretariat to explore ways in which both the level and quality of judicial assistance in criminal matters might be improved, and were encouraged in this by the success that had been achieved in the context of the Commonwealth's initiative against commercial crime. They expressed the hope that consultation might lead to the formulation of a scheme in which their countries would unite in the determination to respond effectively to the challenge presented by increasing levels and dimensions of international criminal activity. This might in the first instance take the form of a Commonwealth Scheme for Mutual Judicial Assistance in Criminal Matters which would respect the characteristics of shared Commonwealth criminal procedures.

Forfeiture of Assets

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 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 co-operation 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.

Protection of Cultural Heritage

20. Ministers acknowledged the central place occupied by cultural property in the national heritage. Historically, many major cultural items had been removed from their country of origin.

21. They firmly believed that, whatever the position with regard to matters in the historical past, it was now widely recognised in Commonwealth jurisdictions that the protection of significant items of national heritage was a legitimate concern of the state. Most countries had legislation which attempted to provide protection, but this could be immediately frustrated when items were smuggled abroad. To this end it would be desirable for the Commonwealth to take affirmative steps to facilitate the protection of cultural property and, in particular, combat the unhealthy market in smuggled and stolen cultural objects.

22. The practical and legal problems involved in attempting to retrieve cultural property once it had been illegally removed from the relevant national jurisdiction were acknowledged. The problem was essentially one of jurisdiction, and Ministers considered that a Commonwealth solution should be sought.

23. The discussions indicated that the UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 had not proved to be a wholly satisfactory solution, as many countries had experienced difficulty in implementing its provisions.

24. Ministers felt that the special ties within the Commonwealth association provided a promising basis for more effective action. Accordingly they asked the Commonwealth Secretary-General to initiate consultation with governments directed towards this end.

Preparation of Legislation

25. Ministers discussed this subject in the light of the pivotal role, and continuing scarcity, of legislative draftsmen throughout the Commonwealth and with particular reference to the three related issues of the training and status of draftsmen, application of new technology, and new approaches to statutory interpretation. Ministers commended the paper placed before them which canvassed ways in which the training, career structure and the retention of draftsmen might be enhanced. They supported the early formation of a Commonwealth Association of Parliamentary Counsel and Law Draftsmen proposed to promote co-operation amongst draftsmen. They saw the Association as being a non-governmental body run by the

draftsmen themselves, and formed along the lines of other Commonwealth professional groupings such as the Commonwealth Association of Tax Administrators. The Meeting accepted with gratitude the offer by Australia to act as headquarters for the Association and to provide editorial services for a regular newsletter for the Association.

26. The second issue was covered in a presentation which the Ministers received with interest, pointing to the way in which new computer technology could assist in preparing and publishing legislation.

27. Also discussed were innovative approaches to statutory interpretation to ensure that courts are given as much help as possible in the construction of statutes and the ascertainment of the intent of the legislature. In their discussions Ministers expressed interest in following the development of these suggestions.

28. It was clear from the discussions that there would be few Commonwealth jurisdictions that could consider their drafting needs to be properly or adequately served and look to the future with equanimity. The various training courses that had been arranged under CFTC and other auspices had improved the situation in some countries, but for most the shortage of trained draftsmen, or the lack of appropriate personnel to be sent for training, continued to be a problem. For many jurisdictions, an added difficulty was the retention of trained draftsmen in post. In this context Ministers asked the Commonwealth Secretariat to conduct a comparative study of the working conditions of legislative draftsmen in the Commonwealth.

Computerization of Legal Material

29. Ministers exchanged views on their experience in the development and application of technology to the law. For many the early provision of computerized services was improbable, but there was consensus that the intrusion of computers into the area of the law was a fact of life that governments would not be able to ignore. No government, it was felt, could afford to be isolated indefinitely from modern technology.

30. The fear expressed that the application of computers to the law would have only a limited number of subscribers and might therefore prove to be an expensive luxury, was tempered by a recognition of their potential usefulness. The present cost of computerization put the facility beyond the reach of most developing countries. Therefore Ministers asked that a special study be made by the Commonwealth Secretariat to examine the needs of developing countries in this regard and if the need was found to exist, ways in which they might gain the benefits of the new technology.

Laws of Evidence

31. Ministers were conscious of the need to review regularly their laws of evidence in the light of technological developments, in particular with regard to electronic data based materials. These were alien to tradition concepts of admissible evidence and special legislative provisions were generally required to ensure that reliable evidence was not arbitrarily excluded from consideration in court proceedings.

Copyright

32. There was little doubt that the biggest single threat to the copyright systems stemmed from the past scale of piracy in its various forms. A contributory factor was that copyright laws, and the rights they gave, were national rights, whereas developments in technology had created an international dimension. Ministers were perturbed by the present levels of illicit use of copyright material and invited the Commonwealth Secretariat to survey the position in Commonwealth countries and to prepare materials to assist countries which might wish to become party to the relevant international conventions.

Activities of the Commonwealth Secretariat in the Legal Field

33. Ministers discussed the broad spectrum of the legal activities undertaken by the Commonwealth Secretariat and commended the considerable achievements of the Legal Division. These included an impressive range of activities of particular benefit to smaller jurisdictions. Ministers noted considerable increase in activities over the past eight years and were concerned to ensure that adequate resources were made available to the Division. The catalytic approach adopted had proved to be highly effective.

34. Ministers expressed appreciation for the regular production of the Commonwealth Law Bulletin, which fulfilled a vital need for draftsmen and those engaged in law reform, and which was making a major contribution to the development of many Commonwealth legal systems. The other publications of the division were practical in nature and of considerable assistance to law officers and their staff.

35. A number of Ministers expressed their governments' indebtedness to the Commonwealth Fund for Technical Co-operation. Many countries had benefited from urgently-needed help which the CFTC had been able to provide in a variety of areas of legal need. However, the need for experienced legislative draftsmen was critical, and the CFTC had been able to make a major contribution in those instances where its resources had permitted it to provide the full-time services of draftsmen. The services of the Technical Assistance Group were also greatly valued, and particular mention was made of the drafting facility it offered to small jurisdictions needing to produce major new pieces of legislation or urgently required Bills.

36. Notwithstanding these valuable services, Ministers expressed the keen hope that a higher level of assistance might be achieved. They appreciated that this could only be done if the Fund's resources were increased, and they would take up the matter with their governments.

37. Another facet of the CFTC's assistance which was highly commended was the continuing series of training courses in legislative drafting. These had made an impact in an area of acute need. However there was always a degree of natural wastage and the need for the courses was likely to continue for the foreseeable future. A suggestion that the CFTC might fund a training course at a more advanced level which, in addition to refining their skills, might introduce trainees to modern technological aids was also supported.

38. In some jurisdictions there was a need for training in the preparation of law reports, which lie at the heart of the legal system. Ministers expressed the hope that a short training programme might be mounted as there was little point in publishing law reports which were poorly prepared and ill-suited for use by the legal profession.

39. A number of countries were suffering from an acute shortage of legal material, and the position was deteriorating as foreign exchange became increasingly difficult to obtain for the purchase of books. These countries were encouraged by initiatives being undertaken by the Commonwealth Secretariat to explore whether systems might be developed to recover legal materials which were at present being discarded.

40. The Meeting also welcomed a suggestion that the Commonwealth Secretariat join with the Asian/African Legal Consultative Committee to survey the existing arrangements between Commonwealth jurisdictions and the countries of West Asia for the recognition and enforcement of judgments and orders.

Socio-Medical-Legal Issues

41. Ministers acknowledged that increasingly their Ministers were confronted by competing and at times conflicting demands to develop responses to socio-medical-legal issues involving, in particular, ethical considerations requiring a considered and multi-disciplinary approach. Recent developments in the field of health had highlighted a wide lack of regular and systematic consultation between relevant professional groups both at the national and regional level. Such matters as tissue transplants, the definition of "death" and the control of drugs were problems which all would have to face, but to which lawyers alone were ill-equipped to respond without interacting with professionals in other fields.

42. In this context, Ministers welcomed the meeting organised jointly by UNICEF, WHO and the Commonwealth Secretariat in Harare which had examined the implementation of the WHO International Code of Marketing of Breastmilk Substitutes, adopted by the World Health Assembly in 1981. They saw the Meeting as instancing the value of bringing different disciplines together to address a common problem. Conscious of the potential of such consultations and of their impact and relevance to other countries, they invited the Commonwealth Secretary-General to examine ways in which similar consultations within the Commonwealth might be enlarged and enhanced.

Combating International Fraud

43. Ministers welcomed the appointment of the Commonwealth Fraud Officer for a trial period to assist them to combat serious international commercial crime. Dramatic results had been obtained in just one year by a single officer. Ministers were unanimous in reaffirming their dedication to combating effectively a type of crime which could be so damaging to national economies, particularly those of developing countries. The seriousness of the cases already referred to the officer, and the prompt action taken, had amply justified the initiative they had taken in Barbados and, in order to consolidate the advances made, they requested the Secretary-General to constitute the post on a permanent basis.

44. Ministers were convinced that commercial crime prevention was clearly preferable to detection after the event. In this the Commonwealth Fraud Officer had a unique role to play. It was the concentration of the Commonwealth Scheme on loss prevention that rendered it of major and practical significance to Commonwealth governments, and in this there was no overlap with any other international agency.

45. Critical to effective loss prevention was the development of criminal intelligence, and Ministers strongly endorsed the suggestion that the Commonwealth Fraud Officer's resources should be increased to allow the development of an effective intelligence facility. Ministers were also concerned at the dependence of the operation of the Scheme on a single officer. Not only would this inevitably give rise to problems of continuity, but it was impossible for a single officer fully to discharge the responsibilities of the service particularly as he was obliged to travel. At present even a brief illness could paralyse the service. Ministers urged the Secretary-General to strengthen this service as a matter of priority.

Law of the Sea

46. Ministers noted with satisfaction the signing of the Law of the Sea Convention by 121 countries, including most Commonwealth countries. Most delegations welcomed the Convention and recommended its signature and ratification as soon as possible in order to ensure its early entry into force. The United Kingdom expressed the wish that there should be an acceptable agreement on the law of the sea but stated its objection to Part XI of the Convention as presently worded.

Further Consultation

47. Ministers learned with interest of a proposal to holding a meeting of Commonwealth Administrators of Correctional Institutions to discuss and share experience in a number of highly relevant areas relating to the treatment of prisoners. They congratulated the Federal Government of Australia and the Government of Victoria for this initiative and invited the Commonwealth Secretariat to give such assistance as the Australian Institute of Criminology might require to organise it.

Next Meeting

48. Ministers accepted with pleasure and appreciation the invitation generously extended by the Government of Zimbabwe to hold their next Meeting in Harare which they hoped would take place during 1986.

Appreciation

49. Ministers had for long looked forward to gather for the first time in Colombo and were deeply touched by the warmth of their reception by the Government and the people of Sri Lanka. They would take back cherished memories to every corner of the Commonwealth. They congratulated the Chairman, the Hon. Dr. Nissanka Wijeyeratne, who had conducted their proceedings with diplomacy and tact and they asked him to accept their heartfelt appreciation and congratulations, and to convey these also to his Government.

Colombo, Sri Lanka
18 February 1983.

A G E N D A

OPENING CEREMONY

- ITEM 1 COMPUTERIZATION OF LEGAL MATERIALS: THE RESPONSIBILITIES OF GOVERNMENTS
- ITEM 2 THE PREPARATION OF LEGISLATION
- ITEM 3 REVIEW OF THE 1966 COMMONWEALTH SCHEME FOR THE RENDITION OF FUGITIVE OFFENDERS
- ITEM 4 REPORT OF THE COMMONWEALTH WORKING GROUP ON HUMAN RIGHTS
- ITEM 5 EMERGING PROBLEMS IN THE FIELD OF COPYRIGHT
- ITEM 6 REVIEW OF THE ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD
- ITEM 7 COMMONWEALTH CO-OPERATION IN THE ADMINISTRATION OF JUSTICE
- ITEM 8 DISCRETIONARY FACTORS IN THE DECISION TO PROSECUTE
- ITEM 9 THE MAINTENANCE OF PUBLIC ORDER
- ITEM 10 OTHER BUSINESS

CONSIDERATION OF COMMUNIQUE

NEXT MEETING OF COMMONWEALTH LAW MINISTERS

CLOSING CEREMONY

Meeting of Commonwealth Law Ministers

Sri Lanka, 14-18 February, 1983

STUDY OF ABORTION LAWS IN THE COMMONWEALTH

Memorandum by the Commonwealth Secretariat
and a report by PROFESSOR BERNARD DICKENS
of the University of Toronto
and Ms REBECCA COOK, Legal Adviser on
Commonwealth Abortion Laws.



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STUDY OF ABORTION LAWS IN THE COMMONWEALTH

Memorandum by the Commonwealth Secretariat
and a report by PROFESSOR BERNARD DICKENS
of the University of Toronto and Ms REBECCA
COOK, Legal Adviser on Commonwealth Abortion
Laws

The origins of the accompanying report lie in a request first made by Commonwealth Health Ministers in 1974 and arising from their concern that legal provisions in some jurisdictions had not kept pace with medical advances in the prevention of unwanted pregnancies.

2. The Secretariat subsequently circulated a questionnaire to Member governments, and the resulting survey, prepared by Professor Bernard Dickens and Ms Rebecca Cook, was presented to the 1977 Law Ministers' Meeting in Winnipeg and to the Commonwealth Health Ministers' Conference held in Wellington later that year.

3. Health Ministers commended the survey as providing comprehensive background for governments and asked that the data "be kept updated on a permanent basis".

4. The survey was subsequently published in English and in French by the World Health Organization, with assistance from the United Nations Fund for Population Activities.

5. In response to the request from Health Ministers, the Secretariat, in collaboration with the International Planned Parenthood Federation, was able to arrange for the same consultants to review and revise their survey in the light of subsequent developments, both medical and legal.

6. Ministers may be interested in their conclusion that in some jurisdictions the gap between medical technology and legal definitions may be more apparent than real in that it may be capable of being bridged by judicial or administrative interpretation, and so not call for legislative intervention.

REVIEW OF LEGAL ACTIVITIES OF THE COMMONWEALTH SECRETARIAT

Memorandum by the COMMONWEALTH SECRETARIAT

Introduction

The activities of the Commonwealth Secretariat in the legal field, as established and guided by Meetings of Commonwealth Law Ministers over the years, have developed into a substantial, day-to-day workload for the Legal Division. The Commonwealth Law Bulletin represents the most significant investment of our resources. Requests for assistance and for information are received daily, most often by telex and these are dealt with as swiftly as the means at our disposal permit. In these, as in all aspects of our work, the members of our staff are privileged in being able to draw upon the enthusiasm of a brotherhood of law which in a Commonwealth setting achieves a reality and a substance which may be illusory elsewhere. We are always conscious of the demands we are called upon to make on our Commonwealth colleagues, and endeavour to keep these precise, simple to meet and to a minimum.

2. This environment is ideally suited to the catalytic approach: those of goodwill are invariably quick to take up and turn to account any suggestions they see as helpful, and also give generously of their time and talent when they are convinced both of the need for action and of the readiness of governments to give serious consideration to their proposals. In an era of shrinking resources the challenge has been to make what is available go further, and to identify and utilise the resources of others. This has given special urgency in particular to our work for small island states - a concern permeating all facets of the Secretariat's work.

3. A major development during the period under review has been the establishment within the Legal Division of the post of Commonwealth Fraud Liaison Officer at the level of Assistant Director, to enhance international co-operation to counter fraud - a post requested by Commonwealth Law Ministers when they last met, in Barbados in 1980. A number of commissioned studies have been arranged in support of this initiative, and the volume and variety of requests for assistance received to date is eloquent testimony of the need for it. We have dealt in some detail with our activities in this regard, as Ministers may wish to inform themselves more closely in this respect. The post was established in November 1981 for an initial period of three years. As the decision whether to continue the service beyond November 1984 must be taken before the next Meeting of Law Ministers, some initial indication of its usefulness would be helpful.

4. Significant progress has also been made in the review of the 1966 Commonwealth Scheme for the Rendition of Fugitive Offenders, culminating in a Meeting of Commonwealth Governments held at Marlborough House in November 1982, the first Commonwealth *ad hoc* meeting of its kind in the legal area. A report of this Meeting will be distributed separately.

5. Another important development was our active participation within The Hague Conference on Private International Law in connection with the Convention on the International Abduction of Children by a Parent or Guardian. Following the discussions of Law Ministers at Barbados, we were able to convene a caucus of the Commonwealth members of The Hague Conference on the eve of its deliberations in an exercise which helped to lay the basis for a successful conclusion to the work of the Conference.

6. We have consistently maintained an "open door" approach and, as a matter of policy, have given consideration to every request and suggestion for action we have received. We have, however, necessarily endeavoured to limit our involvement in the activities of other organisations to those in fields in which the Commonwealth perspective introduces a major element or which might otherwise be overlooked. We have seen our primary role in this regard as being to encourage the work of others, and only to become directly involved when there are compelling reasons for us to do so. By so doing we have striven to avoid duplication of effort, and have also fostered the interest of others equipped and able to do so, to attend to additional activities which might otherwise fall upon the Secretariat.

7. Mention has been made of the flow of ad hoc requests for information which we receive, and Ministers may be interested in two, in particular. Each concerned litigation of

constitutional importance and of international interest. In each case we were able, overnight, to provide in triplicate (for prosecution, defence and judge) case law and other materials which the law officers of the governments could not have obtained within their regions and required to rebut arguments advanced by well-funded defence lawyers. In so doing the Secretariat's unique position to provide speedy assistance was illustrated. Also demonstrated was a lack of materials, some measures of which might be overcome if libraries and large law firms in developed countries were encouraged to donate, rather than discard, loose parts of series which include a bound volume service. We are currently exploring this possibility with a sample of law libraries and with the British Council.

Commonwealth Law Bulletin

8. Production of the Commonwealth Law Bulletin continues to be the principal focus of our activity in collating and disseminating information on legal developments. While a substantial part of the Bulletin is prepared in the Division, an indispensable role is played by correspondents in Commonwealth capitals who not only regularly send us material but also give vital assistance in helping to fill the many requests for further information we receive as a consequence.

9. The Bulletin continues to appear quarterly, and to a timetable that even a Law Minister's Meeting cannot disturb. The January issue will be arriving in Law Ministries as Ministers gather in Colombo, and the manuscript for the April issue will have already gone to the printers.

10. The Bulletin attracts a growing volume of complimentary comment, particularly from law draftsmen (who find it an indispensable tool in their work), law reformers and members of the judiciary. Additionally, the Bulletin is increasingly depended upon by jurisdictions whose receipt of primary legal matters is being affected by foreign exchange constraints and the requirement for Law Ministries to bear their share of necessary cutbacks. We exercise strict editorial control over its contents, but despite our determination to keep its size to the absolute minimum, in 1981 and 1982 the Bulletin extended to some 1,625 and 1,622 pages respectively. In its nine years of publication nearly 10,000 printed pages have been produced. This growing volume of useful and informative material has highlighted the need for a professionally-prepared cumulative index. This is now in hand, with the end of 1983 as the target date for completion. Such an index should serve to make much more readily accessible a unique storehouse of Commonwealth expertise and experience, and to facilitate still further the use made of comparative material.

11. As a by-product, we were able to use extract from the Bulletin to produce economically and usefully a separate, distinct publication, Commonwealth Developments in Health Law, which has been widely distributed by our colleagues in the Medical Division and which has received a highly favourable reception.

Legislative Drafting

12. The shortage of law draftsmen throughout the Commonwealth continues unabated and is suffered to varying degrees. In some jurisdictions, particularly in developing Commonwealth countries, the severity of the shortage is compounded by a lack of personnel suitable for training or an inability to release suitable personnel. This has meant that some of the jurisdictions most in need have been unable to take advantage of training facilities available to them at no cost.

13. At the end of 1981, too, the Australian Government found it necessary to close the Australian Legislative Drafting Institute. The Institute has served the Commonwealth well and Ministers would wish us to express gratitude to the Government of Australia as well as to Canada and the United Kingdom for the Canadian Legislative Drafting Course and the United Kingdom's Overseas Government Legal Officers' Course. In the place of the Institute, the Australian Government is examining ways in which to assist by making available in-service training facilities for trainee draftsmen from developing Commonwealth countries in the drafting services of either the Federal or the State Governments. The post-graduate course in legislative drafting at the Cave Hill Campus of the University of the West Indies, Barbados, introduced in 1979, also affords training.

14. The need has continued for the ad hoc legislative drafting courses funded through the Commonwealth Fund for Technical Co-operation (CFTC) and organised by the Legal Division. During the three years under review some 35 trainees attended from 19 different Commonwealth countries bringing to a little over 200 the total number of draftsmen trained

since the inception of the programme in 1974/1975. Details of these courses are set out in Annex 1. Unfortunately a serious shortfall in CFTC resources throughout the period had resulted in an inevitable cutback in CFTC-funded programmes, and this was unavoidably reflected in the number of courses we have been able to hold. Happily, however, an improvement in CFTC finances has enabled it to give provisional approval for us to increase the number of courses during the current financial year, to three. Two of these will commence in early 1983, one in Sri Lanka and the other in Kenya.

15. Ministers will wish us to express gratitude not only to the CFTC for continuing to fund the programme even during times of acute financial stringency, but also to the commendable services rendered by the Course Directors, Mr O.M. de Alwis (Sri Lanka) and Mr Justice V.C.R.A.C. Crabbe (Ghana). Their personal devotion to the Commonwealth cause has helped to maintain and nurture a vital Commonwealth link. That it has been possible to hold these courses since 1980 has also been due in no small measure to the generosity of the Government of Kenya, to whom our appreciation is due for assistance and support.

16. One suggestion made to us for the development of the CFTC drafting courses is that consideration be given to the holding of an occasional short "masters' course", at which more experienced draftsmen from developing countries might study advanced techniques in the preparation of legislation (including the use made of modern aids) and share the experience and insights they have gained from their own service. The views of Ministers on the merits of this suggestion would be of assistance.

17. The question of regional law drafting units for small jurisdictions is referred to later in this review.

Commonwealth Fraud Liaison Service

Establishment of post

18. In response to the request made by Commonwealth Law Ministers at Barbados arising from their concern about the serious implications of international commercial crime for their national economies, the Commonwealth Secretary-General appointed in November 1981 an Assistant Director in the Legal Division with special responsibility for fraud prevention. This officer is now conveniently referred to as the Commonwealth Fraud Officer (CFO). According to his appointment he has the following terms of reference:

- (a) Facilitating and promoting judicial assistance between Commonwealth countries and in appropriate cases non-Commonwealth countries in regard to commercial crime enforcement and related matters.
- (b) Developing criminal commercial intelligence and other intelligence bases between Commonwealth law enforcement agencies and between Commonwealth and such other agencies as may be appropriate and to this end, in a catalytic manner engendering and enhancing the flow of information to and between Commonwealth law enforcement agencies from both official and unofficial sources.
- (c) Gathering and disseminating relevant information with particular regard to criminal modus operandi, targeting and new facilities relating to combating commercial crime and related matters.
- (d) Assisting 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.
- (e) Providing a general facility for liaison for co-operation in combating commercial crime and related matters in the Commonwealth including in the area of international investigations, and in particular the development of close liaison with the General Secretariat of ICPO-Interpol and other such international organisations.
- (f) Facilitating and, where appropriate, conduct studies relevant to the combating of commercial crime and related matters.

- (g) Assisting in the establishment of a Commonwealth Panel of Experts on Commercial Crime (as called for by Commonwealth Law Ministers at their Meeting in Barbados in May 1980) and the servicing of this Panel.

19. Given the breadth of this officer's terms of reference and the limited resources available, it has been essential to select priorities. Of prime importance has been establishing a framework for effective communication within the Commonwealth and with agencies outside the Commonwealth. However, the pursuit of general objectives has had, in practical terms, to be subordinated to the provision of immediate assistance in specific matters where this has been requested. The unexpectedly high demand for his services in the development of investigations, and the workload of other officers in the Division has inevitably severely restricted his ability to pursue other terms of reference.

20. The effectiveness of the Commonwealth Fraud Liaison Service in its first year of operation has already become clear. One approach, adopted by some Commonwealth police agencies in attempting to quantify this, is to assess the total "cash at risk". This is well over US\$8 billion. While it could of course not be asserted that the CFO has saved or contributed to saving but a very small proportion of this staggering sum, nevertheless, the figure underlines the need for the service and emphasises (if emphasis be needed) the serious implications for developed as well as developing economies if this sort of crime is unchecked. In a good many of the cases already referred to the CFO the political and social implications had the frauds been successfully perpetrated would have been even more dramatic than the loss purely in financial terms. It is perhaps in the area of loss prevention through the strategic use of intelligence, that the service is of most practical use to Commonwealth countries.

Other International Organisations

21. Commonwealth Law Ministers expressed the wish that a closer working relationship be developed between ourselves and the General Secretariat of ICPO-Interpol. The Director of the Legal Division, and latterly the CFO, has made a number of visits to the Headquarters of ICPO-Interpol in France and an effective working relationship has been established in regard to commercial crime matters. We have also been able to maintain liaison with ICPO-Interpol on other criminal matters, not directly connected with commercial crime. The Commonwealth Secretariat has not yet been accorded formal observer status to the General Assembly of ICPO-Interpol, but we have been assured that this will be granted during 1983. The CFO has attended several proceedings organised by the General Secretariat as an ad hoc observer.

22. In addition, we have developed similar relationships with a number of other international and regional organisations. In some instances this relationship has been forged to provide a basis for liaison on matters only indirectly connected to commercial crime, such as attacking the financial assets of international organised crime and in particular traffickers in illicit narcotics. The close relationship between commercial crime and these other forms of serious organised crime, has been clearly shown in a number of sensational cases in recent months in the USA. These agencies include the International Air Transport Association (Fraud and Prevention Division); the International Maritime Bureau; the United Nations Division on Narcotic Drugs; the World Health Organization; the Commission of the European Communities; the Council of Europe; the Association of South East Asian Nations; the CARICOM Secretariat; the United Nations Crime Prevention Office; the SPEC Secretariat and the CHOGRM Working Group on Illicit Drugs.

Direct assistance

23. The most important aspect of our work in this area during the last year in practical terms has been the direct assistance that we have been able to give to Commonwealth law enforcement agencies in preventing or minimising the effects of commercial crime or in the investigation of such cases. The quantity and seriousness of these cases was unexpected, insofar as it was assumed that it would take some time before police agencies had sufficient confidence in the facility to employ it with the regularity it has. There is a present danger that our resources will be stretched to a point where the quality of service and/or the speed of response could be affected. Within the first year of operation fully 41 cases have been referred to us for intervention. In 26 of these cases the request has been made by or on behalf of a Law Minister or Law Officer, the designated official contact point, or a senior police

officer. In eight cases the request was made by or through an international organisation (i.e. ICPO-Interpol, IATA or the IMB). In one case the initial request for assistance came from a non-commonwealth country, and in that case a number of Commonwealth countries proved to have an interest).

24. Considering the nature of the assistance provided in many of these cases, the fact that many related to loss prevention, and to maintain essential confidentiality, the cases cannot either usefully or properly be described in any detail. In most cases, evidence of serious organised crime was present and in at least two cases links between the perpetrators and terrorists were established. In three others a relationship with illegal trafficking in narcotics could safely be assumed. In one instance a clear relationship was established between a Chinese secret society and a Mafia-type organised crime group in the USA. It is perhaps disturbing that so many matters of grave concern should be brought to light by such an office with such limited resources at its disposal.

Commonwealth Panel of Experts

25. A number of experts have agreed provisionally to serve on this Panel and several sub-panels relating to specific areas of commercial crime have been organised informally. We have been able to arrange on at least four occasions for experts to visit Commonwealth countries to provide assistance in the investigation of specific matters, with the cost involved being borne by the government in question. These cases have all involved maritime matters. It is hoped that this important facility may be extended to other areas.

Inter-police Force Co-operation

26. Our experience to date suggests that enhanced co-operation between Commonwealth police forces on a broad basis than we have either a mandate or the resources to foster, holds considerable potential not only in the fight against organised international fraud, but in the development and maintenance of forces with the skills and outlooks essential to the well-being of the societies they serve.

Technical Assistance Group

27. The Secretariat has been able to respond to requests from many Commonwealth governments for specialised consultancy services through the Technical Assistance Group (TAG), a specialist consultancy team of legal, economic and financial consultants, maintained by CFTC on its headquarters staff. The Group provides advisory services particularly on natural resource development in response to requests from governments. It assists governments, to devise legal and fiscal regimes and arrangements which seek to provide adequate protection for national interests. If required, the Group supports governments by actively participating in their negotiations with multinational oil and mining companies and other foreign investors. The Group has developed particular expertise in the legal as well as the economic and fiscal aspects of petroleum and hard mineral development. It also provides similar advice in the area of forestry. TAG has over the past few years, been building up expertise in the area of fisheries agreements and related issues in the context of the declaration of 200-mile Exclusive Economic Zones off the shores of islands and coastal States. It provides advice and assistance to Commonwealth Governments in these matters. The Group also continues to provide other more general legal and constitutional advice.

28. Over the past few years, TAG has responded to requests from many Commonwealth Governments principally in Africa, the Caribbean and the Pacific, on various aspects of petroleum development. The assistance provided has varied according to the stage a particular country may have reached in the development of its petroleum sector. In the wake of the general level of international interest in petroleum exploration worldwide, there has been recognition by many governments that their existing pre-independence legislation relating to petroleum operations is inconsistent with the modern requirements of both the governments and the international petroleum industry. Such recognition has sometimes been prompted by an approach to the government by an oil company but has on occasions reflected a government's view that fresh policies and legislation were required to stimulate serious interest in the country's petroleum sector. TAG has responded to requests to review, revise or replace existing petroleum legislation from a number of Member Governments including The Bahamas, Bangladesh, Cyprus, Fiji, Guyana, Malawi and Western Samoa. TAG has also advised the Government of

Belize and Kenya on licensing regimes for petroleum development and has assisted the Government of Barbados and Belize in the review of their petroleum income tax legislation.

29. Closely related to legislation is advice on policy and strategy, tailored to the particular requirements and needs of the requesting government. TAG has advised a number of governments on speculative seismic survey arrangements designed to provide data to the government and companies as regards the petroleum potential of the country, and to assist in attracting oil companies to undertake serious petroleum exploration programmes in the prospective areas identified by the geophysical surveys. TAG's advice on the designing and negotiation of these geophysical survey agreements has involved specialised legal inputs as well as technical and policy considerations. The instances of such advice were TAG's assistance to the Government of Seychelles and recently to the Government of St. Kitts on speculative seismic survey arrangements.

30. Following its assistance to the Government of Botswana in the preparation of its new petroleum legislation, TAG provided legal as well as economic support to the Government in its negotiations with an oil company for petroleum exploration agreement and following the withdrawal of the company is currently assisting the Government in its efforts to stimulate exploration by oil companies in Botswana. A senior legal adviser led a TAG team which provided the Government of Seychelles advice on petroleum development options and strategies and assisted the Government in its negotiations with an American oil company which resulted in a petroleum exploration agreement being signed by the Government. In Tanzania, following on earlier assistance provided by TAG in the preparation of modern petroleum legislation and in the negotiations for the conclusion of a petroleum exploration agreement with a Dutch oil company, TAG has assisted the Government in concluding arrangements for the participation by way of a farm-in by two other oil companies in the petroleum production sharing agreement. The legal issues which arose in the course of these negotiations proved complex and required specialised treatment by TAG's legal advisers.

31. TAG has sought increasingly to involve itself in collaborative projects in the petroleum sector with other international agencies active in the area including the World Bank, UNCTCD, and UNCTC and Commonwealth regional organisations. A recent example of regional collaboration involving TAG's lawyers is the provision of a senior legal adviser (himself from the Caribbean) to chair a Caribbean Community Secretariat Working Group set up recently to study and formulate the necessary measures for the harmonisation of petroleum policies and regimes in the CARICOM member countries.

32. As regard the hard mineral sector, in the current state of the world economy requests for assistance, particularly with non-fuel minerals, have been considerably reduced. This trend reflects the international economic climate in which both mineral corporations and developing country governments are now giving clear priority to fuel minerals over non-fuel minerals. Nevertheless, in the period under review, TAG has assisted a number of governments on various aspects of hard minerals development policy and on specific coal and uranium projects. The Group has responded to requests from a number of governments including Guyana, Swaziland and Western Samoa for new mineral legislation as a framework to assist them in their negotiations for mining agreements with transnational mining companies. TAG has also assisted the Government of Fiji in the review of its existing mining legislation. More substantial involvement in the hard mineral activities must probably await the recovery of the world industrial economy which when it comes is expected to stimulate an exploration boom in the hard minerals sector.

33. In support of its project activities in the minerals sector, TAG continues to undertake research on the legislative and fiscal regimes and agreements affecting mining in developing Commonwealth countries. Following the earlier publication of a similar study covering Commonwealth Africa, a comparative survey of legal and fiscal regimes governing the mining industry in the Pacific Commonwealth was published and circulated to Governments in November 1981.

34. A new area in which TAG now provides advice and assistance to Member governments is the delimitation of Exclusive Economic zones, and it helps governments in their negotiations on questions of maritime jurisdiction. This is, of course, relevant not only to offshore petroleum development but also to fisheries and, in the long term, to sea-bed mining. The CFTC had previously assisted the Government of Dominica in the delimitation of its maritime boundaries. A TAG senior legal adviser is currently assisting the Government in the negotiations on this matter.

35. In addition to the specialised priority areas described above, TAG continues to make its legal advisory services available to governments on a wide range of issues. TAG has assisted the Government of Papua New Guinea in the review of its foreign investment legislation. TAG provided one of its legal advisers as a resource person for a seminar held in Sweden in 1981 on legal issues relating to borrowing by governments and their agencies in the Eurodollar capital markets jointly arranged by the Dag Hammerskjöld Foundation and the Commonwealth Secretariat. The seminar was designed to assist Commonwealth developing countries in securing better legal terms in their negotiation of Eurodollar loans in the capital markets. On constitutional matters TAG has continued to advise and assist the governments of emerging independent countries of the Commonwealth. TAG is currently assisting the Government of St. Kitts in its preparations for independence. Legal assistance given since 1980 is scheduled in Annex 11.

36. A large part of TAG's work involves speedy preparation of draft legislative instruments and this has been facilitated immensely by TAG's ready access to the prompt and efficient services of a highly experienced and competent British legislative draftsman provided as part of the General Technical Assistance Programme of the CFTC who, in addition to his other work, works closely with TAG's lawyers on the individual projects requiring preparation of minerals and petroleum legislation on a regular basis. With the assistance of the legislative draftsman, TAG has also been able to respond to requests from small island countries in the Pacific for preparation of new or revised legislation in certain financial and commercial areas.

International Legal Activities

37. The main thrust of the Secretariat's legal activities has been in the domestic area, and this emphasis continues. However our work in the field of the recognition and enforcement of judgments has led us into a close relationship with The Hague Conference on Private International Law, and the production of a series of "accession kits" designed to assist governments in acceding to and implementing relevant conventions in the area of private international law. The warm reception these "kits" have received, our close liaison with ICPO-Interpol and our new capacity for involvement in combatting international "white collar" crime have also resulted in the production of several "kits" concerned with public international law. The conventions covered to date include:

- (i) The Hague Conventions on the Service of Process, the Taking of Evidence and Legislation
- (ii) International Conventions in the Field of Succession
- (iii) The Hague Convention on the Civil Aspects of International Child Abduction
- (iv) International Conventions concerning Applications for and Awards of Maintenance
- (v) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- (vi) Three International Conventions on Hijacking and Offences on Board Aircraft:-
 - (a) Convention on Offences and certain other Acts committed on board Aircraft, Tokyo, 14 September 1963
 - (b) Convention for Suppression of Unlawful Seizure of Aircraft, The Hague, 16 September 1970
 - (c) Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971

This is an area which we have approached with care, mindful of the fact that our resources are miniscule by comparison with any other international organisation, and conscious of the need to augment rather than to duplicate the work of others. It is however, a development which has been welcomed by international bodies and by Commonwealth Governments. We have also in keeping with our interests maintained contact with the Council of Europe in its work relating to the Transfer of Convicted Offenders.

38. Our activities in the field of private international law are discussed in greater detail in Paper LMM(83)15 which looks forward to our participation in the preparation at The Hague of a Convention on Trusts. Work has continued, in partnership with Professors Keith Patchett and David McClean (who have made notable contributions to the development of private international law in the Commonwealth, in the area of judicial assistance). Their work was significantly advanced when it was adopted as the foundation for a law reform report on the topic prepared by the Law Reform Commission of Western Australia at the request of the Standing Committee of Australasian Attorneys-General.

39. Following discussions at the Barbados Meeting concerning the transfer of convicted offenders, we have participated actively in the proceedings of a Committee of Experts established by the Council of Europe to formulate a convention on this topic. The Council of Ministers (i.e. of Foreign Ministers) has now approved the draft and the Convention will formally be opened for signature on 21 March 1983. A paper by Canada brings Ministers up-to-date with bilateral developments subsequent to the Barbados Meeting.

Publications

40. Since April 1980 the Legal Division has produced the following publications:

- (i) Commonwealth Law Bulletin (published quarterly in January, April, July and October);
- (ii) Three International Conventions on Hijacking and Offences on Board Aircraft: Explanatory Documentation prepared for Commonwealth Jurisdictions (prepared by Professor David Lloyd Jones in association with the Commonwealth Secretariat);
- (iii) Bibliography of Materials on Legislative and other Legal Drafting and the Interpretation of Statutes: Second revised edition 1982;
- (iv) The Hague Convention on International Access to Justice: Explanatory Documentation for Commonwealth Jurisdictions (prepared by Professor J.D. McClean in association with the Commonwealth Secretariat);
- (v) Decentralisation: Options and Issues: A Manual for Policy Makers (prepared by Edward P. Wolfers, Peter Larmour, and Yash P. Ghai);
- (vi) Legislative Draftsmen: A short list of some legislative draftsmen available for short ad hoc assignments (Commonwealth Secretariat, May 1982);
- (vii) Commonwealth Developments in Health Law (Commonwealth Secretariat);
- (viii) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Explanatory Documentation prepared for Commonwealth Jurisdictions (prepared by Professor K.W. Patchett in association with the Commonwealth Secretariat);
- (ix) Law Reform in the Commonwealth: Law Reform Proposals and their Implementation, Issue No. 1: January 1981;
- (x) International Conventions concerning Applications for and Awards of Maintenance: Explanatory Documentation for Commonwealth Jurisdictions (prepared by Professor J.D. McClean in association with the Commonwealth Secretariat);
- (xi) Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience (prepared by Judith A. Osborne in association with the Commonwealth Secretariat);
- (xii) International Conventions in the Field of Succession: Explanatory Documentation for Commonwealth Jurisdictions (prepared by Professor K.W. Patchett in association with the Commonwealth Secretariat);
- (xiii) The Hague Convention on the Civil Aspects of International Child Abduction: Explanatory Documentation for Commonwealth Jurisdictions (prepared by J.M. Eekelaar in association with the Commonwealth Secretariat);
- (xiv) Selected Memoranda prepared for the 1980 Meeting of Commonwealth Law Ministers in Barbados;
- (xv) Legal Literature in Small Jurisdictions: A selection of papers edited by W. Twining and J. Uglow (prepared by the Canadian Law Information Council for the Commonwealth Legal Education Association (CLEA));
- (xvi) Ombudsmen in the Commonwealth (A survey prepared for the Commonwealth Secretariat by the International Ombudsman Institute);
- (xvii) Report of the 1981 Meeting of Pacific Islands Law Officers (held at Port Vila, Vanuatu, 20-22 July 1981);
- (xviii) The Practice Relating to the Appointment of Queen's Counsel and Senior Counsel in some Commonwealth Jurisdictions (Commonwealth Secretariat);
- (xix) Newsletters of the Commonwealth Legal Education Association (CLEA);
- (xx) Medical-Legal Issues: A Report of a combined Medical-Legal Workshop held in Malawi, October 1979;

41. An addition to the above is a study of comparative legal measures taken to assist the disabled, undertaken to supplement activity at the United Nations in connection with 1981 being designated International Year for the Disabled. We plan a similar study concerning legal measures to assist the Aged relating to the 1982 International Year for the Aging.

42. Further, we have had discussions with Butterworths (UK) and have interested them in publishing three books (wholly at their own risk). One is the Modern Legal Commonwealth by Sir William Dale (by way of a successor to Sir Kenneth Roberts-Wray) and the other two, by Professors David McClean and Keith Patchett, are on the enforcement of judgments and orders in the Commonwealth.

Small States

43. The legal needs of the small State continue to receive special consideration. As Ministers will know, lack of size in no way diminishes the range of skills required of a legal establishment, and the demands of a modern legal system are unremitting. Thus, perhaps as nowhere else in government, the calls made upon its legal resources can be wholly disproportionate to what, from a realistic viewpoint, it can be expected to provide.

44. Proposed future activity in this field is the subject of a paper LMM(83)9, but Ministers may wish to know that, in the light of their endorsement at Barbados of the concept of a "small States' legal unit", we have been promoting the idea with governments and with agencies in both the Pacific and the Caribbean regions. If the necessary resources can be found to augment those which the CFTC is able to provide, the smallest of the States in these regions may be served collectively by units in St. Lucia and, possibly, Fiji with an initial emphasis on assistance with legislative drafting.

45. In this context we were able to encourage and attend a Meeting of Pacific Islands' Law Officers in Vanuatu in mid-1981, at which the proposal was discussed, refined and endorsed. The Meeting proved such a worthwhile forum and held such promise for the promotion of legal co-operation within the region that it has become an annual fixture. Its second Meeting was held in Apia in October 1982.

46. We were also able to take advantage of wide-ranging review of aid to the Caribbean region undertaken by the UK House of Commons' Select Committee on Foreign Affairs by arranging for Professor Patchett to prepare a submission stressing the importance of assistance in the legal area. The Committee has not reported to date, but we have been informed that the Chairman found the submission most useful and that it will be incorporated in the Report.

47. We have also had discussions with the Attorney-General of the Isle of Man, who, of his own initiative, has secured his Government's agreement to host a meeting from 4-8 July 1983, to which law officers from selected small jurisdictions are to be invited. The Government of the Isle of Man is generously offering to meet all costs of accommodation on the Island, and it is likely that the Agenda will embrace such topical matters of concern as the problems of publishing legal materials in the small jurisdictions; internal constitutional development (e.g. what is the role for an Ombudsman and what degree of control should be exercised over the police by the executive; the application of international conventions to small jurisdictions; the legal problems associated with tax havens; the Law of the Sea and the small State).

48. We also plan to have ready for the Isle of Man meeting a paper which examines the parliamentary procedures of some of the Channel Islands jurisdictions which are designed to minimise the waste of legislative drafting resources and to give maximum policy guidance. Under the procedures, in effect the drafting instructions are tabled and debated before substantive drafting is begun.

Relationships with NGOs

49. The Director of the Legal Division continues to act as Honorary Secretary to the Commonwealth Legal Education Association (the CLEA), which is run from within the Division with support from the Commonwealth Foundation. The CLEA produces a regular newsletter and in addition to its special projects it organised a useful exchange between law teachers from various parts of the Commonwealth at Cumberland Lodge in December 1981. A similar seminar is planned for March 1983. It is also assisting with the organisation of a Commonwealth-wide moot competition for Commonwealth law students, to be held in Hong Kong in September 1983 at the time of the Commonwealth Law Conference.

50. A major current concern of the CLEA relates to students from other Commonwealth countries studying law for call to the Bar in London. Ministers of countries which still send students to the UK for this purpose will be aware of the effect of a decision by the Bar's Council of Legal Education by which law students graduating from 1983 will have to have reached at least second class passes in their degree examinations if they are to go to complete the vocational education stage at the Inns of Court Law School, take the Bar Final and be "called". This seems certain to cause problems for the considerable numbers of law students from those other Commonwealth countries which still use U.K. facilities, and some Ministers may wish to pursue the matter with the admission authorities and with law schools in their home countries.

51. The Commonwealth Legal Education Association has given a great deal of anxious attention to this development and has provided this assessment of the position:-

- (a) Although the number of law students from other Commonwealth countries called to the Bar has fallen drastically from the fifty per cent proportion of 1969 to under twenty per cent in 1981, there are still probably 1,000 to 1,200 such students reading law at universities, polytechnics and private colleges in the UK.
- (b) It is impossible to say how many will not achieve seconds and be able to go through to call as in the past but it could well be 250 to 300. Most will have aimed at being barristers. Not many wish to become solicitors.
- (c) The bulk of the 1,000 to 1,200 law students, possibly even a half, come from Malaysia, Singapore and Hong Kong. The rest are drawn from Nigeria, other West African States, East Africa, part of the Caribbean and certain other countries without law schools or training facilities. (Mauritius, Sierra Leone, The Gambia and Cyprus).
- (d) The Commonwealth Legal Education Association and the organisations of British Law Teachers have made known that they consider the action of the Bar Council to be arbitrary and hard on the law students from abroad. The decision of the Bar Council has been defended as made necessary by shortage of training places and likely to be changed later. This cannot however come soon and the Bar Council will probably hold to second class degrees as a minimum qualification as indefinite policy.
- (e) Countries like Nigeria, Malaysia, Singapore, Hong Kong and Kenya can probably cope with graduates with British law degrees coming straight home after graduation to take vocational stage courses and examinations in those subjects, necessary to working as a lawyer, which will not have been covered by their degree course. Such a practice is desirable in any event but the special colleges or centres for practical training in these countries are usually heavily pressed to cope with local graduates and Malaysia is believed to be contemplating setting up Malaysian law courses and its own Bar Final Examinations in London as a temporary measure.
- (f) The hard rub will be students getting thirds from countries without local law schools or facilities for training and testing (Mauritius, Cyprus, Bermuda, etc.). They should not in total number more than perhaps 40 or 50 people but Ministers from the countries affected will want to reflect on what special measures may be necessary to deal with their predicament.
- (g) It seems unlikely that special courses can be arranged in the UK except possibly at a private law college.

52. We have also worked closely with the Commonwealth Legal Bureau, whose membership comprises Commonwealth Bar Associations and Law Societies. The Bureau, established to foster co-operation between the Commonwealth professional legal bodies, has not been as successful as had been hoped. To an extent this may be due to a lack of resources and to problems inherent in an organisation whose membership is wholly institutional. The potential for mutual assistance, especially for jurisdictions whose legal professional organisations are small or established relatively recently is widely recognised. Consultations are continuing and it is hoped that the Bureau will be formally reconstituted at the Commonwealth Law

Conference in Hong Kong in September 1983, so as to add categories of individual membership and to give a more dynamic role both in enhancing Commonwealth co-operation, regional as well as Commonwealth-wide, and in overseeing the Commonwealth Law Conference themselves.

53. We have also continued to assist other Commonwealth organisations as and when this has been appropriate. In the period under review we have been particularly concerned with the Commonwealth Games Federation, the Commonwealth Foundation (most conspicuously in its change of status from charity to international organisation), the Organisers of the Hong Kong Commonwealth Law Conference, the Commonwealth Association of Tax Administrators (with whom we are pursuing a joint project on tax avoidance provisions), the Commonwealth Magistrates' Association (with whom we are preparing a handbook for lay magistrates) and the Commonwealth Human Ecology Council (on legal measures controlling fresh-water and sea-water pollution). Organisations with whom we liaise and not mentioned elsewhere include the Institute of Criminology (Toronto), the Australian Institute of Criminology (Canberra), the International Ombudsman Institute (Alberta), the International Planned Parenthood Federation (London), the British Council (London) and the British Institute of International and Comparative Law (London). In addition our officers serve on a number of Editorial Boards as well as Advisory Committees for the UK Government Legal Officers' Course and the British Council in respect of its activities in the legal field.

Internal Secretariat Work

54. The day-to-day affairs of the Secretariat including the CFTC continue to generate a significant volume of legal work, all of which is attended to by the Legal Division.

Relationships with Other Secretariat Divisions

55. Our involvement with the activities of other functional Divisions within the Secretariat has also developed over the period under review. Most noteworthy is a multi-disciplinary approach to the implementation of the WHO Breast-Milk Substitutes Marketing Code, which is of considerable significance to a large number of Commonwealth countries and which poses a special challenge to legal establishments. Together with the Secretary-General's Adviser on Women and Development and his Medical Adviser, and with financial support from the CFTC, the World Health Organisation and UNICEF, we have been assisting in the preparation of country-by-country reports on strategies for implementation which formed the basis for a selected workshop held in Harare, Zimbabwe in January 1983. We were also called upon in November/December 1980 to assist the Commonwealth team which observed the elections in Uganda.

Staff

56. The size of the Legal Division has remained unchanged for the last eight years, the addition of a Commonwealth Fraud Liaison Officer being balanced by a vacancy which has just been filled. Our staff comprises five professionals (Britain, India, New Zealand, Nigeria and Western Samoa).

Future Activities

57. The basic pattern of our activities is now firmly established and we do not anticipate that Law Ministers will wish to alter it substantially. We remain, as ever, keen to serve and to tackle within the limits of available resources whatever additional responsibilities we may be given.

58. An informal meeting of Commonwealth Law Reform Agencies was held in Lagos, Nigeria in 1980 at the time of the Commonwealth Law Conference there. Together with the Attorney-General of Hong Kong we have now determined that there is considerable support amongst the Agencies for a full-scale meeting to coincide with the Commonwealth Law Conference in Hong Kong later this year, to capitalise on the likely presence there of a large number of those active in the field. This has been agreed with the Conference organisers and is tentatively scheduled for Wednesday, 21 September 1983.

59. Another proposed meeting, and one which holds promise for new areas of mutual assistance and co-operation, has been suggested by the Government of Victoria, and supported by the Government of Australia and endorsed by a number of Commonwealth Governments in the Asia/Pacific Regions. The Meeting tentatively planned for 1984,

would be of Commonwealth administrators responsible for correctional institutions, and be organised by the Australian Institute of Criminology with assistance, should Ministers concur, from the Secretariat. Items suggested for the Agenda include the treatment of foreign prisoners; problems in enforced medication of violent prisoners; complaint procedures; the treatment of young; well-educated prisoners imprisoned for drug-related offences; and the handling of prisoners on "hunger-strike".

60. Paper LMM(83)4, prepared by the Asian-African Legal Consultative Committee (the AALCC) highlights an area into which our work on the recognition and enforcement of judgments and orders might usefully be extended. It may prove possible for us to assist in the formulation of improved arrangements with the Middle Eastern States by developing an appropriate form of liaison through the AALCC, and this we intend to explore.

Appreciation

61. Our role is essentially that of the catalyst, and without the wholehearted co-operation of our colleagues-in-law in all parts of the Commonwealth little, if anything, could be achieved. We are deeply conscious of our indebtedness to so many individuals and organisations who cannot all be listed here. We have endeavoured to keep our demands on the time of busy officials to the very minimum, and if on occasions we have seemed to have imposed unduly, we can only plead in mitigation the volume of requests to which we have been asked to respond. Our most sincere thanks go also to Commonwealth Law Ministers, from whom we receive support and encouragement in such full and generous measure, to whom we look for guidance, and with whom we look forward to working with in the future.

DETAILS OF THE SECRETARIAT'S LEGISLATIVE DRAFTING COURSES ANNEX 1

1980

African Region

4th East African Legislative Drafting Course (Nairobi, Kenya) 6 July to 16 December 1980

Bangladesh	1
Belize	1
Fiji	1
India	1
Kenya	1
Kiribati	1
Malawi	1
Nigeria	2
Sri Lanka	1
Zambia	1

11 countries

12 trainees

1981

African Region

5th East African Legislative Drafting Course (Nairobi, Kenya) 12 May to 31 October 1981

Bangladesh	1
Ghana	1
India	2
Kenya	2
Sri Lanka	2
Swaziland	1
Tanzania	1
Uganda	2

8 countries	12 trainees

1982

African Region

6th East African Legislative Drafting Course (Nairobi, Kenya) 14 June to 16 December 1982

Bangladesh	1
The Gambia	1
Ghana	1
Guyana	1
Kenya	2
Malawi	1
St. Vincent	1
Seychelles	1
Sri Lanka	1
Tanzania	1

10 countries	11 trainees

GRAND TOTAL: 19 Different Countries
35 Trainees

**LEGAL TECHNICAL ASSISTANCE ASSIGNMENTS PERFORMED FOR
COMMONWEALTH DEVELOPING COUNTRIES UNDER THE COMMONWEALTH FUND
FOR TECHNICAL CO-OPERATION**

- 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 them to proceed. The list does not include the legislative drafting 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 ASSISTED, DESCRIPTION AND DURATION (if relevant) OF PROJECT

African Region

Regional Seminar on legal training and courts of first instance, Zambia (9 days)

Asia and South Pacific Region

Advice on financial legislation (October 1981 continuing) (TAG)

Comparative study on mineral resource development in the Pacific (15 months) (TAG)

Caribbean Region

Caribbean Community Secretariat

Legal Consultant on the harmonisation of laws (2 years)

Commonwealth Generally

Legal Draftsman (3 years)

Resource person for Commonwealth programme on Capital Markets - Seminar on legal issues Sweden (November 1981 - 5 days) (TAG)

The Bahamas

Adviser on petroleum legislation and policy (1 week) (TAG)

Barbados

International Law and Treaty Adviser (2 years)

Consultant, Criminal, Judicial and Penal Statistics (3 months)

Expert in training of para-legal personnel (1 year)

Adviser on Law Reform (18 months)

Adviser on petroleum legislation and taxation (April 1981 continuing) (TAG)

Belize

Consultant to assist with negotiations (2 weeks)

Advice on draft petroleum legislation and taxation (July 1981 continuing) (TAG)

Expert, Law Revision Project (2½ years)

Adviser, Land Law (4½ months)

Adviser, Administrative Law (6 months)

Botswana

Legal Draftsman (1 year)

Advice on petroleum legislation, exploration strategy and negotiations (July 1980 continuing)

Legislative draftsman (2 years)

British Virgin Islands

Advice on Insurance Legislation (6 weeks) (TAG)

Cook Islands

Advice on Draft Superannuation Bill (1 week) (TAG)

Cyprus

Advice on petroleum legislation (November 1980 continuing) (TAG)

Dominica

Advice on maritime boundary negotiations (April 1982 continuing) (TAG)

Solicitor General (2 years)

Fiji

Crown Solicitor (International) (2 years)

Principal Legal Draftsman (31 months)

Attendance at Seminar on energy law (1 week)

Review of mining and petroleum legislation and agreements (March 1982 continuing) (TAG)

The Gambia

Legal Draftsman (2 years)

Grenada

Legal Draftsman (1 year)

Guyana

Legal Draftsman (Chief Parliamentary Counsel) (3 years)

Bachelor's Degree Course in Law (2 years)

Advice on mineral and petroleum policy and legislation (March 1982 continuing)

Kenya

Advice on revision of petroleum legislation (4 weeks) (TAG)

Malawi

Advice on petroleum legislation (February 1981 continuing) (TAG)

Mauritius

Adviser on Law Revision (4 months)

Land Bank Expert to advise on the establishment and operations of a Mauritian Land Bank (3 months)

St. Christopher-Nevis

Legal Draftsman (3 years)

Advice on Independence Constitution (June 1982 continuing) (TAG)

Advice on Geophysical survey agreements (February 1982 continuing) (TAG)

St Lucia

Legal Draftsman (2 years)

St Vincent and the Grenadines

Legal Draftsman (4½ years)

Consultant on Law Revision (4 months)

Seychelles

Advice on petroleum strategies and negotiations (11 months) (TAG)

Training attachment with the High Court Kenya (6 months)

Training attachment with the High Court Kenya (6 months)

Chief Justice (2 years)

Adviser Supreme Court Registry (5 months)

Solomon Islands

Advice on petroleum legislation (July 1981 continuing) (TAG)

Treaties and Conventions Adviser (6 months)

Legal Draftsman (2 years)

Sri Lanka

Attendance at Asian-African Legal Consultative Committee Seminar on International Law (1 week)

Swaziland

Advice on mining legislation (July 1981 continuing) (TAG)

Tanzania

Assistance with negotiations with oil company (7 weeks) (TAG)

Advice on extension of petroleum exploration agreement (1 month) (TAG)

Advice on amendments to petroleum exploration agreement (4 months) (TAG)

Advice on legislative measures to give effect to recommendations for changes on capital structure of State Petroleum Corporation (1 week) (TAG)

Tonga

Adviser on Exchange control legislation and banks trust legislation (2 months)

Tuvalu

Legal Adviser on Constitutional Issue (1 week)

Review of Customs Legislation (1 week)

Vanuatu

Advice on mineral and petroleum legislation (October 1982 continuing) (TAG)

Legal Draftsman (2 years)

Western Samoa

Advice on petroleum legislation (September 1981 continuing) (TAG)

Senior Legal Officer (2 years)

Advice on mining legislation (September 1981 continuing) (TAG)

Parliamentary Counsel (2 years)

Zimbabwe

Legal consultant (10 days)

Adviser, training of judicial officers and primary courts (3 weeks)

Legal Consultant for training of magistrates (2 years)

Supreme Court Judge (2½ years)

Parliamentary Draftsman (6 months)

Parliamentary Draftsman (18 months)

Legal Consultant and Senior Inspector for Primary Courts (extended for further two years with effect, from 31 March 1983)

Parliamentary Draftsman (2 years)

Parliamentary Draftsman (2 years)

**THE COMMONWEALTH SECRETARIAT'S
ACTIVITIES IN THE FIELD OF
PRIVATE INTERNATIONAL LAW**

Memorandum by the COMMONWEALTH SECRETARIAT

Introduction

In many areas of law, relevant both to private individuals and to commercial enterprises, there is a gradual diversification of legal rules within the Commonwealth. This is a natural result of the activity of different Member countries in progressively adapting their inherited common legal tradition to meet changing local circumstances. One result is that lawyers dealing with matters affecting two or more Commonwealth jurisdictions have greater needs in terms of legal information; another is that there is a growing importance for private international law (or the conflict of laws) in intra-Commonwealth legal affairs. This latter point has been well recognised at successive Meetings of Law Ministers, and is reflected in the concerns of the Secretariat.

2. Since 1973 one aspect of this concern, that of securing the ready recognition and enforcement of judgments and orders within the Commonwealth, and of providing facilities for service of process and legal assistance generally, has featured on the Agenda. Professors McClean and Patchett have continued their work in this area, and the Memorandum on the Law of Domicile prepared for this Meeting is an offshoot of that work, which has been extended to cover the question of the recognition of divorces.

3. As a result of the Barbados Meeting, a number of member countries have taken action on the Model Bills concerning Grants of Administration (Resealing), Maintenance Orders (Facilities for Enforcement) and the designation of Commonwealth Countries. It is hoped that other countries will soon feel able to take similar action, so that modern and broadly comparable legislation is widely in force.

The Hague Conference

4. As a result of discussions at the Winnipeg Meeting in 1975, the Secretariat successfully negotiated Observer status with The Hague Conference on Private International Law (which, despite its misleading title, is the leading international organisation in this specialist area) and an excellent relationship has developed with the Permanent Bureau of the Conference.

5. The Secretariat was duly represented at the Fourteenth Session of the Hague Conference in 1980. That Session produced two Conventions, one on the Civil Aspects of International Child Abduction and the second on International Access to Justice. Explanatory documentation, with advice on accession and implementing legislation, have already been circulated by the Secretariat in respect of both these Conventions. There was co-operation between the delegates from Commonwealth countries which are individual Members of The Hague Conference (Australia, Canada and the United Kingdom), and Mr. J.M. Eekelaar, who prepared a Memorandum on the subject for the Barbados Meeting, took a leading part. The Conventions are, of course, open to States whether or not they are individually Members of the Conference.

6. The same 1980 Session of The Hague Conference also produced Draft Articles on Consumer Sales for inclusion in a proposed revision of the existing 1955 Hague Convention on the Law Applicable to International Sales of Goods. This revision will take place at an Extraordinary Session of the Conference in 1985, to which all countries will be invited, and preparatory work is being undertaken by a Special Commission restricted to States which are either Members of The Hague Conference or Members of UNCITRAL (the U.N. Commission on International Trade Law).

7. The Fifteenth regular Session of The Hague Conference is due to be held in 1984, and the major topic on the Agenda will be a draft Convention on Trusts, a matter of considerable interest to Commonwealth countries. The Secretariat was represented at the first preparatory meeting on the topic, held in June 1982. The remainder of this present Memorandum is devoted to the matter.

Trusts

8. With few and limited exceptions, countries outside the common law tradition make no use of the concept of the trust. This is in sharp contrast to the position in common law jurisdictions, where the traditional importance of the trust in estate planning and as the basis of the law of charities is being supplemented by more sophisticated developments of importance in business and financial matters.

9. So, for example, trusts are used in the administration of pension schemes (and the size of some pension funds means that their managers' investment decisions are of considerable economic significance); there are other forms of investment trusts (sometimes in the form of "unit trusts"). In some jurisdictions a form of "business trust" is a type of commercial organisation, related to the joint stock company. Trusts are used in creating security interests, in tax planning, and are familiar in bankruptcy practice. Each common law jurisdiction has a slightly different pattern in the use it makes of the trust concept; that fact is itself testimony to the flexibility of the concept.

10. The result is that a lawyer in the common law tradition regards the trust as an essential piece of legal machinery. In intra-Commonwealth practice, many matters, involving investment, tax planning, or simply migration, will involve either the trustees or the whole or part of the trust property crossing legal frontiers.

11. In form at least, a civil lawyer finds the trust an alien concept. In some civil law systems, there is a closed list of "real rights", which means that an interest in property must be either absolute ownership or a limited jus in re aliena (e.g. of the easement type). A trustee is not absolute owner, because he owes duties to the beneficiaries and because the trust fund is not available to satisfy the trustee's personal debts. But equally he is more than the holder of some limited interest: the property is vested in him, not in the beneficiaries (nor in the settlor). A not unrelated feature of civil law systems arises in a succession context; in the absence of anything strictly analogous to the "administration" phase, an "heir" may find himself personally liable for the deceased's debts, a situation made more difficult when property is held, or left, "on trust".

12. In practice, and on a close examination of particular situations, a civil law jurisdiction will often be able to achieve results not dissimilar from those achieved by common law trusts. The exercise being undertaken at The Hague is designed to see whether it will be possible, generalising from that experience, to enable civil law countries (without taking trusts into their own systems) to recognise trusts governed by the law of a common law country.

13. Such a development would be of considerable help to citizens of common law countries in all the areas (e.g. succession, investment, security-interests) in which the trust is used. There would also be advantages as between different common law jurisdictions if internationally agreed rules identified the law governing a particular trust, a matter of some difficulty and doubt at present.

14. The preparatory work undertaken at The Hague in June 1982 suggested that a draft Convention on this subject could be achieved. The strategy which seemed to find favour was:

- (a) to define the trust in fairly general terms;
- (b) to provide that a trust, so defined, would be recognised in every Contracting State so that the trustee would enjoy certain powers and be under certain obligations in all such States;
- (c) to provide a choice of law rule which would identify the law which would govern the trust and fix the precise scope of the trustee's powers; and

- (d) to extend recognition to trusts governed by the law of any country, whether or not that country was a Contracting State.

Comments on these points will be found in the following paragraphs.

15. A possible definition of a trust for the purposes of the Convention would be: "a trust exists when property, whether movable or immovable, is held by a natural or corporate person or persons, further to an instrument in writing, as a fund separate from his own property, with the obligation to administer and employ that fund for the exclusive benefit of one or more persons, or for purposes, as set out in the instrument".

16. The emphasis on the presence of a written instrument is to satisfy the requirements of civil law jurisdictions as to proof of the existence and nature of the trust. (The draft Convention may contain some optional provisions for obtaining court or other official certification as to the trustee's powers and duties under the governing law). Constructive trusts will not be covered, but certain types of resulting trusts would be. There will be no attempt to specify types of trusts (charitable trusts, unit trusts, etc.) which are within the scope of the Convention; a broad definition was felt to be an easier and more readily understood approach.

17. Much discussion at The Hague centred upon the various situations in which a trustee under a trust created in a common law jurisdiction might find himself concerned with matters in a civil law country. For example:

- (i) the trustees might have to recover possession of trust property detained in such a country, or recover debts due to the trust;
- (ii) a dispute might arise as to the control over the trust fund as between the trustee and the beneficiaries;
- (iii) (related to the last) the beneficiaries might seek to enforce the trustee's fiduciary duties;
- (iv) the trustee might have to register certain property on a title or share register and to indicate the capacity in which he was registering;
- (v) on the trustee's bankruptcy, his personal creditors might seek to reach trust assets in satisfaction.

18. In all these cases, the civil law delegates were satisfied that there would be no undue difficulty in recognising the position which the common law governing the trust would indicate. At present the same result can often be obtained in practice by a civil law court treating the trust as if it were some other institution (e.g. agency) known to its own law, but express recognition of the trust would be more certain in its effects (e.g., in the agency analogy the settlor or beneficiaries would be equated with principals, giving them more power than under a common law trust situation).

19. It was however clear that the recognition of the trust would have to be limited so as to protect mandatory rules of a civil law system as to succession (the legatum, e.g., under which certain fractions of an estate pass to identified heirs and cannot be disposed of by will), and as to matrimonial property regimes; and possibly other rules based on public policy (especially in the area of fideicommissary substitutions, which operate almost as entails) would also be protected.

20. The provisional view of those attending the 1982 Meeting was that a trust should be governed by its proper law, giving (perhaps qualified) party autonomy, or failing that by the law of the initial principal place of administration. This would govern the essential validity of the trust (saving the law governing succession, etc. as in the last paragraph) and the powers of the trustee, including his power to designate successors and, in certain cases, to select beneficiaries (though the latter power was felt to cause some problems for some civil law countries).

21. There was general agreement that the Convention to be drafted should be "universal", not limited to trusts governed by the law of Contracting States. In this context particular reference was made to the position of Commonwealth countries, and

warm mention was made on behalf of the Permanent Bureau of the helpful interest and participation of the Commonwealth Secretariat.

22. Much further work remains to be done, notably in the area of variation of trusts, a topic neglected in the first round of discussions, but this brief summary of progress so far will perhaps serve to indicate that the trust as a concept, and particular trusts as quasi-legal entities, may soon be more widely recognised. This would be a development of much importance, and of considerable benefit for citizens of common law countries in particular.

Appreciation

23. No review of our activities in this field would be complete without full tribute to the assistance and the scholarship so willingly given to us by Professor David McClean, in Sheffield, and Professor Keith Patchett, in Cardiff. Both have given generously of their time, despite their heavy schedules, and each has made a significant contribution to the reform of the law in this increasingly important area.

ASSISTANCE TO SMALL STATES TO MEET THEIR LEGAL NEEDS

Memorandum by the Commonwealth Secretariat and
a paper by Professor KEITH PATCHETT of the University
of Wales Institute of Science and Technology and
formerly legal adviser to CARICOM (Guyana) and
first Dean of the Faculty of Law,
University of the West Indies (Barbados)

The challenges faced by small States in meeting the demands of independence and of modern government have always been a prime concern of the Commonwealth Secretariat. Perhaps as in no other area, these are felt in legal affairs, for the legal officers of the small State are called upon to handle the same range of multifarious tasks as are their colleagues in larger establishments. The differences are quantitative, not qualitative, and in the absence of quantity, problems in gaining experience arise.

2. As noted in the Review of the Secretariat's Activities in the Legal Field, LMM(83)2, the Secretariat is according priority to doing what it can to assist with these needs. Publications such as the "accession kits" on international conventions have special relevance to the small States, and as well as meeting their requests for information we have been able to assist in ad hoc legislative drafting both by Mr. W. Menary and by circulating a list of experienced draftsmen willing to accept instructions by post and to draft at home. Other ways in which the Secretariat has endeavoured to help include the fostering of initiatives to establish regional legal drafting centres in both the Pacific and the Caribbean.

3. Throughout the period under review, we have lost no opportunity to bring the legal needs of the small State to the attention of aid agencies and donor governments.

4. The accompanying paper is designed to focus on the legal position of small States for the benefit of both aid donor and aid recipient, and to promote efforts to ensure that social and economic development is advanced through the provision of appropriate legal mechanisms and personnel. We propose to circulate it beyond the Commonwealth and to all relevant aid agencies.

5. As larger jurisdictions are forced to examine the size of their legal establishments in order to effect economies, it may be that ways in which the workload can be reduced is by adopting legal strategies which are self-regulating rather than those which rest on a labour-intensive bureaucratic base. As the small jurisdiction has little alternative but to seek these solutions, it may be that research in this area could be undertaken which would have a wider relevance than might at first appear to be the case. It would certainly appear to be a matter to which any small States' regional drafting unit would wish to give early attention.

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ANNEX TO LMM(83)9

ASSISTANCE TO SMALL STATES TO MEET THEIR LEGAL NEEDS

Prepared by PROFESSOR KEITH PATCHETT of the
University of Wales Institute of Science
and Technology and formerly legal adviser
to CARICOM (Guyana) and first Dean of the
Faculty of Law, University of the
West Indies (Barbados)

At their meeting in Barbados in 1980, Commonwealth Law Ministers acknowledged the continuing need for legal technical assistance especially for smaller jurisdictions. Reference

was made then to particular projects and to certain types of assistance afforded to small States, but it remains apparent that there is room for a more systematic approach to the provision of such assistance to those States which are, by reason of their smallness, particularly hard pressed to service their legal needs. 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 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 and the unlikelihood that these States will be able to meet those needs from their own resources, or without considerable assistance from other States.

2. This paper sets out first to describe the kinds and sources of aid in legal matters which has been provided in the past and which presumably donor States might be approached to provide in the future, secondly to comment upon some of the shortcomings of the present arrangements and thirdly to suggest ways in which Commonwealth Governments might develop these and other opportunities - ways which would be of particular value to small States in meeting their peculiar requirements.

Existing Technical Assistance Arrangements

3. No attempt will be made to provide detailed statistics of the arrangements which have been effected to provide technical assistance in legal matters to small States. This account will sketch in outline the types of work for which provision has been arranged, with some comment upon their limits and the variety of agencies through which the assistance has been obtained.

A. Bilateral Government arrangements

4. A considerable number of the acts of assistance are arranged bilaterally, that is between a recipient Government and donor Government or more usually its aid agency. In the main the assistance takes the following forms:-

- (a) provision for students upon training programmes or courses of study provided by the donor government or in the donor State;
- (b) provision of legal experts for particular ad hoc projects in the recipient State;
- (c) provision of personnel to fill establishment legal posts in the recipient State, with supplementation of salary and allowances paid for by the donor Government;
- (d) provision of funds for meeting costs of setting up a legal project in the recipient State (in addition to expert personnel costs).

5. It should be made clear, however, that in no case are these forms of assistance provided exclusively or even in the main to small States. Donor countries do not, as a rule, make specific allocations for that purpose. Small States must, therefore, negotiate for the allocation of assistance from the resources provided by the donor State for its general aid programmes. Since these resources are never enough, they must compete with States which, by reason of much greater sizes of territory and population, and in some cases more serious general underdevelopment, may need substantial assistance if any worthwhile results are to be obtained. Further, those responsible for legal services in a small State must compete with their colleagues to gain the necessary degree of priority for their claim for available funds.

(i) Training programmes

6. Very few formal training programmes have been instituted in the Commonwealth which are primarily designed to providing training on the kinds of legal skills which are needed in small States. Most training in law is concerned to prepare candidates for entry into the legal professions of the (generally developed) States providing them. Candidates from small States have been able to gain admission to certain of these courses (notably in England) but this has become increasingly difficult in recent years as demands for home students and financial pressures have increased and academic requirements raised. It can, in any case, be argued that the nature of these programmes which are tied to the changing requirements of practice in the donor State are of decreasing value for those who will return to practise in the different circumstances of their small community. Provision of courses in these

smaller countries themselves is not always possible. The recent decision of the Cayman Islands to establish their own professional programme (which will provide for but a handful of candidates at a time) may prove practicable but it is not a course of action open to most small states which are generally less well endowed with resources and with legal firms to give support. Regional cooperation in the form of professional law schools of the kind found in the University of the West Indies and the West Indies Council of Legal Education is also unlikely to be feasible in other parts of the Commonwealth where small States are found. It is noteworthy that even in that case, the numbers of candidates from the small Caribbean States generally represent a tiny proportion of those in the programme. Financial backing is just as serious a difficulty for a candidate required to attend for five years at a regional school situated in another State as it is to take part in a metropolitan programme.

7. In any case, these courses are not concerned in main to provide training in the specialist skills of which small States are most in need. Courses for these purposes are few. The best known is the United Kingdom's Government Legal Officers' Course held annually in London and funded through the Overseas Development Administration. It lasts four and a half months providing for 20 places, not all of which are always taken but a small number of legal officers from small States do generally participate. It provides intensive training in public international law, legislative drafting and other subjects of special interest to government law officials.

8. A recent new-comer is the LL.M. in Legislative Drafting at the University of the West Indies in Barbados funded by Barbados and Trinidad and Tobago but available to law graduates or lawyers from the small Caribbean States and (in due course) from countries outside the Region. This is a full year's programme which, in addition to training in the fundamentals of drafting, involves study in important areas of public law. It has been taught by Professor Ryan, UN/UNDP consultant to the Government of Barbados. A similar programme run at the University of Ottawa, until recently under the direction of Professor Driedger, though principally intended for Canadian personnel, has attracted over the years the occasional participant from small States, usually in the Caribbean, who have been funded by Canadian aid.

9. It might be added, however, that the scarcity of courses of the kind suited to the training requirements of lawyers who will perform public service or other specialist legal roles in small States is in fact a reflection of the paucity of courses provided anywhere in the Commonwealth for training public service lawyers in any aspect of their work.

10. There appears to be no regular course which would be suitable for those likely to perform junior judicial functions, despite the frequency with which relatively inexperienced government lawyers in small States are called upon to assume magisterial duties. If lawyers are badly served by the absence of suitable training programmes, the position is even worse for non-lawyers who perform essential functions in the legal systems of small States. Training courses for police officers in the Commonwealth appear rarely to give instruction on prosecuting, a task which in most small States will fall to police officers in summary matters. Of growing concern too is the fact that little opportunity seems to exist for those involved in legal administration, whether in government offices, registries or courts or in private law offices, to obtain systematic training for the efficient performance of their duties in an up-to-date and relevant way. An initiative over a decade ago by the British Council and the Institute of Judicial Administration of Birmingham University to establish such a programme did not receive support from the British Government of the day. More recently a programme for paralegals has been started in Barbados for an in-service training course spread over two years. The problems of accommodating students from neighbouring small States on a course with this type of structure have yet to be overcome. Negotiations have been taking place in the Pacific region for the establishment of a sub-professional law diploma course by the University of the South Pacific (which has no law faculty), but resource difficulties have delayed its introduction.

11. Much more is achieved with respect to participation in academic law programmes. Considerable numbers of students from small States have entered both undergraduate and postgraduate programmes in other States, although funding for the former type of study from donor countries is now less common. It will usually only be made available if the facilities for study are not available in the home country or region. Bodies such as the British Council may assist in obtaining funding in relation to United Kingdom courses. The most noteworthy activity in this respect is the provision of ten places for two years on the Edinburgh LL.B. programme for students from Botswana and Swaziland. Doctorate studies by research are undertaken regularly if by small numbers, usually under a scholarship scheme such as the various Commonwealth Scholarship plans, operated by the students' own

Governments or by the country providing the study facility. Similarly, assistance is provided by most metropolitan Commonwealth States for postgraduate taught courses, although again not for large numbers. There are some indications that the range of those courses is growing and that some will enable candidates to acquire in important specialist areas of law advanced knowledge of the kind which is not locally available in small States - as for example in maritime law and international law of the sea, air law and planning law. The Commonwealth Legal Education Association is compiling details of these courses. Information so far available suggests that more could be done in metropolitan countries to develop academic programmes of postgraduate study which would be relevant to developing, and particularly small developing, States and that not enough is being done to enable suitable candidates to find out about existing programmes and to acquire financial assistance to join them.

12. Lastly, training opportunities are occasionally made available by donor States arranging for legal personnel from small States to be attached for a period to an appropriate section of the donor's country's legal or administrative system. Little information exists about the extent to which small States have benefited from this practice and whether the opportunities are generally confined to studying the operations of a developed country's systems. It would be valuable to learn whether, as a matter of policy, officers from small States are facilitated by donor country support to take up attachments in other small jurisdictions where experience could be gained of a high quality operation of a comparable scale to that of the sending State. Technical cooperation study fellowships are provided through the ODA in the United Kingdom and similar arrangements almost certainly exist in others of the larger Commonwealth States. The Australian Government is currently exploring the possibility of providing "on the job" training in legislative drafting.

13. It should be pointed out, that Governments of small States are particularly hard pressed to release their officers for the length of time which the training properly requires. Release on training usually results in a gap in a service already understaffed, with little possibility of filling it adequately from local resources. It is strongly to be argued that assistance to provide a locum tenens may be indispensable in many instances if local personnel are to become available for training programmes of any kind elsewhere.

(ii) Legal experts for ad hoc projects

14. The inability of small States to find expert or experienced personnel in particular legal fields leads to fairly frequent requests to the larger Commonwealth countries for the provision of appropriate individuals.

15. The Commonwealth States which have been most active in providing bilateral aid of this kind to small States have been Canada (Canadian International Development Agency, in the Caribbean and South Pacific), New Zealand (New Zealand Aid Programme, in the Pacific) and the United Kingdom (Overseas Development Administration, throughout the Commonwealth). It is thought that Australia has provided this kind of aid from time to time. But in any case this is not an exclusive list for information about assistance of this kind by other Commonwealth States is not easily come by.

The following are illustrations of the types of work for which this has been successfully used:

- (a) law reform and preparation of consequential legislation;
- (b) law revision and printing of collected statutes;
- (c) preparation of legislation occasioned by independence;
- (d) treaty succession and preparation of consequential legislation;
- (e) law of the sea and preparation of domestic legislation related thereto;
- (f) preparation of legislation in specialist areas, e.g. taxation, food production and fisheries, company law;
- (g) specialist legal advisory posts, particularly immediately post independence.

16. Generally, the total costs of the personnel are borne by the donor country and the technical experts are nationals of that country. In a number of instances, where the assignment is of a kind which is thought not to necessitate continuous involvement with local personnel, the expert has not taken up residence in the recipient State. In such a case, a former legal officer having retired from service may be employed. But it is usually the case that the Technical Cooperation Officer (in UK jargon) will work continuously alongside legal officers in the country concerned.

(iii) Establishment posts

17. The serious difficulties experienced in many small States in filling essential establishment posts in the judiciary and legal services have been met in part by seeking to secure the services of expatriate personnel. In many instances, however, the local conditions of service are such that appointments of the desired number and quality cannot be made. Aid programmes, administered for the United Kingdom, have been frequently drawn upon for this purpose. Thus the Overseas Service Aid Scheme in the United Kingdom is currently providing some 86 OSAS posts of which 22 are in small States. These officials hold establishment posts in the Judiciary and Magistracy (13), as legal advisers or government law officers (7) and as legislative draftsmen (2). In each case, the salary and allowances of the officers in question are supplemented by the ODA. Both New Zealand and Australia are believed to have provided Western Samoa with judicial officers on a number of occasions. But no other information is available to indicate that bilateral aid of this kind is directly provided by other Commonwealth countries.

(iv) Special projects

18. Little information is available concerning the availability of funds to provide for some element of the legal service needs, other than the services of expert personnel. Certainly the United Kingdom has from time to time assisted its dependent territories through Grant-in-Aid funds which have been used, for example, for court building or the printing of revised laws. But the heavy expenditure required for even such essential purposes as these appears now rarely to be made available from governmental aid sources. One useful project which has received some support from ODA through the British Development Division in the Caribbean has been the preparation and publication of annual indices to the laws of Caribbean countries, under the direction of Sir Clifford Hammett. Limited funds have also been provided from the same source to assist in the printing and publishing of annual volumes of the laws of certain Caribbean dependencies. But in the main, the cost of activities such as these must be borne by local resources or not at all.

19. Other limited examples can be given. Assistance was provided under the Canadian Non-Governmental Organisation Programme to enable the Bar Association of Belize to establish a Belize Legal Aid Society. Also in the Caribbean, a capability study has been funded concerning existing legal regimes to facilitate products cooperatives under the Canadian Institutional Cooperation and Development Services Programme.

B. International and institutional arrangements

20. The principal international agency for providing aid to small States in the legal area in recent years has been the Commonwealth Secretariat and its aid arm, the Commonwealth Fund for Technical Cooperation. These activities are described in a separate paper which reviews the legal activities of the Secretariat. It suffices to say that assistance has been directed towards-

- (a) training courses in legislative drafting;
- (b) workshops for government law officers on specific areas of concern or interest;
- (c) provision of technical assistance personnel principally for ad hoc projects in small states but in some instances to fill serious gaps in the establishments of the judicial legal services;
- (d) commissioning of studies on matters of general legal concern to small States or groups of such States;
- (e) identification of legal personnel required for ad hoc or establishment posts by particular Governments, where provision of funding is not required;
- (f) a specialist consultancy service, particularly in relation to protection and development of natural resources, provided by the Technical Assistance Group of the CFTC;
- (g) publications, particularly of model legislation on matters of major international legal interest, with explanatory documentation;
- (h) provisions of ad hoc information in response to requests.

In some instances, assistance has been provided in conjunction with a national agency (such as CIDA) or an international organisation (such as UNDP).

21. Other bodies providing assistance internationally and which have been engaged with the problems of small States include -

(i) the UN/UNDP programmes which appear in the main to have provided the services of legal experts usually in ad hoc projects, albeit sometimes of an extended nature. These have included -

- (a) law revision;
- (b) legal drafting, especially in connection with reform programmes;
- (c) law reform;
- (d) consultancies in international law, especially law of the sea and in maritime law;
- (e) advisers on other specialist areas of law, such as taxation, town planning, citizenship and social security.

There are no constraints on the types of projects for which States, individually or with others, may request funding.

(ii) The Commonwealth Legal Advisory Service operated by the British Institute of International and Comparative Law: This is paid for in part by subscription from Commonwealth Governments but the ODA makes an annual grant contribution towards the core costs. States have used the service to obtain information about the practice and law in other parts of the Commonwealth on matters of immediate concern to the applicant States.

(iii) The Commonwealth Foundation which is supported by contributions from Commonwealth member Governments has law as one of its identified areas of interest. It can provide assistance which can be of immediate benefit to the legal needs of small States in a number of ways, although its work is concerned to promote the work of non-official bodies.

- (a) the provision of fellowship and bursary schemes up to three months to professional and sub-professional persons to undertake short-term research and career retraining and the widening of professional experience;
- (b) support for the mounting of professional conferences and to enable professional and sub-professional persons to participate in them;
- (c) support for activities of Commonwealth Professional Associations in the legal field, such as the Commonwealth Magistrates Association, the Commonwealth Legal Education Association, and the Commonwealth Legal Bureau.

(iv) Discussions are currently in hand for the restructuring of the Commonwealth Legal Bureau. Its activities in the past have been essentially pan-Commonwealth but the opportunity may arise under a new format for certain of its activities to be directed specifically towards furthering the legal interests of small States in the Commonwealth.

(v) Other United Nations institutions have from time to time funded legal activities for the benefit of small States in areas which fall within their spheres of activity. Thus for example draft fisheries laws have been completed for certain of the Caribbean small States under the FAO's Inter-regional Fisheries Development and Management Programme. IMO has been involved in the development of new shipping legislation for States in the same Region. There is, however, little information readily accessible about the extent to which projects of this kind have been initiated elsewhere by UN agencies and the outcome of the work undertaken.

C. Arrangements for voluntary service and recruitment of personnel

22. Two types of services have developed in the larger Commonwealth countries which have been used in relation to small States' legal needs and which appear capable of development.

(i) Volunteer programmes

23. Programmes exist in Australia, Canada, New Zealand and the United Kingdom for posting of volunteer nationals (whether young or retired) with suitable experience or qualifications to live and work in developing countries which are able to make use of their skills. Whilst opportunities for the placement of volunteers to work in the legal field have not arisen in Australia (Australian Volunteers Abroad) or for Canada's University Service Overseas, elsewhere some activity of this kind have proved possible. The New Zealand Volunteer Service Abroad has provided a people's lawyer in Kiribati and a lawyer for the Public Solicitor's Office in the Solomon Islands. The Voluntary Service Overseas (UK) has also posted a solicitor to the Solomon Islands for the Community Advice Centre and a legal manager for the Fiji Native Land Trust Board. It is understood that the US Peace Corps Programme has occasionally afforded assistance of this kind.

24. All agencies have indicated their interest in helping in this area. VSO reported that few requests for legal assistance were in fact received although there was little difficulty experienced in recruiting well qualified legal personnel of high calibre. Recruitment is less easy in New Zealand as the specialised skills which are thought to be required are not easy to find and legal personnel in New Zealand may experience career difficulties through interrupting their current employment for a period of voluntary work abroad.

25. It is suggested that this source of assistance merits 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 fledgeling non-governmental activities.

(ii) Recruitment of Personnel

26. Many small States rely upon the services of legal personnel recruited from overseas to meet their needs. Considerable informal help is provided by, for example, the Legal Division of the Commonwealth Secretariat particularly for judicial appointments or through bilateral governmental approaches. There are, however, a number of agencies which have been established to search out in their country persons of some experience and expertise for executive appointments to provide volunteer service or to be paid for by funds provided by the recipient government. Little use seems to have been made of these agencies to find legal personnel, although their preparedness to do more in this direction has been indicated.

27. The Overseas Service Bureau of Australia is considering the possibility of acting as a recruiting agency for personnel, either volunteers or staff, to fill on-line positions in the public service, at local or expatriate rates, for developing countries. The Canadian Executive Service Overseas is, in principle, interested in the legal field having recently provided a volunteer lawyer to catalogue judgments in Western Samoa and to set up a law library. The British Executive Services Overseas (which is funded through ODA and non-governmental sources) recruits volunteer executives (usually retired) with professional, technical or specialised management skills for short-term assignments. The requesting organisation has to cover only the local costs of suitable accommodation for a man (and his wife) of retirement age and status, suitable local transport to enable him to carry out his task and agreed modest subsistence allowances in local currency. The requesting organisation, either the Government or private sector, does not have to concern itself with foreign exchange or with fees or remuneration. The executive gives his services free and is a volunteer, his motivation being goodwill and the satisfaction derived from carrying out the task to the best of his ability. To date only a few legal projects have been undertaken for any States, but these include insurance legislation and land registry procedures (Cayman Islands), and the organisation of magistrates' courts (Dominica). The vast preponderance of assignments have related to business and commercial operations.

D. Non-governmental activities

28. Little is known about the existence and availability of non-governmental bodies which can provide services for small States in the legal field. It is probable, for example, that University Research Institutes in the larger Commonwealth States have become engaged in this field, their activities funded by foundation grants or by their national governments.

29. One example is the Dalhousie Ocean Studies Programme run from Dalhousie University in Canada which has received funding from CIDA and CFTC. Their activities have been concerned to assist certain small Caribbean States to develop a maritime resources and boundaries policy and to undertake the preparation of legislation for an economic zone.

30. The existence of bodies equipped to carry out essential legal research for small States needs to be established. Equally, the publication wherever possible of the results of their work to States in similar circumstances would serve to reduce unnecessary duplication of effort.

Shortcomings of present aid arrangements in the Legal Field*

31. Although the following paragraphs contain criticisms of the effectiveness of present aid arrangements in legal matters for small states, it cannot be gainsaid that much has been done which has been of great value to them. Indeed, the serious problems which, it is suggested, now face the legal systems of a number of small states would be infinitely worse without such assistance. Yet the impression remains that for at least some of these states assistance has done no more than stick the occasional finger temporarily in one of a growing multiplicity of holes in the legal dyke.

32. The systems of government in small States generally rest upon the premise that the process of change will be effected through the investment of law. Those who may be prepared to lend or invest in these States expect that the system of law will provide them with a proper protection of their interests. Equally importantly, the citizens of these States look to the law to protect them and their country as far as possible against misuse of political and economic power and exploitation from outside interests. These conditions are increasingly hard to maintain in those tiny island States which are marked by extreme external economic and financial dependence and inadequate resources of their own. Political independence has imposed upon many of these States, as upon much larger countries, demands for a range of specialist legal skills which are almost as extensive, if not as intensive, as for large ones. In many instances, small States are finding serious difficulties in maintaining a legal service which provides such skills adequately to meet the constitutional and domestic development requirements. There are clear indications that their legal arrangements are insufficient for the fulfilment of their international legal responsibilities. In many cases, they lack the crucial infrastructural support in legal matters for basic government activities, for the furtherance of economic objectives and for protecting vital international and regional interests.

33. Technical assistance has been applied in many small States to alleviate these problems but the basic infrastructural services in government upon which the States depend for their ordinary governance and their economic development have been largely untouched. They remain fragile, as the following paragraphs illustrate -

(i) many of the States on achieving independence have been unable to carry out major responsibilities which arise therefrom. For example, frequently no examination has begun of the extent to which the State is to succeed to international treaties entered into on their behalf when they were dependencies; many of these have important implications (e.g. in matters of civil aviation and merchant shipping). Some of the States have not even issued a declaration as to their interim position pending a detailed examination of succession to individual treaties. This is a matter of major concern to many countries and agencies which deal with these States;

(ii) the formulation of policies both domestic and with respect to international and regional matters calls for the ready availability of specialist legal expertise. For example, the negotiations with respect to the Law of the Sea and the decisions necessitated by their recent conclusion are of vital concern to small island States. If a proper policy response is to be made, these States must be able to have the best possible legal advice about the courses of action open to them;

* This section draws heavily upon a Memorandum by the author to the House of Commons Select Committee on Foreign Affairs, which will appear appended to the Committee's forthcoming report on the Caribbean and Latin America.

(iii) even in small States, issues of considerable complexity over a very wide range of matters occur which demand first-rate legal analysis. This can arise in sensitive matters which may lead to litigation involving the State. The need is particularly apparent where governments have found themselves in negotiation with external funding agencies or corporations offering to make local investments. Invariably, government lawyers are at a serious disadvantage through their relative inexperience on the subject matter and their limited specialist knowledge and in the amount of preparation time available to them. It is not uncommon for negotiations to be conducted with an entity which has available to it more - and far better experienced - lawyers than exist in the entire State. Regrettably, there are cases where schemes have been allowed to proceed which have turned out not to have been in the best interests of the community and where more sophisticated legal safeguards could and should have been introduced;

(iv) the law in major areas of legal activity in many of these States is archaic and lacking the features which modern practice demands. This is particularly the case in areas of commercial law with which potential investors may be concerned. Just as responsible investors may be deterred by the antiquity of the legal requirements, unhappily there have clearly been those with less scrupulous motives who have been attracted by the very same weaknesses;

(v) the statute "books" of many States are in a chaotic condition, some much worse than others. The publication of new collections of legislation, as was always the practice in the past, is essential if there is to be just government under the law. At present many small States are in default and in some it is exceedingly difficult - and at times even impossible - to determine with any degree of certainty precisely what the law is on a particular topic. There have even been instances of Parliaments purporting to amend Acts which had previously been repealed in the entirety;

(vi) the preparation of innovative legislation to give effect to new development policies has often proved a difficult task and has contributed to slowness with which those policies may be put into effect. The lack of experienced legal draftsmen and of ready access to appropriate expertise and the necessary legal materials are felt everywhere. Too often this legislation is derivative, is drawn up too quickly, and is not subjected to experienced and objective analysis before enactment. If development is to be brought about in an orderly fashion under the authority of the law, these major shortcomings must be rectified;

(vii) the bureaucratic features of legal administration which sophisticated legal requirements often call for are frequently outdated and outmoded. Court administration, the methods of collecting on and enforcing court orders, registration systems, the systems for filing and retrieving forms and documentation and the levels of charges (which in many cases are inadequate and represent revenue foregone) often cry out for modernisation with systems suited to the needs of the particular State.

34. Technical assistance schemes have not always come to terms with these demands for a number of reasons, of which the following are instances -

(i) legal services, as with other institutions of government, are not normally seen as priority matters for aid. Aid is more frequently given for purposes of economic development. Yet this may not achieve its purpose because the legal and other infrastructural State services are incapable of making their required response;

(ii) even when neighbouring States have much in common, particularly in the legal field, projects are rarely instituted for a group of States. More usually aid is given at the request of a single government, even in matters of equal importance to neighbouring States. No doubt more could be done to ensure that these programmes can be extended for the benefit of the latter, thereby precluding the need to consider a request for duplicating aid at a later stage. There are, it is thought, considerable opportunities for greater cooperation and systematisation in funding between the various agencies in the legal field especially collectively for small States in a subregional grouping;

(iii) aid has quite often been given to enable essential establishment posts to be filled when local efforts have failed. A prime example is that of legislative

draftsmen. Whilst it is clearly an appropriate use of aid to meet emergencies of that kind, it is noticeable how frequently in the legal field the same emergency recurs when a period of assistance comes to an end. It is clear that local steps to ensure that essential service posts can be filled locally are not always taken. Sensible manpower planning, the provision of counterparts for training by working with aid personnel and reconsideration of conditions of service to attract recruits should be put in hand where the posts in question are essential to the service. However the very smallness of a State can render even the most well thought out planning vulnerable, as in St. Christopher-Nevis where care was given to the training of a competent legislative draftsman only for it to become unavoidable for him to be elevated quickly to the office of Attorney-General;

(iv) legal experts have not always brought with their subject expertise an appropriate background knowledge or experience of the countries in which they are to operate. Small States themselves have produced many fine lawyers who, though they now work outside their country of origin retain their links and their understanding of these communities. It is thought that more could be done to utilise their services and thereby reduce the acclimatisation period which, for some outside lawyers, may be an unduly large proportion of the aid period. There can, however, be a reluctance on the part of aid agencies to provide under expatriate terms a country with the services of its own nationals;

(v) insufficient preparation is made, on occasion by the host countries for the aid personnel, both in terms of providing support facilities (office, staff, materials) and in working out the mechanisms which, for the government, will allow their work to be utilised as promptly and effectively as possible. Too frequently, scarce time is spent by the aid officer on instituting the arrangements under which he will work and inadequate opportunities are given to ensure that what he has been brought to do is put into effect by the appropriate local agency. Not infrequently a legal expert arrives from abroad with little or no advance notice to an Attorney-General's Department, in response to a request made by some other Department of Government;

(vi) legal aid personnel report that they are too frequently requested to undertake urgent functions outside their project which they find unavoidable. In consequence, they are occasionally unable to complete their assignments as required and, as a result, the aid may have served to assist the government in meeting its day-to-day commitments but it will not have fulfilled the longer term objectives for which it was provided;

(vii) legal projects, particularly those which are currently required, can demand a substantial period during which the assistance must be provided. The processes of developing, drafting, enacting, establishing and vetting legal changes of any magnitude are lengthy in any system, though perhaps in a small State some of the stages may be completed more quickly. If the assistance is withdrawn before the programme is brought to completion, it may never be finished, as frequently in these States the initiative in this respect rests with the expert. Accordingly, assistance for the kinds of legal programmes contemplated must be covered by a commitment for funding for periods longer than are usually allowed by most aid agencies.

Development of Assistance Arrangements

35. It is clear that many small States will continue to seek technical assistance to enable them to keep their legal system and institutions running in response to day-to-day demands. It may be expected that donor States will continue as in the past to help in this respect where they have the necessary resources and manpower. Although it may be possible for more to be done in the Commonwealth generally to match these requirements with aid resources, as far as small States particularly are concerned, the major need, it may be suggested, is to provide more satisfactorily for longer term or structural changes - for those projects essential to the proper legal development of the State and which tend to take second place to the immediate demands of the day. The most urgent requirements is for assistance to refurbish the very foundations of their legal structures to enable them to deal with their expanding responsibilities.

36. The following paragraphs set out some proposals which Law Ministers may wish to examine. It is recognised that in the main funding will continue to be provided by the larger and wealthier members of the Commonwealth. It needs to be emphasised, however,

that small States may well be better placed to contribute certain types of assistance. Small States require systems, institutions and trained personnel which take full account of the "smallness factor". Models and experience found in the larger States may be of less value than those whose size and resources are more nearly comparable. It is, therefore, of some importance that successful innovations in the law or legal institutions and operations of smaller Commonwealth States, often unremarked outside their country of origin, are made accessible to the very small States. A fortiori, the achievements from changes made in that handful of small States whose economies have permitted reasonable levels of expenditure on legal matters must be fully documented.

A. Provision of personnel

37. Serious shortages of all kinds of experienced qualified personnel in legal fields, especially those with specialist skills, are common to almost all small States. Some proposals to alleviate these circumstances can be made but it needs to be stressed that changes in manpower policies of the small States themselves may also need to be made if the effects of assistance in this respect are not to be dissipated. Legal services are generally entirely dependent upon a miniscule number of qualified persons, insufficient to cover the range of responsibilities which arise in a modern State and contemporary society. In addition many of these services are remarkable for the rapidity of turnover of personnel, the relative inexperience of the majority of those service (often discharging service bonds in the three years immediately after qualifying), the paucity of nationals in the service and the frequency of contract appointment of non-nationals, the non-availability of any specialist inputs and thus the reliance upon technical assistance in matters such as legislative drafting. Given the general unattractiveness of public legal service compared with private sector practice and the limited career prospects and uncompetitive conditions of service at present, it may appear that immediate improvement cannot be hoped for. But comparatively little attention appears to have been paid in any public service manpower planning to legal service needs and in consequence the general pattern established by the pre-independence administrations has largely been continued without adaptations to meet vastly expanded and more demanding functions.

38. Similar shortcomings are also manifest in the judicial system, notably at the magisterial, level, where vacancies, acting appointments, short contractual arrangements, and newly-qualified lawyers (and even unqualified personnel) too frequently are resorted to. Support services are also generally weak in terms of adequate numbers and quality of the administrative personnel and of the basic organisation systems.

(a) Training

The kinds of skills and expertise required in small States will usually best be gained by experience in the particular subject. It is clear that learning solely by experience is rarely possible in these States, as a consequence of the range of other work which must be taken on and the limited amount of the particular work which arises in a small State. The up-grading of specialist knowledge can be provided through appropriate training programmes.

(i) Professional qualification courses

Traditional programmes provided in the larger Commonwealth States are increasingly less available or less suited for the preparation of lawyers for small States. The numbers who require training of this kind at any one time are likely to be small but the expense of being trained abroad, either for the community or the individual, is likely to be considerable. Obviously bursaries from agencies would be possible, though this is only one head of education of the many competing for such resources. This task might prove easier if the preponderance of the study could be undertaken in the small State itself. Too little attention has been paid by Commonwealth law schools to the development of distance learning in law. Modern techniques, most of which could be harnessed in education centres in small States, are as far removed from the law correspondence courses of the past as the word processor is from the manual typewriter.

Item 1. The Law Ministers may wish to ask the Commonwealth Legal Education Association to institute a study of the possibilities of distance learning in law and to determine which jurisdictions might benefit from such an

approach. Funding for particular law schools in different parts of the Commonwealth to establish such programmes especially for the foundation years of academic study might then be sought from appropriate sources.

(ii) Specialist postgraduate study

Item 2. Although some courses already exist which would be suited to giving specialist training at the postgraduate level, it is thought that these opportunities are rarely taken by lawyers or law graduates from small States. Insofar as this may be traced to a lack of information about what suitable is available, Law Ministers may feel that a directory of such graduate programmes with adequate accompanying information would be useful. The Commonwealth Legal Education Association might be asked to publish such a directory at regular intervals and funding agencies might be pressed to give favourable consideration to the award of bursaries to small States personnel to participate in them.

(iii) Short post-experience courses

Short post-experience courses for which legal personnel from small States would be suited are mounted only rarely. Where they do take place, they are often in distant parts of the Commonwealth for which there is neither money nor replacement personnel available to permit release of officers from a small State.

Item 3. Law Ministers may wish to consider whether, instead of encouraging personnel to be sent on overseas courses which are irregularly mounted, course tutors might be funded to run short and intensive programmes on important specialist subjects in individual small States, albeit for a very small number of persons. There are in the Commonwealth many with vast practical experience in legal matters of relevance to small States who might be willing and well able to instruct personnel for whom acceptable job release arrangements could be made. Again the Commonwealth Legal Education Association might be asked to explore this possibility and to put forward proposals for aid funding.

Short courses for those about to assume junior judicial or magisterial office are not readily found, although they are likely to be of particular value. It is probable that existing institutions in the Commonwealth interested in court systems could be encouraged to develop these if it appears probable that the appropriate officers would be assisted to attend. Similar techniques might be appropriate for giving managerial and systems training to administrative staff in the legal sector.

Item 4. Law Ministers may like to request the Legal Division of the Commonwealth Secretariat to explore the possibilities with such bodies as the Institute of Judicial Administration in Birmingham or the Institute of Criminology in Toronto.

(iv) Placements and in-house training

The advantages of developing expertise by working with an agency heavily involved with a particular type of activity need no emphasis. Legislative drafting or international legal practice in a foreign affairs department are clear examples of this kind of work. In the past, such training of this kind which has occurred has tended to be provided by the developed States of the Commonwealth.

Item 5. Law Ministers may wish to ask the Secretariat to explore the possibilities for developing and funding placements in smaller jurisdictions. In this respect and in relation to more formal training courses in law and legal administration, Law Ministers may wish to suggest the preparation by the Secretariat of a directory of training opportunities in law throughout the Commonwealth.

Item 6. There can be few better learning situations than that of working with a legal expert who has been assigned to a particular programme. In many technical cooperation postings, it is often assumed that full advantage will be taken of opportunities which provide this kind of training. It is also the basis on which CFTC assistance is usually given. Further consideration might be given by agencies to the ways in which this approach can be made more effective than it at present is.

(b) Expert personnel

(i) Recruitment

It is a common practice for bilateral assistance schemes to provide experts from the donor State. Most agencies find some difficulty in funding experts from the recipient State. For small States, it is of first importance that the expert is thoroughly conversant with the needs of small States and, as is often the case in law, with the social and economic circumstances of the particular State to which he is assigned. There is, therefore, room for greater liaison between aid agencies in identifying persons with appropriate expertise, particularly those who have working experience of small States and knowledge of their problems.

Item 7. Law Ministers may wish to consider what steps may be taken to encourage collaborative arrangements between small States for the exchange of professionals, especially in skills in short supply. As the Commonwealth Foundation Seminar in Barbados on appropriate skills for small island States concluded in 1982, such developments seem particularly appropriate for support from aid agencies.

(ii) Legal assistance units

Small States in relative regional proximity have common legal problems and are lacking in the same types of expert personnel. There is, it is suggested, a powerful case for a programme for assistance which will enable these groups of States, as they generally wish, each to create a common legal service which will allow the States in the group to tackle the long terms projects for modernising their law and legal systems and services, for developing common policies in relation to matters of acute contemporary importance (such as the law of the sea, civil aviation, treaty succession, merchant shipping, protection of marine resources and the marine environment, commercial and investment law) and for the provision of specialist skills which will allow high grade legal advice and assistance to be given where it is at present completely lacking (e.g. negotiations with transnational or overseas investors, preparation of loan agreements and the drafting of legislation).

There is little doubt that radical innovations such as this will be beyond the resources of the States even acting collectively. As this mechanism is conceived as a way of attacking neglected subjects and providing skills which scarcely exist at the present, any assistance programme must not be at the expense of aid to individual States whose day-to-day requirements will not be substantially altered by a development such as this.

Item 8. Discussions for the establishment of units of this kind have been initiated in the Pacific Region and by the recently established Organisation of Eastern Caribbean States. Law Ministers may wish to restate the support for this kind of activity which they gave at the Barbados Meeting, particularly as recent advice from the Pacific suggests that some small island governments are still largely unaware of their predicament despite the endeavours of their law officers to persuade them otherwise. As in other matters, realisation of need is a pre-requisite to remedial action.

B. Special projects

39. If, as has been suggested, the legal requirements of small States are peculiar by reason of the "smallness factor", there is a good case for instituting inquiries into the kinds of institutional and organisational arrangements which might be particularly suited to small systems. A number of such projects may be suggested.

(a) Printing and publishing of laws and law reports

In almost every small State, the preparation and publishing of basic legal materials is a matter of major concern. In some jurisdictions, it is nearly impossible to gain access to, let alone acquire, a complete set of the local statutes and subordinate laws which are currently in force. In most cases, the publication of revised collections of the legislation is a priority need if an accurate up-to-date statement of the law is ever to be available. There is no collection of local legal precedents and those of other jurisdictions which can be provided are few and poorly maintained. Basic legal texts and practitioners' works provided for State use are woefully inadequate in their number and their range. In systems which depend upon a body of written law and collected precedents, the arrangements for ensuring that these are readily available for those who must use them are thoroughly defective. These jurisdictions have inherited the English-style legal system but they have not been able to maintain the essential facilities for its proper functioning. Their systems are eroding with every passing day.

Technological developments for preparation, collation, retrieval and printing of materials of this kind have been immense in recent years. It is conceivable that such developments, properly utilised, could permit a new approach to these matters to be attempted. Some relatively small jurisdictions, such as Northern Ireland, have recently undertaken computer-assisted publication of collected statutes. It may be possible for cooperative arrangements to be instituted between a small State with a limited hard- and soft-ware capability and more developed State with modern computer assisted storage and printed facilities.

- Item 9. Law Ministers may wish to request the Secretariat to commission a study of the opportunities afforded by these developments for publication and indexing of revised statutes and law reports and the ways in which aid assistance might be most effectively utilised in this respect.

(b) Institutional reforms

The restructuring of court systems, registries, government legal offices and drafting sections has rarely been undertaken in small States. Existing systems are still largely those provided for much less sophisticated or politically advanced societies. In many instances, the antiquity of the systems contributes seriously to the inefficiency of the legal administration.

There is, however, much experience which can be gathered from other Commonwealth States which have tackled problems of this kind but generally the information is not readily available and more importantly there is often no-one with responsibility or expertise in a small State to draw the practical conclusions. Little attention is being given to question of cost effectiveness and the extent to which legal administration can be supported by properly structured fees. Equally, more might be done to examine how far self-regulatory rather than bureaucratic supervisory techniques can be utilised.

- Item 10. Law Ministers may wish to ask the Secretariat to commission a preliminary study of the ways in which proposals for institutional reforms of small States' legal arrangements could be formulated and relevant experience from elsewhere in the Commonwealth drawn upon.

- Item 11. Law Ministers may also wish to ask the Secretariat to commission a study upon the organisation of a legal drafting service in a small State. This area of need is one more frequently identified as a matter of priority. There is room for an independent and realistic account of what is required in terms of manpower and support services, given the requirements of a small State. Experience of the structure and operations in small States which have reformed their systems would be useful.

(c) Availability of legal information

Small States are generally far from well supplied with libraries or collections of legal materials. The recent increases in costs of such materials have merely added to already serious weaknesses. Preparation of soundly researched opinions or of forensic arguments and the acquisition of relevant precedents in case or statute law or by commentaries are greatly handicapped.

Item 12. New methods of information retrieval are becoming available. Law Ministers may wish to ask that studies commissioned by the Commonwealth Secretariat in this field should pay particular attention to their suitability, with or without enhancement, for small States. Comparative costs of providing the kind of library resources which are needed or of developing access to a retrieval system would be of particular interest. It is certain that basic collections will continue to be needed into the foreseeable future. With the huge explosion in legal publishing, it is improbable that any officer in a small State can determine what is required from what is available.

Item 13. Law Ministers may wish to ask the Secretariat to seek advice via associations of professional law librarians in different regions of the Commonwealth concerning the components of a basic collection for a central small State's law library. This may enable a state to develop a considered library policy and to formulate reasonable applications for assistance. Law Ministers may wish to convey to funding agencies the central importance of a sound law collection for developing small States.

The Secretariat has provided a number of "accession kits" which have contained explanatory documentation in relation to particular international treaties with implementing model legislation.

Item 14. In the light of the recent publications, Law Ministers (particularly from those small States) may wish to indicate whether this technique has in fact been useful and has led to local action and whether it could be usefully extended to other subject areas, whether or not governed by treaty. Many small States appear to have similar difficulties as a result of the antiquity of their shipping and aviation legislation, for example. There may be room for "kits" in these subjects, thereby reducing the amount of local research in many small States for the same materials.

A number of small States are currently engaged - or would like to be engaged - on legal action on the same matters - treaty succession, law of the sea, protection of sea resources, maritime boundaries, corporate law reform, as well as shipping and aviation. In many instances much of the same ground must be covered in the formulation of the legal policy.

Item 15. Law Ministers may wish the Secretariat to consider ways in which the existence of such work can be made known to other States, whereby collaborative arrangements between different funding agencies supporting similar activities can be instituted and by which research bodies or personnel engaged in these subjects as they affect small States can be identified.

C. Co-ordination of aid activities

40. Reference has already been made to the desirability of systematised co-ordination between agencies in providing assistance in legal fields to small States. In this way, unnecessary duplication of effort can be avoided and funds can be applied by different agencies to activities which not only complement each other but together can tackle more substantially certain of the long term requirements which have been described.

41. Proposals have been made on occasions for the convening of Donors' Conferences which are able to examine the technical assistance requirements of, for example, regional groups of states in particular fields. This approach has the virtue of allowing potential donors to become familiar with the special circumstances of the donee countries and their priority needs. As a consequence individual aid agencies' funding policies can better take account of longer term aid strategies suited for these countries and can determine how the funds which they are likely to be able to make

available over a period of time can be most effectively displayed alongside what other agencies are prepared to undertake.

Item 16. Law Ministers may wish to endorse this approach as one particularly suited to the development of considered policies for the provision of technical assistance in the legal field for small States.

D. Professional links

42. Persons engaged in legal activities in small States necessarily have limited opportunities for regular professional contacts with persons undertaking similar work and having similar problems. A sense of professional isolation tends to increase the more specialised the work and it is not of course confined to the legal field. There is a great deal to be gained in the quality of professional life and in the way duties are performed from the stimulus and support from established relationships with others involved with similar responsibilities.

Item 17. Law Ministers may wish to propose that the Commonwealth Foundation, which is generally concerned to develop professional links, be asked to consider ways in which these needs can be met among professionals in the legal field in small States.

Conclusion

43. This paper has attempted to show that the present circumstances facing the legal institutions in small States call for particular consideration when policies for allocating aid funding are under review. In the author's view, there is a good case for saying that substantial assistance is necessary for the kinds of infrastructural aid described, and that such types of aid should be given as high priority as assistance directly for economic development. A programme of action for most small States (which in many cases should seek to involve the lawyers of the States themselves, particularly those who favour private rather than public practice) is a pressing need. If it is not instituted, political and social development could easily be retarded to the serious disadvantage of the peoples of these States and of those who have an interest in their continued stability and orderly development.

**SERVICING THE LEGAL SYSTEM:
A PROGRESS REPORT ON NORTHERN IRELAND**

Memorandum by the Commonwealth Secretariat
and a Paper by PROFESSOR COLIN CAMPBELL
and BRICE DICKSON of the Faculty of Law,
The Queen's University of Belfast,
Northern Ireland

The jurisdiction of Northern Ireland is small in the sense that it has its own legal system and insufficient lawyers to make the production of legal textbooks and other materials attractive to commercial publishers.

1. To meet the demands of the legal profession, the energies of the jurisdiction's only law faculty were harnessed in a novel enterprise that brought together both governmental and private funding as well as both practising and academic lawyers. The result has been a programme entitled "Servicing the Legal Profession", instituted in July 1980.

2. At the invitation of the Secretariat, two of the prime movers behind the programme - Professor Campbell and Brice Dickson, both of The Queen's University of Belfast - have prepared a paper, outlining the background to the programme and its success to date. The problem of legal publishing in small jurisdictions is one which has assumed a growing dimension: the need for domestic materials has steadily increased but has been matched by escalating costs of production. At the same time, too, an eventual need for computerized legal materials is being recognised. The Northern Ireland programme illustrates one possible solution.

ANNEX TO LMM(83)3

**SERVICING THE LEGAL SYSTEM:
A PROGRESS REPORT ON NORTHERN IRELAND**

Prepared by PROFESSOR COLIN CAMPBELL
and BRICE DICKSON of the Faculty of Law,
The Queen's University of Belfast

Introduction

In February 1979 a proposal was submitted to government departments, the governing bodies of the legal professions and to private institutions suggesting that significant sums of finance be made available to the Faculty of Law, in The Queen's University of Belfast. The proposal was that a Programme entitled "Servicing the Legal System" should be established. The dearth of published information about the law and the legal system in Northern Ireland was described, and it was argued that this detracted from the quality and efficiency of professional practice, hindered legal education and training, and inhibited access to the law by the general public. It was claimed that if new financial resources were made available, fresh opportunities to tackle the problems on behalf of the legal profession and the public could be pursued with some confidence of success. The idea to create a Programme, using the new finance, which would ensure that the whole was much greater than the sum of its constituent parts.

2. The background to the proposal may be sketched briefly. Northern Ireland has a population of approximately 1.5 million people. It has its own legal system; the legislation in force may be similar to that in the rest of the United Kingdom and the common law administered by the courts may be close to that followed in England and

Wales, but in important ways, and in various branches of the law, the legal provisions may be different and unique. In 1979 the legal profession comprised approximately 720 solicitors in private practice and 150 members of the Bar (overall, perhaps, 1,500 lawyers in all walks of life). Within the jurisdiction of Northern Ireland there was only one Faculty of Law - the Faculty in The Queen's University of Belfast. The proposal to establish the "Servicing the Legal System (SLS) Programme" claimed that because Northern Ireland was a "small jurisdiction" it followed that it did not receive the support from legal publishers and specialised institutions such as were enjoyed in larger jurisdictions. In simple terms the problems in Northern Ireland arose from the combination of (a) having a fully developed modern and complex legal system and (b) there being too small a market to support publications to cover all aspects of that system. Northern Ireland's problems were not, it was appreciated, unique - they compared with and mirrored similar situations in other "small jurisdictions" in the Commonwealth and elsewhere.

3. The initial proposal was drafted and presented by the then Dean of the Faculty of Law, Professor Colin Campbell. It was his duty, in the early stages, to undertake the lengthy discussions which ultimately (more than a later) led to sufficient financial sponsorship being available for the Programme to be inaugurated. Contributions came from the Northern Ireland Courts Service (the government department responsible for administration of the courts in Northern Ireland), from the governing bodies of the legal profession (The Law Society, the Bar Council and the Benchers) and, in addition, from the charitable Nuffield Foundation and the Northern Ireland Bankers' Association. In broad terms the Programme was funded for a five year term, subject to review, for a total of about £2,000,000 (i.e. £40,000 per annum). Matching this financial support, however, was the preparedness of Queen's University, as host of the Programme, to provide extensive hidden subsidies. It is difficult to cost the University's contribution but it is significant indeed.

4. The "Servicing the Legal System Programme" was designed to allow existing expertise (in academia and in both branches of the profession) to be tapped and, by the provision of a new resource for shared use, to underwrite its transformation into written and generally available form. By providing a new "vehicle" it was hoped new publications and services might emanate in a way that was not allowed previously. The Programme was, above all, to be "non-exclusive" - work of quality from whatever source was to be encouraged and published. There was no intention of duplicating such services as were already offered by the major English legal publishers (whose services were in some cases of value in Northern Ireland) but to fill gaps, supplement existing services, or establish on an "in-house" basis what the commercial publishers could not countenance. Even at the earliest stages, however, it was realised that the Programme would have to be relatively unambitious and should concentrate on practical and useful tasks rather than attempting any grand or wide-ranging provision of the publications and services that prevail within large and well-endowed jurisdictions.

5. Since the original idea was to tap existing resources as much as possible, so as to minimise the amount of new finance required, it should be noted that the total new staff engaged to run the Programme comprised one Senior Fellow, one full time Research Assistant, and two secretaries. Other members of the Faculty academic staff have administrative, editorial and financial responsibilities within the Programme, but they are very much part-time contributors. One office containing some relatively advanced office technology was opened.

6. In July 1980 the Senate of the University formally established the "Servicing the Legal System Programme" and constituted its Advisory Committee to comprise representatives of the sponsoring bodies under the Chairmanship of the University's Vice-Chancellor. The Projects Committee to undertake day to day responsibility for the programme was set up in the Faculty of Law, the office was opened, and work got underway. The broad objectives were to publish the information that was needed by professional lawyers, law students, other professional groups and associations, and the general public. The ways of "reaching" these groups could vary and might include awareness and up-dating services, textbooks, pamphlets, conferences and seminars. It was up to the Projects Committee, under the Chairmanship of Professor Desmond Greer, and with Brice Dickson as Secretary, to implement in practical ways the objectives so generously endorsed by the sponsors, the Faculty and the University.

The First Two Years

7. A review of experience in the first two years will begin with a general description of the types of work which have actually been done. These may be grouped into six areas. (Appendix A lists all SLS publications and activities during 1980-1982).

8. In the discussions leading to the establishment of SLS it came to be agreed that the major priority was to be the publication of a regular Bulletin providing up-to-date information about all major developments in the law of Northern Ireland. In August 1980 Judith Eve was appointed Editor and, with the assistance of an editorial team, she planned and then published the Bulletin of Northern Ireland (BNIL). It is worth recording that in these early days, the Faculty received generous help and advice from legal publishers - in particular Sweet & Maxwell Ltd., who advised on their methods and experience in publishing the famous Current Law. The first issue of the Bulletin appeared in February 1981 and it has been published regularly since then - there being ten issues each year (no issues appear in the summer). The Bulletin digests all relevant legal developments affecting Northern Ireland in the previous calendar month.

9. The Bulletin is usually about 40 pages in length and includes material on the following items:

- all new legislation applicable in Northern Ireland
- written judgments delivered in the Province's Court of Appeal, the High Court and county courts
- published decisions of the Industrial Court, industrial tribunals, and society security tribunals
- selected decisions of the Lands Tribunal and the Planning Appeals Commission
- selected tax cases
- jury awards in the High Court
- selected county court awards and criminal damage and criminal injury to persons claims
- practice directions
- Law Society and Bar Council circulars
- selected developments in EEC law
- selected developments in the law of England and Wales and of the Republic of Ireland.

10. There can be no question that the Bulletin has been an outstanding success and has already achieved the status of being indispensable for anyone who wishes to know and keep up-to-date with the law in Northern Ireland. The vast majority of subscribers are legal practitioners, but other individuals and groups subscribe also. In 1981 there were 480 subscriptions (the annual cost is £42.50) which meant that after only a year in operation three-quarters of all firms of solicitors in Northern Ireland had subscribed. The take-up among barristers is much less encouraging - doubtless because they have access to the Bulletin in a central library. All the signs are that the Bulletin will proceed and flourish in the foreseeable future - no matter what happens to any of the other aspects of the SLS Programme.

11. The Northern Ireland Legal Quarterly is a journal which was originally launched in 1936. Its history has been a chequered one and substantive responsibility for its operations was transferred to the Faculty of Law in Queen's in 1964. By 1978 the financial pressures on the Quarterly had become dire and were becoming greater. The inauguration of the SLS Programme allowed its finances to be placed on a sounder footing and the appearance of the Bulletin allowed rationalisation of the journal's marketing and coverage. (The annual subscription has been "pegged" at £22.50 and

joint subscription to the Quarterly and the Bulletin costs only £55.00). The Quarterly need not, now be "all things to all men". It has serious and lengthy leading articles, some shorter articles, comments and notes, and book reviews. Since it is now relieved of the burden of carrying all the material that is included in the Bulletin, it is a more elegant, and more efficiently produced, publication.

12. A different series of publications, organised by the SLS Committee, is the preparation of annotated versions of selected Statutes or Orders in Council. These comprise section by section comment and reference is made to corresponding English legislation and to relevant case law interpreting Northern Irish or English provisions. The cost to a customer can, if the annotation is properly planned, be only very slightly above the purchase price of the "raw text" of the legislation, without annotation or commentary, from the Government's Stationery Office. The first pieces of legislation to be annotated in this way have been the Legal Aid, Advice and Assistance (N.I.) Order 1981 and the Limitation Amendment (N.I.) Order 1982. Annotations are in the pipeline for the Judgments Enforcement (N.I.) Order 1981, the Magistrates' Courts (N.I.) Order 1981, and the Road Traffic (N.I.) Order 1981. The aim is to have most of the publications in this series annotated by practitioners or administrators with particularly close and detailed working knowledge of the topics in question. There is little doubt that if such persons can be persuaded to co-operate on a regular basis the series as a whole could be very valuable.

13. Before 1980, very few textbooks about Northern Ireland law had been produced. An important aspect of the SLS Programme was to encourage the appearance in book form of materials that were being or might be written but whose production was inhibited by conventional market considerations. One book, Compensation for Criminal Damage to Property in Northern Ireland, has appeared already; another (Housing Law) is almost completed. Similarly practice manuals are sorely needed by the practising profession in Northern Ireland, and the first publication in this series (Land Registry Practice) has now been published. There is a need for many more books but it is unlikely the Faculty of Law staff can sustain the series by themselves. If practitioners, who alone have the necessary knowledge and expertise in some areas, are not prepared to contribute, the serious gaps will continue.

14. In some areas of law or legal practice, there are substantial Northern Ireland materials but not quite sufficient to justify the publication of a separate book. Here a supplement to a standard English text may (with the due consent of authors and publishers) be the best way of proceeding. Preparatory work has, accordingly, been done to produce supplements to such standard English legal texts as Smith and Hogan on Criminal Law, Cross on Evidence and Bromley on Family Law. This is work which can perhaps best be done by the academic rather than practising lawyer, and it is likely that the number of supplements will grow and that they will be updated from time to time. There are also lectures on recent developments in areas of importance to the practising profession, and the circulated materials which ensue are popular and valued.

15. As envisaged at the outset, the SLS team has organised conferences and seminars on matters of interest to members of the legal profession, other specialised groups, and wider audiences. Frequently, the organisation of a seminar is a quicker, more cost effective and indeed more appropriate way of allowing discussion and commentary on areas of topical interest rather than planning, preparing some printed copy. In addition it has provided some training for the lay staff of Citizens Advice Bureau (i.e. para-legal advisers). A major commitment has been the provision of a course on legal studies for employees of the Northern Ireland Housing Executive. This has been a serious exercise involving about seven members of the academic staff in the Law Faculty at Queen's and while it constitutes a considerable strain on the manpower resources of the SLS Programme, clearly it also fills an important need for those responsible for all public housing in Northern Ireland. Recently a series of lectures on "Understanding Law" has been mounted with the Extra-Mural Department of the University and this provides an introduction to the legal system for members of the public who attend a course of evening classes. One by-product of such ventures can be the stimulus to proceed to publications.

16. From the outset it was recognised that the need for information about the law could extend to all types of people to all categories of clientele. The need of the practitioner is for up-to-date, clear accounts of what the law in force is, how it

operates and where he can find it. Lay advisers and members of the general public have greater need for introductions to areas of the law and explanations as to how they may be affected, or how they should react, when they experience a problem. A couple of important publications have been prepared which, from their high volume of sales, obviously have met a felt need. A pamphlet on Small Claims Procedures has gone into a second edition already, and a publication on Industrial Tribunals (how they operate, what Tribunal Chairmen are looking for, and how parties should prepare for appearances) has also been successful. A booklet on The Cost of Going to Law has recently appeared and a variety of further pamphlets and brief publications for the general public are in preparation. (See Appendix B).

Reflections

17. In the last two years a lot of work that probably would not have been done otherwise has been completed under the SLS Programme. It seems that most of those associated with the Programme, or familiar with its record, remain convinced of its merit, just as they appreciate that a great deal remains to be done - and will always remain to be done. So far the Programme has enjoyed the support of all the professional bodies, the University and the Faculty of Law, and there are no signs of the support withering away. One of the advantages of being a "small jurisdiction" is that those concerned in different aspects of the legal process may maintain fairly regular and informal contacts, and there is little doubt that in the organisation of the SLS Programme these contacts have been of value. So far work has proceeded on the basis as originally envisaged; it has covered its own costs and while some individual ventures may be loss-making, others are highly profitable and this allows cross-subsidisation. As yet these are early days, but the following points seem to us (one of us is involved in the daily operations of the Programme and the other is not) as summarising experience so far.

18. The initial thinking behind the proposal was sound. This is shown by the support provided by the sponsors, and the record of productivity since the scheme was established. There is as much a need for information about the law in a small jurisdiction as there is in a large one, and if market considerations do not allow the appearance of the information that is required some other means may deserve to be used to ensure that those who need information about the law get it. This follows from recognition of the importance of the law in regulating social and business affairs.

19. Within Northern Ireland the obvious way forward was to base the Programme in the Faculty of Law (the only such Faculty), and to expect it to accomplish such work as it could do and invite others to co-operate in other areas. It would appear that the Faculty has been diligent and effective in discharging its responsibilities. The Programme has got off to a solid start. The spectacular success has been the Bulletin of Northern Ireland Law. A failure has been in not sufficiently attracting or involving private practitioners - solicitors and barristers - or lawyers employed within local and central government. There is, undoubtedly, a wide range of expertise available that has not been tapped. Realisation of the need to involve others more closely (to promote the range of publications needed) is accepted; so far, however, the difficulties in engaging the busy practitioners in the necessarily time-consuming work of transforming their expertise into clear transcripts, have not been overcome.

20. One of the strengths of the SLS Programme is its base in the Faculty of Law in the University - the Faculty is committed to the Programme and the University provides valuable support. Thus, the University generously allowed word-processing technology to be made available and it is unlikely that the Bulletin (or other publications) could have been produced without such technology. Of course, the sense of proceeding in this way was realised at the outset and the "magnetic copy" of the Bulletins has been transferred on to the University's computer so that the beginnings of a Northern Ireland legal database are being produced at no extra cost really as a by-product of the Programme. This is likely to bring many benefits at low cost in the future.

21. Just as academics and university administrators are good at some things, they are not good at others. The business and marketing side of the SLS Programme would, from the point of view of a conventional legal publisher, probably seem thoroughly amateurish if not amusingly naive. Those responsible for the day to day operations of

the Programme would probably accept such an analysis - after all they are academics, not businessmen. Yet the success of the publications so far might indicate that even if there is no aggressive marketing nevertheless those responsible for the Programme must have some good idea of what they are doing! It may, again, be that in a "small jurisdiction", where there are relatively close and informal contacts, it is easier to learn and diagnose the needs which require to be met.

22. It seems that the flexibility of the Programme is a major advantage just now - but it may be that this will become circumscribed as time passes. In the first two years the reactions of most commentators have been relatively generous. In part this was because care was taken, at the outset, not to raise expectations to an inflated level, and, in part, it is because those responsible for the publications have produced high quality material that has met a need. Thus, subscribing to the Bulletin, buying an annotated statute, using a pamphlet, or attending a seminar or conference are now possibilities for lawyers in Northern Ireland in a way that they were not before. Of course human nature being as it is, there is a danger that expectations will grow and that the demands made on those running the Programme will become unrealistic. The publications so far produced could come to be taken for granted, and there could be a clamour for "more and better". Should this happen the Programme could be at risk since the resources available are, already, fully used. Cutbacks in University finances have been heavy in the United Kingdom and they could threaten the Programme.

23. The SLS Programme has done a good deal for professional lawyers (particularly through the Bulletin) and it has done something (though not as much as many would have wished) for lay advisers and members of the general public. It is doubtful if it has done much of significance for the other professions and occupations in society that require recourse to specialised areas of the law. The difficulty, of course, is that those involved in the Programme have limited knowledge of the needs of such groups or the specialisms involved. To overcome this problem a more expansionist interpretation of the Programme - involving many more outsiders than has been achieved in the last two years - is probably required. That, however, will not be possible unless new resources come, somehow, to be made available.

Conclusion

24. The prospects are that the Programme will continue to grow. It will, at the least, complete its initial five year term and discussions about its continuance will have to take place. If for any reason the Programme were not to continue, there is a reasonable chance that some of its enterprises might be "taken over" and continued by commercial publishers. The SLS Programme has proved, even in its first two years, that there is a thirst for information about the law in many areas of public and professional life in Northern Ireland, and the information is valued highly enough for people to pay for its provision.

SLS Publications and Activities 1980-82

Periodicals

Bulletin of Northern Ireland Law: 10 issues per year, January 1981-
Northern Ireland Legal Quarterly: 4 issues per year, continued January 1981-
Northern Ireland Statutes Annotated: occasional

Books and Pamphlets

Allen, The Cost of Going to Law
 Bateson & McKee, Industrial Tribunals in Northern Ireland (with supplement)
 Gray, Limitation (Amendment) (NI) Order 1982
 Greer, Small Claims: the New Procedure in Northern Ireland (1st and 2nd eds.)
 Greer, The Admissibility of Confessions under the Northern Ireland (Emergency Provisions) Act
 Greer, Legal Aid, Advice and Assistance (N.I.) Order 1981
 Greer and Mitchell, Compensation for Criminal Damage to Property in Northern Ireland
 Hadfield, Committees of the House of Commons and Northern Ireland Affairs
 Kerr (ed.), Custody of Children on Breakdown of Marriage
 Moore, Capital Transfer Tax
 Wallace, Land Registry Practice in Northern Ireland (with supplement)

Recent Development Booklets

Bateson, Company Law: Receiverships and Liquidations
 Eve, Domestic Proceedings in Magistrates' Courts
 Greer, Negligence and Damages for Personal Injuries
 Harkness, Sale of Goods
 Harkness, Some Aspects of Building Contracts
 Moore, Some Tax Implications of Marriage Breakdown
 Steele, Individual Employment Law

Conferences and Seminars

Williams & Glyn's Bank v. Boland (for solicitors, estate agents, bankers, building societies)
 Conveyancing and Housing Development (for staff of the Northern Ireland Housing Executive)
 Consumer Law (for advisers at Citizens Advice Bureaux)
 Consumer Credit (for Faculty staff, bankers, advisers, media representatives)
 Employment Law (for the Institute of Personnel Management and for staff of the Northern Ireland Housing Executive)
 Custody of Children on the Breakdown of Marriage (for solicitors, social workers, students)
 Introduction to law and elementary contract, tort, family, land and employment law (for the staff of the Northern Ireland Housing Executive)
 Understanding Law (evening course for students of the Department of Extra-Mural Studies)

Projected SLS Publications and Activities 1982-83

Periodicals

As listed in Appendix A

Books and Pamphlets

Bateson and Steele, Labour Law in Northern Ireland
 Blumental, Cross-Border Tax Issues in Ireland
 Boyle and Allen, Sentencing Practice in Northern Ireland
 Burns and Connolly, Judgments Enforcement (N.I.) Order 1981
 Dickson, The Northern Ireland Legal System
 Dinsmore, Till Divorce Us Do Part
 Greer, A Handbook on Legal Aid in Northern Ireland
 Hadden and Trimble, Housing Law in Northern Ireland
 Jackson, Supplement to Cross, Evidence
 Lavery, Road Traffic Law in Northern Ireland
 Malcolm, Supplement to Bromley, Family Law
 Maxwell and Toolan, Magistrates' Courts (N.I.) Order 1981
 Moran, Road Traffic (N.I.) Order 1981
 O'Higgins, Bibliography of Northern Ireland Law (supplement)
 Paisley, A Guide to EEC Law
 Stannard, Supplement to Smith and Hogan, Criminal Law
 Valentine and Glass, County Court Practice in Northern Ireland

Conferences and Seminars

In-Service teaching on many aspects of law for staff of the Northern Ireland Housing Executive
 Conference on Small Claims Courts
 Further courses for students of the Department of Extra-Mural Studies
 In-Service teaching for accountants, bankers and other professions

A REVIEW OF CO-OPERATION BETWEEN
THE COMMONWEALTH SECRETARIAT AND THE ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

Memorandum by the Commonwealth Secretariat
and a Paper by DR. B. SEN, Secretary-General
of the Asian-African Legal Consultative Committee

Over the past ten years the Commonwealth Secretariat and the Asian-African Legal Consultative Committee (AALCC) have co-operated in a number of areas. In order to appraise Ministers who are not familiar with the work of the AALCC the Secretariat invited the Committee's Secretary-General to prepare the accompanying paper.

2. The AALCC has been engaged in work of its own in the field of judicial assistance. In recent times there has been an upsurge in commercial transaction and in the number of Commonwealth citizens who have moved to work in the "oil States" of West Asia. In view of the membership of AALCC embracing many of those States and in view of the extensive work in the area of the recognition and enforcement of judgments and orders and the service of process within the Commonwealth undertaken for the Commonwealth Secretariat by Professors David McClean and Keith Patchett, the paper suggests that Ministers may consider it timely to extend the Secretariat's work to act in liaison with the AALCC and, where appropriate to promote, Commonwealth arrangements with West Asia.

3. The paper also suggests that liaison in the field of extradition is potentially fruitful and that enhanced Secretariat involvement in the AALCC's training programmes may prove mutually beneficial.

Annex to LMM(83)4

A REVIEW OF CO-OPERATION BETWEEN
THE COMMONWEALTH SECRETARIAT AND THE ASIAN-AFRICAN
LEGAL CONSULTATIVE COMMITTEE

Prepared by Dr. B. SEN, Secretary-General
of the Asian-African Legal Consultative Committee

Introduction

Official contacts between the Commonwealth Secretariat and the Asian-African Legal Consultative Committee (AALCC) were first established in 1972 when the then-Director of the Legal Division (Mr. T.O. Kelleck, QC) attended the Committee's Thirteenth Sessions held in Lagos in January of that year. Since then contacts have been maintained regular basis between the AALCC Secretariat and the Legal Division of the Commonwealth Secretariat through periodic consultations with the AALCC Secretary-General and exchanges of publications. The Commonwealth Law Bulletin also covers the activities of the AALCC. The Commonwealth Secretariat has continued to be invited at the AALCC's regular sessions each year, as also to some of its working group meetings.

2. There are fifteen¹ Commonwealth Governments among the members of the AALCC out of a total membership of 40 States; four other governments maintain close working relations with the AALCC, and a large number of other Commonwealth governments (including Britain and Canada) attend the AALCC's Sessions on a regular basis as observers. Furthermore, the interests of the Commonwealth countries in areas of the Asian-African region which are within the AALCC membership has increased a great deal during the past few years. The time may now be opportune to consider closer co-operation between the two bodies and their possible collaboration in certain specific fields of work. The Commonwealth Law Ministers' Meeting in Colombo in February 1983 provides an opportunity for this to be considered. Sri Lanka is a founder member and the current Chairman of the AALCC.

Brief background of AALCC

3. The Asian-African Legal Consultative Committee, an intergovernmental organisation, was established in November 1956 as an outcome of the Asian-African Conference held in Bandung in April 1955. Originally conceived as an advisory body in the field of international law to its member governments, then comprised of seven Asian States, the Committee has gradually established itself as a major international organisation with a membership of 40 governments and has expanded its activities to cover areas both in the field of law and economic relations. It acts as forum for consultation and exchanges of views on a number of matters before the United Nations or Conferences of Plenipotentiaries. The Committee has played an important role in the negotiations on the Law of the Sea and, consistent with the global impact of its activities, the Committee's annual sessions have been attended by 40 to 50 observer delegations from different parts of the world.

4. The AALCC was accorded Permanent Observer Status with the United Nations by a decision of the General Assembly taken at its Thirty-fifth Session in 1980. It has been a participating inter-governmental organisation with the United Nations Conference on Trade and Development (UNCTAD) since 1968, and it maintains official relations with a number of United Nations agencies including the International Law Commission (ILC), the United Nations Commission on International Trade Law (UNCITRAL), the Food and Agriculture Organisation (FAO), the International Maritime Organization (IMO), the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Environment Programme (UNEP). In addition it has entered into co-operation agreements with the International Institute for the Unification of Private Law (UNIDROIT), The Hague Conference on Private International Law, and the Council of Europe. It also maintains contacts with other international organisations including the Organization of American States and the League of Arab States. Most of these organisations attend the Committee's Sessions on a regular basis and actively co-operate in its work.

5. The Committee holds its Session once annually by rotation in its member States, and in between Sessions a number of Expert Group Meetings and Working Groups are organised.

6. The Committee's Secretariat is at present located in New Delhi and is headed by an elected Secretary-General. He is assisted by a Deputy Secretary-General and three Assistant Secretaries-General who are senior officials of the Government seconded to the Committee's Secretariat. In addition, there is a highly qualified technical staff of six legal officers apart from its administrative personnel and languages pool.

¹ The members of the Commonwealth who are also members of the AALCC are the following: Bangladesh, Botswana, Cyprus, The Gambia, Ghana, India, Kenya, Malaysia, Mauritius, Nigeria, Sierra Leone, Singapore, Sri Lanka, Tanzania and Uganda. In addition, Australia and New Zealand were accorded Permanent Observer Status by a decision of the AALCC taken in 1981. Zambia and Zimbabwe are invited to Committee's Sessions and all Working Group Meetings and receive documentation intended for AALCC members.

Work of the AALCC in the field of international law

7. The Committee in the past has concluded its work by way of recommendations in regard to a large number of matters which include Diplomatic Relations, State Immunity, Extradition, Status and Treatment of Aliens. Rights of Refugees, Dual Nationality, Enforcement of Foreign Judgments, Legality of Nuclear Tests and Law of Treaties. Some of these subjects are likely to be taken up again for review in the light of recent developments.

8. Its current programme of work embraces the following:

- (i) Consideration of the subjects and topics before the International Law Commission;
- (ii) Preparation of notes and comments on matters before the Sixth Committee of the General Assembly and such other items on the agenda of the General Assembly which are relatable to the work of the Committee;
- (iii) Law of the Sea;
- (iv) Optimum utilisation of the resources of the exclusive economic zones through preparation of appropriate framework legislations, model agreements, etc.;
- (v) Protection of the environment with special reference to marine environment and promotion of IMO Conventions;
- (vi) Law of International Rivers;
- (vii) Legal aspects of peaceful uses of Outer Spaces;
- (viii) Reciprocal Assistance in the matter of service of process, issue of letters rogatory and recording of evidence both in civil and criminal matters; and
- (ix) Economic, Scientific and Technical co-operation in the use of the Indian Ocean.

AALCC's work in the field of Economic Relations and Trade Law

9. Although the role originally assigned to the Committee lay primarily in the field of international law, its activities have from time to time been widened consistent with the Committee's broader objectives as a forum for Asian-African co-operation. This trend has been particularly evident in the field of economic relations and trade law due to the close inter-relationship between principles of law and economics. It has been felt that in the field of trade and economic relations legal and economic considerations are so inextricably interwoven that any reasonable and effective solution can only be achieved through a judicious blending of both the elements. Thus, as early as in 1960 with the adoption of the first development decade, the Committee at its Third Session, decided to take up for examination various questions and issues concerning International Sale of Goods and commodities in view of the expected changes in the trading pattern of the countries of the region. The Committee's work in the field spread over several years and culminated in the adoption of two standard forms for sale transactions in commodities which are normally exported from the countries of the region. The Standard Contracts drawn up by the Committee were published by the United Nations as ECOSOC documents in 1977.

10. The Committee's continuing involvement in the economic field led to the establishment of its official relations with the United Nations Commission on Trade and Development (UNCTAD) in 1969. Even at the initial stages one of the important initiatives which the Committee was able to take within the framework of UNCTAD's programme in the field of shipping was to help in the consolidation of the position of developing nations in regard to the adoption of Convention on a Code of Conduct for Liner Conferences.

11. At its Accra Session in 1970, the Committee decided upon the establishment of a Standing Sub-Committee to deal with economic and trade law matters as a regular feature of its activities and official relations were established with the United Nations Commission on International Trade Law (UNCITRAL) in the following year. The subjects considered include International Payments, Carriage of Goods by Sea and International Sale of Goods.

12. One of the major achievements of the Committee in the economic field is the adoption of its integrated scheme for settlement of disputes with a view to creating stability and confidence in economic transactions with the countries of the region. The scheme envisages development of national arbitration institutions, establishment of regional centres under the auspices of the Committee and making available the services of specialised arbitration institutions to the countries of the region within the framework of the integrated scheme. Two Regional Centres, one in Kuala Lumpur and the second in Cairo have already been established, and a third Centre to be located in Lagos is in the process of formation. The World Bank's International Centre for Settlement of Disputes (ICSID) has concluded formal agreements with the Committee in relation to its Regional Centres for mutual co-operation and assistance. The Japan Maritime Arbitration Commission which is one of the major specialised institutions in the field of shipping has agreed to make its services available to the countries of the region within the framework of the AALCC's scheme.

13. Another development of far-reaching importance where the Committee has been able to take an initiative during the past two years is in regard to regional co-operation towards industrial growth of developing countries in Asia and Africa. A Ministerial meeting held in Kuala Lumpur in December 1980 under the Chairmanship of the present Prime Minister of Malaysia had identified the areas and modalities for bringing about closer co-operation between the Asian-African States in the context of slow progress of negotiations in global forums. The following Ministerial meeting, in Istanbul in September 1981, established a system of exchange of information in the field of industry through the media of the Committee's Secretariat.

14. The current work programme of the AALCC in the field of trade and economic law include the following:

- (i) Preparation of model bilateral agreements for investment protection with particular reference to investments by one developing country in another;
- (ii) Model framework for joint or tripartite venture agreements in relation to industrial projects;
- (iii) Technical support including examination of matters and issues in the proposed global negotiations on international economic relations;
- (iv) Continuation of Ministerial meetings for regional co-operation in industries and co-operation with the UNCITRAL and the UNCTAD; and
- (v) Implementation of the programme for settlement of disputes in economic and commercial matters.

Reciprocal assistance in Judicial Matters

15. It will be seen from the current work programme of the AALCC that one of the matters in which the Committee is actively engaged is Reciprocal Assistance in regard to Service of Process and Recording of Evidence both in civil and criminal matters. The AALCC at its Twenty-second Session, in Colombo in May 1981, had decided to accord priority to this topic in view of the increasing importance of international co-operation in judicial matters during the past decade in the light of wider involvement of the countries of the Asian-African region in trade, commerce, investments and movement of labour force from one country to another. In accordance with the mandate given at that Session, the AALCC convened a meeting of an Expert Group in August 1982 which finalised the drafts of two model bilateral agreements, one relating to civil and commercial matters and the other on letters rogatory for criminal cases. The Hague Conference on Private International Law has

been actively associated with this project. A copy of the Report of the Expert Group is annexed. This Report will be taken up at the next regular session of the AALCC.

Training Programme and Publications

16. The Committee arranges training programmes for officials of its member governments and undertakes various publications which have included studies on Asian and African constitutions. It brings out a quarterly Bulletin to assist member governments to keep trace of recent developments in international conferences and treaty practice.

Possible collaboration between the AALCC and the Commonwealth Secretariat

17. Although there is considerable scope for greater collaboration between the two bodies in a number of areas, it is suggested that to begin with some thought may be given in regard to the three specific matters discussed below.

18. The AALCC's work on judicial assistance might be of particular interest to Commonwealth governments since the Commonwealth Secretariat has also continued its work in the area of mutual assistance in the administration of justice and has in perspective the enlargement of scope of existing arrangements. As well as for Commonwealth Governments, which are members of the AALCC, the work of the Committee in this field might be of interest to other Governments who may wish to facilitate wider arrangements with countries in West Asia² in the matter of mutual judicial assistance, since most of these countries are within the AALCC membership. A close working arrangement between the AALCC and the Commonwealth Secretariat on this subject may therefore prove to be fruitful.

19. Another area in which co-operation between the Commonwealth Secretariat and the AALCC might be useful is in the field of extradition. The AALCC's own recommendations on this subject were adopted at its Tokyo Session, in 1961. Since then changes and new developments have occurred in the shape of State practice, multilateral treaties and other forms of arrangements. The Commonwealth Secretariat's work in this field has been of particular significance. In the light of these developments the AALCC might consider taking up the subject again for further consideration.

20. Apart from these, it may be possible for the Commonwealth Secretariat and the AALCC to collaborate in organising training programmes for personnel from developing countries in Asia and Africa in specific fields. The Commonwealth Secretariat has been providing training programmes for legal draftsmen from developing countries of the Commonwealth, whilst the AALCC's training programmes have been primarily directed to matters of international law. The Commonwealth Secretariat has been able to arrange, from time to time, for the CFTC to make available funds to enable officials from developing Commonwealth countries to take advantage of the AALCC's training programmes, and the possibility of further co-operation could perhaps be investigated.

² AALCC membership in West Asia and Northern Africa include Egypt, Libya, Syria, Jordan, Iraq, Iran Saudi Arabia, Kuwait, Qatar, Oman, North Yemen and U.A.E.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE
EXPERT GROUP MEETING ON MUTUAL ASSISTANCE
IN JUDICIAL MATTERS
NEW DELHI, 5TH TO 7TH AUGUST 1982
REPORT OF THE SECRETARY-GENERAL

An inter-sessional meeting to consider certain aspects of mutual assistance and co-operation in judicial matters was held at the Committee's Secretariat in New Delhi from the 5th to 7th August 1982 in pursuance of the Committee's decision taken at its Colombo Session held in May 1981.

The meeting was attended by the representatives of Arab Republic of Egypt, Australia, Bangladesh, Cyprus, Ghana, India, Indonesia, Iraq, Kenya, Democratic People's Republic of Korea, Republic of Korea, Malaysia, Mongolia, Pakistan, Philippines, Singapore, Somali Democratic Republic, Sri Lanka, Thailand and Zimbabwe. The meeting was also attended by the Representative of the Hague Conference on Private International Law.

Mr. K.M.M.B. Kulatunga (Sri Lanka) was elected Chairman of the Meeting.

The meeting had before it for its consideration a Secretariat study containing the draft of a Convention on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad relating to Civil or Commercial Matters as also the Draft of a Convention on Mutual Assistance on Letter Rogatory in Criminal Cases.

The Secretary-General stated that international co-operation in judicial matters has assumed increasing importance in the Asian-African region during the past decade in view of wider involvement of the countries in the region in trade, commerce and industrial development. Extensive investments have been made in developing countries of the region in the projects of national importance by countries both within and outside the region which have led to employment of technicians and other personnel from the investing countries. Furthermore, shortage of manpower in some of the countries of the region had given rise to vast movement of labour from the over-populated areas in search of employment. The Secretary-General stated that these increasing contacts made it incumbent that proper judicial process should be available to facilitate protection of rights and enforcement of obligations of the parties involved which could not be achieved without adequate co-operation between the countries concerned.

It was mentioned that framework to effectuate and enforce judicial process that could cover the entire area of co-operation would necessarily include:-

- (i) Enforcement of judgments and decrees relating to civil or commercial matters rendered by the competent courts of a country in the territories of another;
- (ii) Extradition of fugitive offenders;
- (iii) Enforcement of foreign arbitral awards;
- (iv) Assistance in the service of process and taking of evidence in respect of civil or commercial cases instituted or proposed to be instituted before the courts or tribunals in another country;
- (v) Assistance by means of execution of letters rogatory in criminal cases pending before the courts of another country.

It was however felt that the matter needed to be taken in progressive stages and in this context it was considered that the Committee's present programme to deal with matters to assist in the service of process and taking of evidence could well constitute the first step in this process since these were areas it might be relatively easy to achieve concrete results within a reasonable time frame.

The Secretary-General stated that a study on the question of mutual assistance in the matter of service of process and taking of evidence both in civil and criminal matters had been initiated in pursuance of the Committee's decision taken on its Kuala Lumpur Session held in June 1976. The Draft of a comprehensive Convention dealing with the subject was presented at the Committee's Seoul Session held in February 1979 which was considered in some detail at the Colombo Session held in May 1981. At that Session views had been expressed that the model provisions relating to civil and commercial matters should be separated from those relating to criminal matters and it had been accordingly decided that the Secretariat should prepare two drafts for model conventions, one relating to Civil and Commercial matters and the other for issue of Letters Rogatory in criminal Cases. The Secretary-General stated that although the Secretariat drafts had been drawn up in the form of model conventions, they could easily adapted to form the basis of bilateral arrangements.

The meeting expressed the view that it would be preferable at the present stage to contemplate bilateral arrangements for Mutual Assistance in Judicial Matters in order to promote contacts between the states of the region initially on bilateral basis which could eventually provide a solid basis for multi-lateral Conventions on the pattern which has found acceptance in other regions. A view was expressed that if it would be fruitful for the Expert Group to draw up principles for bilateral co-operation in regard to service of process and taking of evidence which could be incorporated in suitable bilateral arrangements by the States concerned. It was however felt that the principle should be set out in the model drafts of two bilateral arrangements one relating to civil and commercial matters and the other relating to criminal cases in view of the fact that the model drafts were likely to be of greater assistance to governments whilst initiating negotiations on bilateral arrangements for mutual assistance in judicial matters.

The meeting examined in detail the provisions of the Secretariat drafts which were revised to conform to the pattern of bilateral arrangements. The principles which were likely to be acceptable to the countries in the Asian-African region were incorporated in the drafts finalised by the Expert Group. These are annexed to this Report.

It was agreed that the Committee's final report on this subject for submission to governments should include the following:

- (i) The drafts of two model bilateral arrangements for mutual co-operation relating to service to process and taking of evidence.
- (ii) A statement of principles contained in the two model drafts.
- (iii) The model drafts together with explanatory notes on each of the provisions to be prepared by the Committee's Secretariat.

It was also agreed that the modalities for appropriate follow up action be discussed at the next Session of the AALCC and the Secretariat should undertake a study on the question of formulation of suitable legislation which may be needed to implement bilateral arrangements.

New Delhi
9 August, 1982

B. SEN
Secretary-General

DRAFT OF MODEL BILATERAL ARRANGEMENTS ON MUTUAL ASSISTANCE FOR THE SERVICE OF PROCESS AND THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

Preamble

The States Parties to the Present Arrangements, Desirous of bringing about closer co-operation in the matter of mutual assistance for service of process, taking

of evidence and other related functions in aid of judicial proceedings relating to Civil or Commercial matters.

Have agreed as follows:

CHAPTER I

General Provisions

Article 1

Use of Terms

For the purpose of these arrangements:

- (a) **Process:** means any notice, writ, summons or any other type of document, which is required to be served on a party or witness in judicial proceedings relating to civil or commercial matters;
- (b) **Requesting State:** means the State which requests the service of process in the territory of another State or the State from which a request to take evidence, obtain information or perform some other judicial act emanates;
- (c) **Requested State:** means the State in which the service to be effected or the State in which the request is to be executed for taking of evidence, obtaining information or performing some other judicial act;
- (d) **Central Agency:** means the authority which is empowered:
 - (i) to transmit to a Central Agency of the other Contracting State requests or letters of request for the purpose of service of process or for taking of evidence, obtaining of information or performing some other judicial act, emanating from a competent authority in its own State, and
 - (ii) to receive and to take action on requests or letters of request transmitted by a Central Agency of the other Contracting State.

Article 2

Scope of the Arrangements

1. The Contracting States undertake to afford each other, in accordance with the provisions of these arrangements, mutual assistance with regard to service of process or taking of evidence, obtaining of information or performing some other judicial act, by means of requests or letters of request issued for the purpose, addressed by a competent authority of the other State in civil or commercial proceedings.

2. Letters of request shall not be used for taking of evidence which is not intended for use in judicial proceedings.

3. The expression 'other judicial act' does not cover the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 3

Execution of request or letter of request Non-commitment to recognition of the judgment

Execution of the request shall not imply ultimate recognition of the jurisdiction of the authority issuing it or a commitment to recognise the validity of the judgment it may render or to enforce it.

Article 4

Central Agency

1. Each contracting state shall designate or establish a Central Agency through which requests or letters of request to the other Contracting State shall be transmitted. Requests or letters of request from the other Contracting State shall be received by the Central Agency which shall forward them to the component authorities in its own State for taking action.

Note Federal States shall be free to designate or establish more than one Central Agency and this paragraph would need to be adapted accordingly.

2. Each contracting State shall inform the other Contracting State the name and address of the Central Agency (or Agencies) designated or established in accordance with the provisions of this Article.

Article 5

Legislation

Unless required otherwise the request or the letter of request shall be presumed to be duly legalised in the requesting State when the same is signed and bears the seal of a Central Agency.

Article 6

Conformity with the Arrangements

If the Central Agency of the requested State considers that the request or the letter of request does not conform with the provisions of the present arrangements it shall promptly inform the requesting Central Agency, to that effect.

Article 7

Languages

1. The request or the letter of request and the appended documentation shall be drawn up in _____ language or be accompanied by a translation into that language.

2. The reply shall be prepared and transmitted in the language specified in paragraph 1 or be accompanied by a translation.

3. Any translation accompanying a request or a letter of request shall be certified as correct, by a sworn translator or by any other person so authorised in either State.

Article 8

Time-limits

The competent authority issuing the request may indicate a time-limit for the service of process or taking of evidence, obtaining of information or performing some other judicial act in the requested state. The competent authority shall briefly state the reasons for establishing such time-limit. The Central Agency of the requested State shall communicate with the Central Agency of the requesting state if any difficulty is experienced in adhering to the time limit. The competent authority of the requesting State shall have the option to indicate a further period of time taking action on the request.

Article 9

Grounds for non-compliance with the request or the letter of request

1. The execution of a request or a letter of request may be refused if:
 - (a) in the requested State the execution of the request does not fall within the functions of the judiciary or any other competent organ of the State;
 - (b) the requested State considers that its sovereignty, security, public policy or other essential interests ("ordre public") would be prejudiced thereby;
 - (c) its compliance might prejudice the fundamental rights of the person affected, or that the request concerns information held in confidence, which may be disclosed;
 - (d) the letter of request relates to taking of evidence prior to judicial proceedings or in "pre-trial discovery of documents" as known in the common law system.
2. Execution may not be refused solely on the ground that under its internal law the requested State claims exclusive jurisdiction over the subject matter of the action or that its internal law would not permit the action upon which the application is based.
3. In the case of refusal, the Central Agency of the requested State shall promptly inform the requesting Central Agency and state the grounds for such refusal.

CHAPTER II

Service of Process

Article 10

Form of Request

1. The authority competent under the law of the requesting State shall forward a request for the service of process to its own Central Agency for transmission to the requested State.
2. The request for the service of process shall be drawn up in accordance with form "A" appended to the present Arrangements and the document to be served or a copy thereof shall be annexed to it.

Article 11

Execution of Request for Service

1. The authorities of the requested State shall effect service of the process by simple transmission of the document to the person to be served or by any other method prescribed by its internal law.
2. Where the competent authority of the requesting State has indicated any particular method of service, an endeavour should be made to comply with such request provided that the same is not inconsistent with the laws of the requested State.
3. That part of the request, in form "C" attached to the present Arrangements, which contains a summary of the document to be served, shall be served with the document.

Article 12

Certificate of the Executing Authority for Service of Process

The Central Agency of the requested State or any authority which it may have designated for that purpose, shall complete a certificate in form "B" appended to the present Arrangements.

Article 13

Costs

The requested State shall be entitled to be reimbursed:

- (a) the fees of charges paid for effecting service as authorised under the law of the requested State; and
- (b) the costs occasioned by the use of a special procedure requested by the competent authority of the requesting State.

***Article 14**

Service of Process by Diplomatic or Consular Officers

A diplomatic or consular office of a Contracting State may, in the territory of the other Contracting State and within the area where he exercises his functions, effect service of judicial documents upon his own nationals provided no compulsive measures are applied.

*The representatives of Thailand and Singapore reserved their position on the provisions of this Article.

Article 15

Service of Process by Post and Other Modes

Subject to any objection on the part of a Contracting State:

- (a) each Contracting State may send judicial documents by postal channels, directly to persons in the other Contracting State;
- (b) the judicial personnel, officials or other competent persons in a Contracting State may effect service of judicial documents directly through the judicial personnel, officials or other competent persons in the other Contracting State; and
- (c) any person interested in a judicial proceeding may effect service of judicial documents directly through the judicial personnel, officials (legal practitioners) or other competent persons in the other Contracting State.

CHAPTER III

Taking of Evidence

Article 16

Form of Request

The authority or judicial officer competent under the law of the requesting State shall forward to its own Central Agency a letter of request for taking of evidence or performing some other judicial act with the request to transmit it to the Central Agency of the requested State. The letter of request shall be drawn up in form "D" appended to the present Arrangements.

Article 17

Execution of Letters of Request

1. The authority responsible for the execution of letters of request shall apply its internal law as to the methods and procedures to be followed.
2. However, it shall follow any special method or procedure specified in the letter of request unless that procedure conflicts with the internal law of the requested State or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.
- [3. If the requesting State desires witnesses or experts to give evidence on oath, it shall expressly so state, and the requested State shall comply with the request if its internal law does not prohibit the same.]
4. In the execution of the letter of request, the authorities of the requested State shall not require any person to give evidence in respect of any matter where he has a privilege or duty to refuse to give such evidence under the law of the requested State or of the requesting State.
5. The requested State may transmit original or certified copies of records or documents requested.

Article 18

Notice to the Requesting Authority Regarding Time and Place of the Execution of the Request

1. On the express request of the requesting authority the requested State shall inform that authority of the time when, and the place where, the proceedings will take place. The requested State shall endeavour to send such information directly to the parties when the authority of the requesting State so desires.
2. The officials designated by the requesting State and parties concerned may be present or be represented at the proceedings, if the same is not inconsistent with the internal law and the requested State gives its consent.

Article 19

Application of the Measures of Compulsion by the Authority

[In the execution of the letter of request, the requested authority shall apply appropriate measures of compulsion in the instances and to the same extent as are provided for by its internal law].

Article 20

Costs

1. The requested State shall be entitled to be reimbursed:
 - (a) the fees or charges paid to experts, witnesses, interpreters or any other person as authorised under the law of the requested State; and
 - (b) the costs occasioned by the use of a special procedure requested by the competent authority of the requesting State.
2. The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the letter of request, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking such consent the requested authority shall indicate the approximate costs which would result from following of this procedure. If the requesting authority gives its consent it shall reimburse the costs incurred; without such consent the requesting authority shall not be liable for the costs.

***Article 21**

Taking of Evidence by Diplomatic or Consular Officers

1. A diplomatic or consular officer of a Contracting State may, in the territory of the other Contracting State and within the area where he exercises his functions, take the evidence of nationals of his home State in aid of proceedings commenced in the courts of that State, without application of any compulsion.
2. If an attempt to obtain evidence in the manner provided for in paragraph 1 of this Article fails, it shall not prevent a letter of request being subsequently sent to the Central Agency of the requested State in accordance with Article 16 of these Arrangements.

Article 22

Taking of Evidence by Commissioner

The Commissioner appointed by a judicial authority in a Contracting State to record the evidence of a witness or expert, for the purposes of proceedings pending before it, may take such evidence in the other Contracting State, provided a competent authority of that State has given its endorsement or authorisation on the warrant of commission and subject to such terms and conditions as may be specified in the endorsement or authorisation.

CHAPTER IV

Requests for Information and Documents

Article 23

Request for Information on Laws and Regulations

The Contracting States agree to furnish each other with information on their laws and regulations relating to civil or commercial matters, both substantive and procedural, whenever a request is made by a Contracting State for such purpose.

*The representative of Singapore reserved his position on this Article.

Article 24

Requests for Judicial Records

1. Upon the request made by a judicial authority of the requesting State transmitted through the Central Agency, extracts from and information relating to judicial records, shall be made available to the same extent and in like manner as these are made available to the judicial authorities of the requested State.
2. The requesting authority may not use any information or document furnished for purposes other than those specified in its request for assistance.

CHAPTER V

Final Provisions

Article 25

Entry into Force of the Arrangements

1. The present Arrangements shall be subject to ratification.
2. The Arrangements shall enter into effect days after the date of exchange of instruments of ratification and shall remain in force for a period of years.

Article 26

Other International Agreements or Arrangements

Nothing in these Arrangements shall affect existing or future bilateral or multilateral agreements and practices or other arrangements between Contracting States which relate to matters provided for in the present Arrangements.

Article 27

Difficulties Arising in Operation of the Arrangements to be Settled Through Negotiations

Any difficulties which may arise between Contracting States in regard to the interpretation or application of these Arrangements shall be settled through negotiation.

Article 28

Revision of the Arrangements

At the request of any Contracting State, the State Parties shall enter into negotiations with a view to examine the provisions of these Arrangements and to consider the advisability of a revision or of an enlargement of the scope of these Arrangements.

Article 29

Denunciation of the Arrangements

Any Contracting State may denounce these Arrangements by means of a notification communicated to the other State Party. Denunciation shall take effect six months after the date of receipt of such instrument of denunciation.

NOTE : The Expert Group decided that the provisions in regard to which some doubts had been expressed about their suitability should be placed within brackets []. This pattern has been followed in the present text of the Draft.

**ANNEX TO THE DRAFT OF MODEL BILATERAL ARRANGEMENTS ON
MUTUAL ASSISTANCE FOR THE SERVICE OF PROCESS AND THE
TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS**

FORMS

- (i) Request for Service - FORM "A"
- (ii) Certificate - FORM "B"
- (iii) Summary of the Document to be served - FORM "C"
- (iv) Request for Taking of Evidence - FORM "D"

(i)

ANNEX TO THE ARRANGEMENTS

REQUEST FOR SERVICE**

FORM "A"

1. REQUESTING CENTRAL AGENCY:

2. RECEIVING CENTRAL
AGENCY:

ADDRESS _____

ADDRESS _____

3. REFERENCE: of the requesting authority

4. SUBJECT OF THE REQUEST:

Service abroad of documents
(documents listed below enclosed
in duplicate)

5. ADDRESSEE OF THE DOCUMENT:

(a) NAME (in capitals)

(b) Where applicable further details for
identification of the addressee;

(c) ADDRESS:

(d) COUNTRY:

6. METHOD OF SERVICE REQUESTED:

(a) by simple transmission to the addressee:-

(b) in accordance with the methods prescribed by internal law of the requested State:-

(c) in accordance with the following method:-

* As referred to in Article 10 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad in Civil or Commercial Matters

** This form must be drawn up in duplicate, one being the original, the other the copy

7. IDENTITY AND ADDRESS OF THE ADDRESSEE:

If the requested authority requires additional information for effecting service, this form should be returned to the requesting authority specifying in the space below the additional information to be furnished: _____

_____ The document sent with this request should however be retained with the requested authority pending supply of the additional information by the requesting authority.

8. TIME-LIMITS:

The document should be served before _____ (Date). The reasons for fixation of the time-limit are the following: _____

If it is not possible to effect service by the dates specified, the document should be returned unserved/it should be served whenever possible.*

The authority is requested to return or arrange to have returned to the requesting authority a copy of the documents - and of the annexes - with a CERTIFICATE as provided in Form "B".

List of Documents

_____ Done at _____
_____ the _____
_____ Signature and/seal

* Delete whichever is inapplicable.

(ii)

CERTIFICATE

FORM "B"

The undersigned authority has the honour to certify, in conformity with the provision of the Arrangements*.

1. THAT THE REQUEST HAS BEEN COMPLIED WITH:

ON (DATE) _____

AT (place, street, number) _____

In one of the following methods:

(a) by simple transmission to the addressee:-

(b) in accordance with the methods prescribed by internal law of the requested State:-

(c) in accordance with the following method:-

The documents referred to in the request have been delivered to:-
(identity and description of person) _____

relationship to the addressee (family business or other) _____

* Article 12 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad in Civil or Commercial Matters.

2. THAT THE REQUEST HAS NOT BEEN COMPLIED WITH FOR THE FOLLOWING REASONS:

3. ANNEXES

- (a) Statement of costs
- (b) Documents establishing the service
- (c) Documents returned

Done at _____ the _____

Signature and/Seal

(iii)

IMPORTANT

THE ENCLOSED DOCUMENT IS OF A LEGAL NATURE AND MAY AFFECT YOUR RIGHTS AND OBLIGATIONS. THE "SUMMARY OF THE DOCUMENT TO BE SERVED" WILL GIVE YOU SOME INFORMATION ABOUT ITS NATURE AND PURPOSE. YOU SHOULD HOWEVER READ THE DOCUMENT ITSELF CAREFULLY. IT MAY BE NECESSARY TO SEEK LEGAL ADVICE.

SUMMARY OF THE DOCUMENT TO BE SERVED*

FORM "C"

- 1. NAME AND ADDRESS of the Requesting Authority: _____
- 2. Particulars of the parties:** _____

- 3. Nature and purpose of the document: _____

- 4. Nature and purpose of the proceedings and, where appropriate, the amount in dispute: _____

- 5. Date and place for entering appearance: _____
- 6. Court which has given judgment : _____
- 7. Date of Judgment : _____
- 8. Time limits stated in the document: _____

* Article 11 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad in Civil or Commercial Matters.

** If appropriate, identity and address of the person interested in the transmission of the document.

(iv)

ANNEX TO THE ARRANGEMENTS

REQUEST FOR TAKING OF EVIDENCE*

FORM "D"

1. REQUESTING CENTRAL AGENCY:

2. RECEIVING CENTRAL AGENCY:

ADDRESS _____

ADDRESS _____

3. Authority to whom the intimation about the execution of the request is to be sent

(address) _____

4. (a) Requesting judicial authority

(address) _____

(b) The competent authority of requested

State _____

5. Names and addresses of the parties and/or their representatives in the proceedings

6. Nature and purpose of the proceedings and summary of the facts

7. Evidence to be obtained/other judicial act to be performed

(Items to be completed where applicable)

8. Identity and address of any person to be examined

9. Questions to be put to the persons to be examined or statement of the subject - matter about which they are to be examined

(as set out in the attached sheet

10. Documents or other property to be inspected or [searched and seized]

(Specify whether it is to be produced, copied, valued, etc)

11. [Any requirement that the evidence be given on oath or affirmation and any special form to be used]

(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence)

12. Special methods of procedure to be followed

* As referred to in Article 16 of the Draft of Model Bilateral Arrangements on Mutual Assistance for the Service of Process and the Taking of Evidence Abroad in Civil or Commercial Matters

13. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified

14. Request for attendance or participation of personnel from the requesting State at the execution of a request

15. Specification of privilege or duty to refuse to give evidence under the law of the requesting State

16. The fees and costs incurred which are reimbursable under the Arrangements will be borne by
_____ (Address) _____
17. If the requested authority requires additional information for executing the request, this form should be returned to the requesting authority specifying in the space below the additional information to be furnished
_____ (the documents sent with this request should however, be retained with the requested authority pending supply of the additional information by the requesting authority) _____
18. Time-limits: The request should be executed before
_____ (date) _____
The reasons for fixation of the time-limit are the following:

If it is not possible to execute the request by the dates specified, the request should be returned unexecuted/it should be executed whenever possible*

Done at _____, the _____
Signature and seal of the requesting authority

* Delete whichever is inapplicable

**DRAFT OF MODEL BILATERAL ARRANGEMENTS ON MUTUAL
ASSISTANCE OF LETTERS ROGATORY IN CRIMINAL MATTERS**

PREAMBLE

The States Parties to the present Arrangements, desirous of bringing about closer co-operation in the matter of mutual assistance in aid of judicial proceedings of a criminal nature,

have agreed as follows:

CHAPTER I

General Provisions

Article 1

Use of Terms

For the purposes of these Arrangements:

- a) Requesting State: means the State which requests for assistance from the other State in aid of judicial proceedings in its territory.
- b) Requested State: means the State in which a request emanating from the other State for assistance in judicial proceedings is to be executed.
- c) Central Agency: means the authority which is empowered:
 - (i) to transmit to a Central Agency of the other Contracting State requests for assistance in judicial proceedings, issued by a judicial authority in its own State; and
 - (ii) to receive and to take action on requests for assistance in judicial proceedings, emanating from a Central Agency of the other Contracting State.

Article 2

Scope of the Arrangements

- 1. The Contracting States undertake to afford each other, in accordance with the provisions of these Arrangements, mutual assistance in criminal proceedings in respect of offences which are punishable under the laws of both the States and the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the requesting State.
- 2. The requested State shall render such assistance when a request is received from the other Contracting State, by means of a letter rogatory issued by a judicial authority of that State, for:
 - (a) the performance of acts of a procedural nature, such a Service of writs, process, summons, subpoenas or judicial records;
 - (b) taking of evidence, [transmitting articles to be produced in evidence,] obtaining information, records or documents.
- 3. These Arrangements shall not apply:
 - (a) to arrests or the enforcement of verdicts;
 - (b) in relation to offences under military law which are not offences under ordinary criminal law.

4. Letters rogatory shall not be used to obtain evidence or information which is not intended for use in judicial proceedings.

Article 3

Execution of the letter rogatory non-commitment to recognition of the judgment

Execution of letters rogatory shall not imply ultimate recognition of the jurisdiction of the authority issuing the letter rogatory or a commitment to recognize the validity of the judgment it may render or to enforce it.

Article 4

Central Agency

1. Each Contracting State shall designate or establish a Central Agency through which the letters rogatory to the other Contracting State shall be transmitted. Letters rogatory from the other Contracting State shall be received by the Central Agency which shall forward them to the competent authorities in its own State for taking action.

Note: Federal States shall be free to designate or establish more than one Central Agency and this paragraph would need to be adapted accordingly.

2. Each Contracting State shall inform the other Contracting State the name and address of the Central Agency (or Agencies) designated or established in accordance with the provisions of this Article.

Article 5

Legalisation

[Unless required otherwise] the letter rogatory shall be presumed to be duly legalized in the requesting State when authenticated by a Central Agency.

Article 6

Conformity with the Arrangements

If the Central Agency of the requested State considers that the request does not conform with the provisions of the present Arrangements, it shall promptly inform the requesting Central Agency, to that effect.

CHAPTER II

Letters Rogatory

Article 7

Form of Request

1. The competent judicial authority in the requesting State may issue a letter rogatory for any of the purposes set forth in paragraph 2 of Article 2 of these Arrangements and shall forward the same to the Central Agency in its own State for transmission to the Central Agency of the requested State. The letter rogatory shall be drawn up in the appropriate form relevant to the subject matter as appended to the present Arrangements.
2. In the case of service of process, the document to be served or a copy thereof shall be annexed to the letter.

Article 8

Language

1. The letter rogatory and the appended documentation shall be drawn up in _____ language or be accompanied by a translation into that language.
2. The reply shall be prepared and transmitted in the language specified in paragraph 1, or be accompanied by a translation.
3. Any translation accompanying a letter rogatory shall be certified as correct, by a sworn translator or by any other person so authorised in either State.

Article 9

Service of Process

1. The requested State shall effect service of writs, process, summons, subpoenas or judicial records, which are transmitted to it for the purpose by the requesting State by simple transmission of the document to the person to be served or by any other method prescribed by its internal law.
2. Where the competent authority of the requesting State has indicated any particular method of service, an endeavour should be made to comply with such request provided that the same is not inconsistent with the laws of the requested State.
3. That part of the request, in form "C" to the present Arrangements, which contains a summary of the document to be served, shall be served with the document.

Article 10

Certificate of the executing authority for service of process

The Central Agency of the requested State or any authority which it may have designated for that purpose, shall complete a certificate in form "B" appended to the present Arrangements.

Article 11

Taking of Evidence

1. The judicial authority responsible for the execution of letters rogatory shall apply its internal law as to the methods and procedures to be followed for the purpose of taking evidence or [transmitting articles to be produced in evidence,] obtaining information, records or documents.
2. [However, it may follow any special method or procedure specified in the Letter unless that procedure conflicts with the internal law of the requested State or is impossible of performance by reason of its internal practice and procedure, public policy or by reason of practical difficulties.]
3. [If the requesting State desires witnesses or experts to give evidence on oath, it shall expressly so state, and the requested State shall comply with the request if its internal law does not prohibit the same.]
4. In the execution of the letter rogatory, the authorities of the requested State shall not require any person to give evidence in respect of any matter where he has a privilege or duty to refuse to give such evidence under the law of the requested State or of the requesting State.
5. The requested State may transmit original or certified copies of records or documents requested.

Article 12

Notice to the requesting authority regarding time and place of the execution of the request

1. On the express request of the requesting authority the requested State shall inform that authority of the time when, and the place where, the proceedings will take place.
2. The officials designated by the requesting State may be present or be represented during the proceedings, if the same is not inconsistent with the internal law and the requested State gives its consent.

Article 13

Application of the measures of compulsion by the authority

[In the execution of the letter rogatory, the requested authority shall apply appropriate measures of compulsion in the instances and to the same extent as are provided for by its internal law.]

Article 14

Conditions governing execution of letters rogatory for search and seizure

[The execution of letters rogatory for search and seizure of property shall be subject to the condition:

- (a) that the offence is an extraditable offence in the requested State; and
- (b) that execution of the letters rogatory is consistent with the law of the requested State.]

Article 15

Handing over of property to the requesting State in execution of letters rogatory

1. The requested State may delay the handing over of any property, records or documents requested, if it requires the said property, records or documents in connection with pending judicial proceedings.
2. Any property, as well as original records or documents, handed over in execution of letters rogatory shall be returned by the requesting State to the requested State as soon as possible unless the latter State waives the return thereof.]

Article 16

Time-limits

The judicial authority issuing the request may indicate a time-limit for the execution of the letter rogatory in the requested State. The judicial authority shall briefly state the reasons for establishing such time limit in the letter rogatory. The Central Agency of the requesting State shall communicate with the Central Agency of the requested State if any difficulty is experienced in adhering to the time-limit. The judicial authority of the requesting State shall have the option to indicate a further period of time for taking action on the request.

Article 17

Grounds for non-compliance with the letter rogatory

1. The execution of a letter rogatory may be refused if:

- (a) the request concerns an offence which the requested State considers a political offence, an offence connected with a political offence, or a fiscal offence;
 - (b) the requested State considers that its sovereignty, security, public policy or other essential interests ("ordre public") would be prejudiced thereby;
 - (c) its compliance might prejudice the fundamental rights of the person affected or that the request concerns information held in confidence, which may not be disclosed.
2. The expression "fiscal offence" in this Article means any offence under the laws of a Contracting State relating to revenues and taxation.
 3. In case of refusal, the Central Agency of the requested State shall promptly inform the requesting Central Agency and state the grounds for such refusal.

Article 18

Costs

The requested State shall be entitled to be reimbursed:

- (a) the fees or charges paid for effecting service as authorised under the law of the requested State;
- (b) the fees or charges paid to experts, witnesses, interpreters or any other person as authorised under the law of the requested State; and
- [(c) the costs occasioned by the use of a special procedure requested by the judicial authority of the requesting State.]

CHAPTER III

Requests for Information and Documents

Article 19

Request for information on laws and regulations

The Contracting States agree to furnish each other with information on their laws and regulations both substantive and procedural in criminal matters whenever a request is made by a Contracting State for such purpose.

Article 20

Requests for judicial records

1. Upon the request made by a judicial authority of the requesting State transmitted through the Central Agency extracts from and information relating to judicial records needed in criminal proceedings, shall be made available to the same extent and in like manner as those are made available to the judicial authorities of the requested State.
2. The requesting State may not use any information or documents furnished pursuant to these Arrangements for purposes other than those specified in its request for assistance.

Article 21

Laying of information

- [1. Information laid by one Contracting State in aid of proceedings in the courts of the other Contracting State shall be transmitted to the Central Agency of that State.

2. The State to which such information has been furnished shall notify the other State of any action taken on such information and shall forward a copy of the record of any verdict pronounced.
3. The provisions of Article 8 shall apply to information laid under paragraph 1 of this Article.]

CHAPTER IV

Final Provisions

Article 22

Entry into force of the Arrangements

1. The present Arrangements shall be subject to ratification.
2. The Arrangements shall enter into effect _____ days after the date of exchange of instruments of ratification and shall remain in force for a period of _____ years.

Article 23

Other international agreements or arrangements

Nothing in these Arrangements shall affect existing or future bilateral or multilateral agreements and practices or other arrangements between Contracting States which relate to matters provided for in the present Arrangements.

Article 24

Difficulties arising in operation of the Arrangements to be settled through negotiation

Any difficulties which may arise between Contracting States in regard to the interpretation or application of these Arrangements shall be settled through negotiation.

Article 25

Revision of the Arrangements

At the request of any Contracting State, the State Parties shall enter into negotiations with a view to examine the provisions of these Arrangements and to consider the advisability of a revision or of an enlargement of the scope of these Arrangements.

Article 26

Denunciation of the Arrangements

Any Contracting State may denounce these Arrangements by means of a notification, communicated to the other State Party. Denunciation shall take effect six months after the date of receipt of such instrument of denunciation.

Note: The Expert Group decided that the provisions in regard to which some doubts had been expressed about their suitability should be placed within Square brackets []. The pattern has been followed in the present text of the Draft.

ANNEX TO THE DRAFT OF MODEL BILATERAL ARRANGEMENTS ON
MUTUAL ASSISTANCE ON LETTERS ROGATORY IN CRIMINAL MATTERS

FORMS

- (i) Request for Service - FORM "A"
- (ii) Certificate - FORM "B"
- (iii) Summary of the Document to be served - FORM "C"
- (iv) Request for Taking of Evidence - FORM "D"

(i)

ANNEX TO THE ARRANGEMENTS

REQUEST FOR SERVICE**

FORM
"A"

1. REQUESTING CENTRAL AGENCY:

ADDRESS _____

2. RECEIVING CENTRAL
AGENCY:

ADDRESS _____

3. REFERENCE: of the requesting judicial authority

4. SUBJECT OF THE REQUEST:

Service abroad of documents
(documents listed below enclosed
in duplicate)

5. ADDRESSEE OF THE DOCUMENT:

- (a) NAME (in capitals)
- (b) Where applicable further details for
identification of the addressee;
- (c) ADDRESS:
- (d) COUNTRY:

6. METHOD OF SERVICE REQUESTED:

- (a) by simple transmission to the addressee;
- (b) in accordance with the methods prescribed by internal law of the requested State;
- (c) in accordance with the following method:-

* As referred to in Article 7 of the Draft of Model Bilateral Arrangements on Mutual Assistance on Letters Rogatory in Criminal Matters.

** This form must be drawn up in duplicate, one being the original, the other the copy

7. IDENTITY AND ADDRESS OF THE ADDRESSEE:

If the requested authority requires additional information for effecting service, this form should be returned to the requesting authority specifying in the space below the additional information to be furnished: _____.

The document sent with this request should however be retained with the requested authority pending supply of the additional information by the requesting authority.

8. TIME-LIMITS:

The document should be served before _____ (Date). The reasons for fixation of the time-limit are the following: _____

If it is not possible to effect service by the dates specified, the document should be returned unserved/it should be served whenever possible.**

The authority is requested to return or arrange to have returned to the requesting authority a copy of the documents - and of the annexes - with a CERTIFICATE as provided in Form B".

List of Documents

_____ Done at _____
_____ the _____
_____ Signature and/seal

** Delete whichever is inapplicable. _____

(ii)

CERTIFICATE

FORM "B"

The undersigned authority has the honour to certify, in conformity with the provision of the Arrangements*.

1. THAT THE REQUEST HAS BEEN COMPLIED WITH:
ON (DATE) _____

AT (place, street, number) _____

In one of the following methods:

- (a) by simple transmission to the addressee:
- (b) in accordance with the methods prescribed by internal law of the requested State:
- (c) in accordance with the following method:

The documents referred to in the request have been delivered to:
(identity and description of person) _____

relationship to the addressee (family business or other) _____

* Article 10 of the Draft of Model Bilateral Arrangements on Mutual Assistance on Letters Rogatory in Criminal Matters.

2. THAT THE REQUEST HAS NOT BEEN COMPLIED WITH FOR THE FOLLOWING REASONS:

3. ANNEXES

(a) Statement of costs

(b) Documents establishing the service

(c) Documents returned Done at _____ the _____

Signature and/Seal

(iii)

IMPORTANT

FORM "C"

THE ENCLOSED DOCUMENT IS OF A LEGAL NATURE AND MAY AFFECT YOUR RIGHTS AND OBLIGATIONS. THE "SUMMARY OF THE DOCUMENT TO BE SERVED" WILL GIVE YOU SOME INFORMATION ABOUT ITS NATURE AND PURPOSE. YOU SHOULD HOWEVER READ THE DOCUMENT ITSELF CAREFULLY. IT MAY BE NECESSARY TO SEEK LEGAL ADVICE.

SUMMARY OF THE DOCUMENT TO BE SERVED*

1. NAME AND ADDRESS of the Requesting Judicial Authority: _____

2. Particulars of the parties:** _____

3. Nature and purpose of the document: _____

4. Nature and purpose of the proceedings: _____

5. Date and place for entering appearance: _____

6. Court which has given judgment: _____

7. Date of judgment: _____

8. Time limits stated in the document: _____

* Article 9 of the Draft of Model Bilateral Arrangements on Mutual Assistance on Letters Rogatory in Criminal Matters.

** If appropriate, identity and address of the person interested in the transmission of the document.

(iv)

ANNEX TO THE ARRANGEMENTS

REQUEST FOR TAKING OF EVIDENCE*

FORM "D"

1. REQUESTING CENTRAL AGENCY:	2. RECEIVING CENTRAL AGENCY:
_____	_____
ADDRESS _____	ADDRESS _____
_____	_____
3. Authority to whom the intimation about the execution of the request is to be sent	_____ (address) _____
_____	_____
4. (a) Requesting judicial authority	_____
(address)	_____
_____	_____
(b) The competent authority of requested State	_____
_____	_____
5. Names and addresses of the parties and/or their representatives in the proceedings	_____
_____	_____
6. Nature and purpose of the proceedings and summary of the facts	_____
_____	_____
7. Evidence to be obtained/other judicial act to be performed	_____
(Items to be completed where applicable)	_____
8. Identity and address of any person to be examined	_____
_____	_____
9. Questions to be put to the persons to be examined or statement of the subject - matter about which they are to be examined	(as set out in the attached sheet)
_____	_____
10. Documents or other property to be inspected or [searched and seized]	(Specify whether it is to be produced, copied, valued, etc)
_____	_____
11. [Any requirement that the evidence be given on oath or affirmation and any special form to be used]	(In the event that the evidence cannot be taken in the manner requested specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence)
_____	_____
12. [Special methods of procedure to be followed]	_____
_____	_____

* As referred to in Article 7 of the Draft of Model Bilateral Arrangements on Mutual Assistance on Letters Rogatory in Criminal Matters.

13. Request for notification of the time and place for the execution of the Request and address of the authority to be notified _____
14. Request for attendance or participation of personnel from the requesting State at the execution of a request _____
15. Specification of privilege or duty to refuse to give evidence under the law of the requesting State _____
16. The fees and costs incurred which are reimbursable under the Arrangements will be borne by _____ (Address) _____
17. If the requested authority requires additional information for executing the request, this form should be returned to the requesting authority specifying in the space below the additional information to be furnished _____ (the documents sent with this request should however, be retained with the requested authority pending supply of the additional information by the requesting authority) _____
18. Time-limits: The request should be executed before _____ (date) _____
- The reasons for fixation of the time-limit are the following: _____
- If it is not possible to execute the request by the dates specified, the request should be returned unexecuted/it should be executed whenever possible* _____

Done at _____, the _____
Signature and seal of the requesting authority

* Delete whichever is inapplicable

DISCRETIONARY FACTORS IN THE DECISION TO PROSECUTE

Memorandum by the Commonwealth Secretariat and a Discussion
 Paper prepared by PROFESSOR JOHN LI.J.EDWARDS
 of the University of Toronto

During consultations with Governments on possible topics it emerged that discretionary factors in the decision to prosecute was a matter of wide interest and concern, and was of practical relevance.

2. In view of this interest, the Commonwealth Secretariat invited Professor John LI.J. Edwards (author of Law Officers of the Crown, published by Sweet & Maxwell in 1964) to produce a discussion paper on the topic. His paper highlights problem areas and draws in particular from experience in the United Kingdom. Professor Edwards' new book, The Attorney-General, Politics and the Public Interest, to be published shortly by Sweet & Maxwell will include this paper as one chapter. This paper thus also serves as a preview of a major publication.

ANNEX TO LMM(83)5

DISCRETIONARY FACTORS IN THE DECISION TO PROSECUTE

Prepared by PROFESSOR JOHN LI. J. EDWARDS
 of the University of Toronto

The factors that control the outcome of discretionary authority in the area of law enforcement and criminal prosecutions have been aptly described as exhibiting the quality of low visibility. Calls for the public disclosure of the reasons behind individual decisions is symptomatic of a growing unwillingness to accept unquestioningly the exercise of authority whether by government, statutory bodies or other public institutions. The model frequently invoked as epitomising openness and public accountability is the long established tradition of the judiciary in giving reasons in open court for their decisions. The nature of the adversary system supports judicial commitment to this ideal with its concern for identifying the legal issues before the trial commences and for confining the admissibility of evidence to what is relevant in accordance with well established rules. Far less certainty prevails in those other areas of the administration of justice that are concerned with the preliminary steps leading up to the actual trial of a criminal case.

2. These manifold steps include decisions by the police whether or not to charge a citizen, whether to issue a summons or to arrest a suspect to ensure his appearance before the court, whether to support or oppose a bail application, and, most importantly, whether and when to lay an information before a justice of the peace that sets the formal process of the criminal courts in motion. There may be some inexperienced police officers who believe that no discretion exists in the face of evidence that discloses the commission of a criminal offence. It is certainly not unknown to hear senior officers publicly claim that no discretion is exercisable by the police when confronted with otherwise unexplained circumstances pointing to an offence having taken place. In truth, however, neither the law nor the practice of police forces recognises an inflexible rule that requires a prosecution to be launched irrespective of the particular circumstances surrounding the crime, the victim and the perpetrator. Whether the question arises at the initial contact of the police with the crime or at the level of intervention by the Director of Public Prosecutions or a Law Officer of the Crown, the basic principle that applies is enshrined in the passage from Lord Shawcross' speech in the House of Commons in 1951 when he declared: "It has

never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute ... wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration." In deciding whether or not to authorise a prosecution, Shawcross added, the Director's office must have regard to "the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations of public policy." These views continue to represent the proper theory of criminal prosecution.

3. Whilst the general principle is correctly expressed in Shawcross' dictum it would be unrealistic to equate in any exact sense the evaluation of the relevant factors at every level of the criminal process. Thus, the exercise of judgment by uniformed police officers on the street or by detectives in the interrogation room is likely to be somewhat circumscribed by the knowledge that their initial response will be reviewed by senior officers in the force. In difficult, important or highly sensitive cases this review will likely extend upwards to include the chief constable. In English constitutional law, as between the chief constable and the local prosecuting solicitor the solicitor-client characterisation of their respective roles means that the final decision whether or not to prosecute is firmly in the hands of the chief constable, or such subordinate officer to whom the delegated power is given to make decisions of this kind. If the recommendations of the recent Royal Commission on Criminal Procedure are adopted and translated into legislation the authority of the prosecuting solicitor will change dramatically but that struggle for supremacy is essentially concerned with the location of the final decision-making power. Our present concern is with identifying the considerations that guide those who have to make the decisions to prosecute or not to prosecute.

Discretion and the balancing of competing values

4. Only in very recent years has there been any serious public airing of the discretionary factors that are taken into account by prosecutors. We have now had revealed for public examination some inkling of the balancing of competing values that is the hallmark of discretionary power. The major initiative in opening the windows of disclosure is attributable to the present holder of the office of Director of Public Prosecutions. Since assuming office in 1977 Sir Thomas Hetherington, unlike his predecessors, has gone out of his way to explain in considerable detail how decisions are made in his department. National and regional newspapers, the radio and television media, and occasionally professional bodies and universities, have afforded the Director opportunities to convey a better understanding of the role of the public prosecutor and his relationship to the police forces and to the Attorney-General. The precedents set by Hetherington in England have been paralleled in other countries of which the United States, Canada, Australia, and New Zealand can be cited for individual examples of releasing prosecution guidelines for public scrutiny. Former Directors in charge of the Department of Public Prosecutions revealed as little as possible as to the operation of the institution and this approach was accepted as inevitable if the integrity of the system was to be maintained. The change of policy, instituted by the present Director, has now been in operation for sufficient years to demonstrate that the integrity of the Public Prosecutions' office can remain unimpaired notwithstanding the Director's determination to take the public into his confidence by frankly admitting his mistakes, when called for, but otherwise explaining repeatedly how complex and subjective is the process of reaching an impartial decision as to the enforcement of the criminal law.

5. In the main, the Director's remarks have been associated with the exercise of his "consent" powers or those conferred upon the Attorney-General but with respect to which the Director of Public Prosecutions would normally be involved in advising the Attorney. The focus for these "revelations" has usually depended on the current cause célèbre, so that the involvement of public figure or the contentious nature of prosecutions involving riots, obscenity, race relations, deaths in police custody, or corruption have all tended to figure prominently in the public discussion of the Director of Public Prosecutions' activities. The opportunity for a more dispassionate analysis of the Director's prosecutorial discretion arose in connection with the

appearance of Sir Thomas Hetherington before the Royal Commission on Criminal Procedure. Prior to doing so, Hetherington submitted a volume of written evidence which includes the most authoritative exposition of the factors underlying the decision to prosecute, as practised within the Department of Public Prosecutions. It would be a signal omission, however, when dealing with this subject, not to recognise the even earlier exposure of the inner workings of the office of Director of Public Prosecutions prepared by Mr. Peter Barnes, then an Assistant Director, and delivered to a conference on "The prosecution process" held at the University of Birmingham in 1975. Perhaps it was the cosy setting that prompted the latter to open his remarks by describing the view of the Department probably entertained by the police as being rather like "a sort of voracious Whitehall monster which demands to be fed an unending flow of files and, what is more, sometimes repays all their hard work and kindness by flatly refusing the fare it is offered".

6. The police are obligated to submit to the Director of Public Prosecutions full reports, including witness statements and material documents, in all consent cases that require the statutory approval of the Director, the Solicitor-General or the Attorney-General before criminal proceedings can be commenced. And, in accordance with the Prosecution of Offences Regulations, chief officers of police are also required to provide the Director's office with the same kind of information concerning those categories of offences that are specifically listed in the regulations or which the Director may direct to be the subject of reports to his office because of their individual importance or difficulty. In all, these statutory directives generate some 14,000 cases annually that flow into the Department of Public Prosecutions to be assessed by the relatively small establishment of 53 barristers and 17 solicitors who comprise its full time professional officers.

Decision making in the Department of Public Prosecutions

7. At the apex of this organisation, of course, is the Director, with Deputy Director immediately beneath him. The Department is divided into nine divisions, the responsibility for which is shared between two Principal Assistant Directors. Metropolitan London police cases occupy the attention of two of these divisions, the work of the Central office being separated from that of the Metropolitan divisions. Three other divisions take care of police cases that emanate from the rest of England and Wales, which is divided into three parts, east, west and south, for purposes of administrative orderliness and even distribution of case loads. The remaining divisions are designed to deal with specialised work that has expanded in recent years. One of these, the research division, handles requests for advice from police forces, coroners and magistrates' clerks as well as preparing submissions, for example, to the Law Commission, the Criminal Law Revision Committee, or to the Parliamentary Counsel on points that arise in draft Bills and which impinge upon the Director's functions. Another division, the fraud and bankruptcy division, concerns itself with major company frauds and the Director's responsibilities in connection with the making of criminal bankruptcy orders by the Crown Courts under the provisions of sections 39 to 41 of the Powers of Criminal Courts Act, 1973.

8. Finally, there are two divisions of the Department of Public Prosecutions entirely devoted to the handling of public complaints of alleged offences committed by police officers. Under section 49(3) of the Police Act, 1964 complaints made by a member of the public have to be reported to the Director of public Prosecutions unless the chief officer of police is satisfied that no criminal offence has been committed. The number of such reports has risen steadily since 1964 and shows no sign of diminishing. To gain a true appreciation of the significance of this development, in 1977 (the latest year for which statistics are available) the Director's office received 9,068 such complaints, which accounted for just over half the Department's total intake in terms of numbers of files received from every outside source. Not all of these complaints involved allegations of assaults, corruption or other serious crimes. On the contrary, the bulk of the complaints were concerned with relatively trivial matters such as careless driving and other minor infringements of the traffic laws. This burden on the Director's office is accepted as inevitable and involves a very special category of discretionary power in the area of criminal prosecutions, to which we shall return in due course.

9. Whatever the assigned responsibilities of each division may be it is headed by an Assistant Director. The remainder of the professional officers, who may be solicitors

or barristers, are distributed among the respective divisions according to the volume of work. The important thing to remember is that, by virtue of section 1(15) of the Prosecutions of Offences Act, 1908 "an Assistant Director of Public Prosecutions may do any act or thing which the Director of Public Prosecutions is required or authorised to do by or in pursuance of any Act of Parliament or otherwise". Consequently, in any discussion of the decision to prosecute it is necessary to bear in mind that the Director's direct involvement in the assessment of the varying factors involved will be truly exceptional and not the normal course of procedure. Speaking in the course of delivering the Upjohn Memorial Lecture in 1979, the present holder of the office of Director revealed that in the two and a half years during which he had been in office he had never been required to take any decision on whether to prosecute in a murder case. He added "...in all I have taken the decision to prosecute, or been concerned in consultations with the police and with counsel, in not more than 10 or 12 cases a year - usually when they are exceptionally sensitive because of the subject matter or because of the persons involved". The majority of cases brought to the attention of the Department of Public Prosecutions, either by way of mandatory edict, to obtain the formal consent of the Director or one of the Law Officers, or to be subject to the guiding discretion of the Director, will not proceed beyond the Assistant Director in charge of the appropriate division or the Principal Assistant Director responsible for co-ordinating the cluster of divisions assigned as his mandate within the Department.

10. The fullest description of the actual functioning of the decision-making process in the Department of Public Prosecutions is contained in the address given to the conference on "The Prosecution Process" by Mr. Peter Barnes, presently the Deputy Director of Public Prosecutions. Barnes emphasised the high level at which decisions to prosecute are taken in the office, decisions which, in his words, "should only be taken after a very careful consideration of all the available evidence, quite calmly and in the light of day because a wrong decision either way can have pretty disastrous consequences". He may well have had in mind the handling of the Confait case in 1972 and the strong criticism subsequently levelled against the professional staff in the Department of Public Prosecutions by Sir Henry Fisher, the former High Court judge, who was appointed by the Home Secretary to conduct a public inquiry into the affair. Three youths, aged 18, 15 and 14 years respectively, were convicted in 1972 of the killing of Maxwell Confait, a homosexual prostitute. They were freed three years later after a successful public campaign to prove their innocence. The entire case depended on confessions by the accused in which they admitted having gone to Confait's home for the purpose of stealing. The victim had been strangled and the three accused were said to have sprinkled paraffin about the home in order to destroy any fingerprints they may have left. At one conclusion of the trial, verdicts of murder, manslaughter by reason of diminished responsibility, and arson were returned by the jury. Leave to appeal against conviction was refused by the Court of Appeal but the case was referred back to the court three years later following the emergence of fresh pathological evidence. It informed the court that a substantial amount of time had elapsed between the setting fire to the house and the death of the victim. In direct contradiction to the confessions obtained by the police there was incontestable evidence that the three youths were elsewhere at the time of the fire. The prime suspect for the murder, a transvestite who lived at the same house as Confait, hanged himself in 1974. He gave evidence at the original trial about the time the fire had started.

11. Evidence adduced before the Fisher inquiry as to the handling of the papers in the Confait case indicated that the professional officer concerned in the Department of Public Prosecutions had treated the case as straightforward because of the independent nature of the respective confessions and their having been repeated in the presence of the youths' parents. He was not aware that there had been another suspect. Sir Norman Skelhorn, the then Director of Public Prosecutions, expressed doubts as to whether the discrepancies, revealed later, should have been spotted and regarded as important by the professional officer who first reviewed the file and whose recommendations were adopted by his superiors. This view was rejected in forthright terms by Sir Henry Fisher, the chairman of the departmental inquiry, who concluded: "It seems to me clear that it was (the professional officer's) duty to look for weaknesses or contradictions in the prosecution's case, and to see whether there were matters which should be further enquired into ... If (as he said) he did not notice anything which required further investigation or specific reference to counsel, then in my view he was at fault, though in extenuation it can be said that he was under great pressure of work. If (as the police say) his attention was drawn to them and he did

nothing, then his fault was greater". Before leaving the subject of his inquiry, Sir Henry Fisher turned his attention to the administrative practices then in force in the office of Director of Public Prosecutions. Noting that the Director had not seen fit to criticise his subordinate's handling of the Confait case, the chairman of the inquiry concluded that "the experienced and conscientious officer did as much as under prevailing practice was expected of him". Based on this assumption the procedures then in place were condemned as unsatisfactory. The lessons of that case are unlikely to be readily forgotten within the Department of Public Prosecutions.

12. Describing the present mode of administering the Department, it has been authoritatively explained that under no circumstances can a decision to prosecute be made by anyone below the rank of Assistant Director who, before obtaining that rank, will generally have served in the Department for something like seventeen years on average. All cases, in the first instance, are sent to the Assistant Director in charge of the particular geographical area where the crime occurred. Short, straightforward cases can be dealt with expeditiously by the Assistant Director reaching a decision himself and communicating at once with the chief constable giving any necessary advice regarding charges and evidence. In all other cases the files will be allocated between the senior legal assistants and legal assistants who constitute the backbone of the division concerned. The individual officer who takes charge of the police file will read the case in greater detail, eventually returning the file to the Assistant Director with a minute summarising the salient facts, identifying any legal or evidential problems and registering his opinion as to the proper disposition of the case. Depending on the seriousness, sensitiveness or difficulties of the case the resolution of the decision to prosecute will be made from among the senior echelons of the office, often after informal discussions that ensure the exercise of all the accumulated experience that is at the disposal of the Director. In addition, if the case is of a highly complex character, either to its facts or the legal issues involved, the Director may invoke the assistance of counsel. In London, this is likely to be one of the eight senior and ten junior Treasury Counsel who conduct all Crown prosecutions at the Central Criminal Court and the Inner London Crown Courts, or one of the Supplementary Counsel whose name is on the Attorney-General's list drawn from the various circuits. Normally, counsel are not instructed by the Director of Public Prosecutions until after committal for trial but this practice will be departed from if the circumstances warrant it and then the same counsel will likely take charge of the committal proceedings. Resort to the opinion of counsel, in the circumstances described above, means exactly that and no more. It does not entail the transfer of responsibility for making the prosecutorial decision from the Director of Treasury Counsel. As Sir Thomas Hetherington explained to the Royal Commission on Criminal Procedure, in the initial stages of a prosecution brought or taken over by the Director of Public Prosecutions he has complete control. It is entirely for the Director to decide against whom proceedings should be brought and on what charges. Once the case has been committed to the Crown Court, however, as Hetherington went on to elaborate, "the position is not so straightforward, since the view is taken that the final responsibility for the conduct of the trial rests with counsel instructed by me to appear for the Crown. The convention, though, is that where questions of substance arise, for example, the acceptance of a plea to a lesser offence than that charged in the indictment, counsel consults me before arriving at a final decision. It is rare that there is any fundamental disagreement between us, but should such a situation arise, the arrangement is that the matter would be referred to the Attorney-General".

13. At whatever level of authority the decision is ultimately taken to prosecute or not to prosecute, the evaluation process involves three separate but inter-related stages. It is possible to compress these exercises into two stages but the position will probably be made clearer if we adhere to the tripartite division of the assessment procedure. How separate the various stages are actually observed in practice may well be open to question, given the years of experience that most of the professional staff can draw upon in reaching their conclusions on the succession of files assigned for their attention. It may be stretching credulity to be asked to believe that each and every such review is conducted with an inflexible adherence to the cycle of analysis that is about to be described. However compressed may be the evaluation of the run of the mill cases that occupy most of the professional officer's time on a regular basis, the following analysis is necessary in order to identify the separate issues that must be resolved in reaching the eventual decision to prosecute or not to prosecute.

14. The first objective is to ensure that there are no insuperable legal or jurisdictional obstacles that could constitute a fatal flaw to the prosecution of a case. Was the

offence, for example, committed outside the jurisdiction of the courts? Have any pertinent time limits for prosecution already passed? Are there any definitional problems that require compliance and which are deficient in the evidence accumulated by the police? It is possible that some of these deficiencies can be rectified by further police investigation, and advice to this effect will be conveyed by letter or in person to the police force concerned. In the absence of such a possibility it stands to reason that it is pointless to pursue the merits of the case if the essential legal underpinnings are not in place.

Sufficiency of the evidence: the fifty-one percent rule

15. The second stage must next be addressed. It is concerned with the issue whether the evidence in the case is sufficient to justify instituting criminal proceedings. The present Director of Public Prosecutions has repeatedly sought to explain to all and sundry the criterion that applies throughout his Department, at whatever level of authority the operational decision is made. Different wording has been used on occasion to explain the governing test, some less felicitous than others, and we can begin by referring to the Director's written submission in 1978 to the Royal Commission on Criminal Procedure in which Hetherington stated: "The test normally used in the Department ... is whether or not there is a reasonable prospect of a conviction; whether, in other words, it seems rather more likely that there will be a conviction than an acquittal. We set an even higher standard if an acquittal would or might produce unfortunate consequences. For example, if a man who has been convicted of some offence is subsequently acquitted of having given perjured evidence at his trial, that acquittal may cast doubt on the original conviction. Likewise, an unsuccessful prosecution of an allegedly obscene book will, if the trial has attracted publicity, lead to a considerable increase in sales. In such cases we are hesitant to prosecute unless we think the prospects of a conviction are high. We also tend to adopt a somewhat higher standard if the trial is likely to be abnormally long and expensive and the offence is not especially grave".

16. On another occasion, this time in a Memorandum prepared in 1980 for the House of Commons Select Committee on Deaths in Police Custody the Director of Public Prosecutions confirmed that the standards applied in police complaint cases are the same as those invoked in all other cases reported to the Department. "The first consideration", the memo stated, is "whether the totality of the available evidence is of such quality that a reasonable jury (or magistrate, in respect of summary offences) is more likely than not to be satisfied beyond reasonable doubt that the accused is guilty of the offence charged. If so, the evidence is sufficient to justify proceedings. If it fails that test, we would not consider it proper to prosecute".

17. In thus delineating the standard of sufficiency the Director of Public Prosecutions was very conscious of the contrary school of thought that maintains it is incumbent upon the Crown to prosecute whenever there is a "bare prima facie case" and that to raise the minimum standard any higher is to "usurp the proper function of the courts". According to this view, in the absence of unassailable evidence that the prospective Crown witnesses are lying, it is not the function of the prosecutor to decide whether he believes a witness or not. Where the question is whether the prosecution's evidence is likely to be believed, it is argued, this is strictly a matter for the jury (or the magistrate in summary cases) and not the Director to decide. Hetherington's response to this argument is an outright rejection of its underlying thesis. The resolution of the sufficiency of evidence test, in the opinion of the present Director of Public Prosecutions, requires that proper attention be paid to the credibility of the witness since "the universal adoption of a prima facie case standard would not only clog up our already overburdened courts but inevitably result in an undue proportion of innocent men facing criminal charges".

18. The elucidation of the key passages in the above extracts from the Director's written submissions, viz., "the reasonable prospect of a conviction" and it is "more likely that there will be a conviction than an acquittal" resemble the difficulties in giving realistic meaning to the task imposed upon examining justices in deciding whether there is "sufficient evidence" to warrant committing the accused for trial, and upon a trial judge to explain to a jury the standard of "proof beyond a reasonable doubt" in a criminal case, or whether the evidence is sufficient to justify him in withdrawing the case from the jury and which is determined according to "whether or

not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty". It is not my intention to venture into a 'comparative analysis of the respective meanings accorded by the appellate courts to the various criteria mentioned above. These comparable situations are introduced in order to draw attention to the difficulties experienced in applying such nebulous standards, and the additional problem encountered by the Director in explaining to the general public how he and his staff approach the task of defining "sufficiency of evidence". In a no doubt sincere attempt to elucidate this piece of legalise, Hetherington has acquired for himself the immortal title of "Mr. Fifty-one per cent", a reference to his resort to mathematical percentages as a vehicle for simplifying the governing criterion. Formulated in these terms the question to be asked in contemplating a prosecution is this - is there a better than 50 per cent chance that a jury will find the accused guilty on the evidence that the prosecution are in a position to present? Hetherington's words of caution, uttered in another public lecture, that is not possible to evaluate evidence to a percentage degree of accuracy have been lost sight of in the public's preference for simple, uncomplicated metaphors. Talk of cases falling within the marginal 49 to 51 per cent category are equally unhelpful because of the false conception implicit in such language that the prosecutor's decision-making bears the stamp of scientific objective. Nothing could be more misleading inasmuch as it obscures the reality of the situation. An experienced Assistant Director disclaimed any ability on his part to offer a neat yardstick as to how to assess the prospects of a conviction or an acquittal. "All I can say" he frankly admitted "is that we do our best to call upon the experience that we have accumulated over the years, and that in itself is a strong reason for the high level at which our decisions are taken". The truth of the matter lies closer to recognising the subjective nature of the prosecutorial decision in individual cases, it being at least likely that a set of different answers would be forthcoming if the same set of files were to be given to a sample, of say, 20 or 50 professional officers all working in the Department of Public Prosecutions. With the restriction of the actual decision-making to the small coterie of senior staff of Assistant Directors and above, vagaries of subjectivity are probably kept to a minimum.

19. A special consideration that we should look at is the weight attached to an earlier police decision to charge, before the papers in the case have been submitted to the Director's office. This election by the police to go ahead may be necessary, for example, where there are substantial grounds for believing that the accused will leave the country, interfere with witnesses or commit further crimes. In these circumstances it is understandable that the police should wish not only to charge the suspected person but to strongly oppose bail. Other situations, however, arise when the Director's consent is refused on policy grounds notwithstanding the existence of ample evidence to support a prosecution, and it is obviously preferable if the issue of consent is first determined before a formal charge is laid by the police. Pre-emptive action of this kind by the police, it has been readily acknowledged, exerts pressure upon the Director of Public Prosecutions and his staff in sustaining the objective of a dispassionate decision. It is also understandable that a team of detectives who have worked laboriously and conscientiously for an extended period in solving a case should feel an acute sense of having been let down by the Director if approval to the bringing of criminal proceedings is not forthcoming. The police may be firmly convinced of the guilt of the suspect, but if the evidence is insufficient in terms of the probability of a conviction the policy of the Department of Public Prosecutions, as stated by its Director, is to oppose the initiation of a prosecution. Any substantiated indications that the Director of Public Prosecutions and the staff of the Department are prone to succumb to police pressures in making their decisions instead of adhering to the principle of fearless impartiality would surely contribute to the erosion of public confidence. It may be assumed that nowhere is this fact better appreciated than in the Office of the Director of Public Prosecutions itself.

An evaluation of some recent controversial decisions

20. Criticisms of particular decisions made by the Director have usually centred around cases that have already attracted public attention, in which cultural or political prejudices are readily given rein. In the early years of the office of Public Prosecutions the Director was to defer a public response to criticisms of his decisions until he prepared his annual report for Parliament. This avenue for defending the Department's actions as long since disappeared and it is doubtful whether in present

day conditions of accelerated communication public opinion would be satisfied to await a yearly accounting of the Director's work. What is evident is the readiness of Sir Thomas Hetherington to defend his record after the event by whatever media resources are placed at his disposal.

21. Some of the more notorious cases in recent times have centred on the narrow question of the sufficiency of evidence. In the Blair Peach case in 1979, for example, of the several situations where a suspect has died in police custody in suspicious circumstances, Hetherington has admitted that the reason why there was no prosecution against any particular officer was that it was impossible to tell which of any policemen committed the crime. In an interview with The Times, and referring expressly to the Blair Peach case, the Director stated: "I am not absolutely certain that he was hit on the head by a police officer, but I think it is probable that he was. There was no evidence as to which one, literally no evidence, and no evidence really as to what the weapon was, except that it was a blunt instrument. We don't have the evidence. What they did in fact was to remain silent, which they are entitled to do". This unusually frank disclosure of the thinking that contributed to the decision not to prosecute in that case should not be extended by inference to the 25 other cases involving complaints against a police officer or police officers that resulted from deaths in suspicious circumstances over a period of 10 years between 1970 and 1979. According to figures published by the Home Office in March 1980, a total of 274 people had died while in custody of the police during the same period. Forty-eight deaths, the highest total in any single year, occurred in 1978 during which the number of persons taken into custody was 1.25 million. The disparity in the respective totals mystified many people at the time, including the members of the House of Commons Select Committee. The explanation for the lower figure is that these cases represent those where a public complaint was registered and where the particular chief constable felt it incumbent upon him to submit the papers to the Director of Public Prosecutions under the test laid down in section 49 of the Police Act, 1964. The remainder would be cases in which either no complaint was received or the chief officer of the police was satisfied that no criminal offence could have been committed. Furthermore, the suspicious circumstances surrounding the deaths were not necessarily confined to deaths that took place while the victim was "in police custody", a phrase that can encompass a variety of situations ranging from an arrest in the home or on the street to the actual detention of the person concerned in a police station or in a hospital. Prominent among the cases generally referred to as having given rise to widespread public concern, in addition to Blair Peach, are those of James Kelly (1979) and Liddle Towers (1976), who died after release from custody. The continuous attention devoted to these cases in the press and in Parliament was reinforced by the remarkable fact that arising out of the 26 situations in which the deceased allegedly died at the hands of the police, in different parts of the country, not one prosecution had been instituted by the Director of Public Prosecutions. Questioned on this subject by the members of the House of Commons Select Committee, the Director stated that in each of the 26 cases the decision not to prosecute was based on the failure to surmount the first hurdle of meeting the sufficiency of evidence test. Sir Thomas Hetherington disclosed that he had personally considered three of the 26 deaths, presumably the most controversial cases, and that he had been fully satisfied in each case that there was no further witness that needed to be interrogated and that no further inquiries needed to be undertaken. In some of the cases the papers had been referred to outside counsel whose conclusions were the same as those eventually reached by the Director. Experience and statistics alike, however, confirm the fact that it is only in the very strongest of cases that a jury will convict a police officer of assault. The same pattern of a very high rate of police acquittals exists with respect to all types of indictable offences. Thus the overall acquittal rate in cases brought against police officers is 59%, compared with a national rate in trials on indictment against other citizens of about 17%. Like it or not, juries appear to view with a high degree of scepticism the testimony of prosecution witnesses who have a criminal record or whose background casts a shadow on their degree of credibility. Another statistic which requires some explanation is the remarkably low figure of cases, involving complaints of assault by the police, in which the Director has initiated prosecution of the police officer(s) concerned. In 1979, for example, which is the last full year for which results are available, the percentage of assault cases prosecuted was slightly in excess of two per cent. A partial explanation for this state of affairs is the demonstrated tendency on the part of chief constables, anxious to avoid public criticism that they have sought to protect their own, to send forward for the Director's consideration cases that do not have the semblance of sufficient evidence to

support a prosecution. Many of the circumstances involve nothing more than technical assaults. Even so the perception of different standards being applied is not such that it can be dismissed and there will be a constant need to explain the Director's policies in this regard.

22. Adherence to the same strict standards as to the quantum of evidence necessary to justify prosecution is confirmed by the attitude of the Director of Public Prosecutions in the Cowley Shop Stewards case in 1966, several years before the formulation of Hetherington's "51 per cent rule". Questions were asked in the House of Commons as to why criminal proceedings had not been brought against the stewards who had admittedly conducted a "kangaroo court" and expelled several workers for not taking part in an official strike. Quintin Hogg (as he then was) had earlier accused the Attorney-General of failing to prosecute for improper motives and Randolph Churchill had trotted out the ghosts of the Campbell affair in 1924 as a warning of the fate that might befall the Government because of the Attorney-General's decision not to prosecute. Sir Elwyn Jones, the then Attorney, explained that he had been consulted by the Director but that there was insufficient evidence to justify proceeding against any identified individual. Confirmation of this wholly non-political explanation for the decision became available years later when Mr. Peter Barnes in his Birmingham address, referring to circumstances that seem to match the Cowley case in 1966, stated: "We eventually managed to satisfy him that the evidence really was insufficient but I was left with no doubt whatsoever that the Attorney-General was anxious that there should be a prosecution if possible, although I had equally no doubt that such a prosecution would have been embarrassing to his Government from the political point of view".

23. The failure to institute major prosecutions arising out of the revelations contained in the Bingham Report to the alleged violations of the Rhodesia Oil Sanctions orders was explained by the Director of Public Prosecutions, in defense of the decision not to launch criminal proceedings against the international companies involved in circumventing the statutory prohibitions. According to Sir Thomas Hetherington the true explanation lay in the inability of the Crown to satisfy the 51 per cent standard. The Director had sought the advice of outside counsel, Mr. Michael Sherrard, QC, who concluded that, whatever the Bingham Report may have revealed about political and economic realities, the evidence it contained would not alone justify a prosecution. An investigation in search of the necessary evidence would take several years, involving uncooperative witnesses who were outside the purview of the British courts' jurisdiction. Even then, in Hetherington's judgment, there was insufficient likelihood of obtaining convictions. As with other high profile cases, it is often difficult to separate convincingly the evidentiary reasons for a negative decision as to prosecution and those other public interest considerations that tend to loom large in the decision-making process.

24. There are, of course, numerous instances in which the go-ahead signal is given by the Director of Public Prosecutions and the outcome is a spectacular failure, when judged in the narrowest terms of a conviction against an acquittal. The Jeremy Thorpe case will often come to mind in this kind of comparison, demonstrating as it does the unpredictability of juries or, if it is preferred, the fallibility of the judgments reached in the calm atmosphere of the Department of Public Prosecutions. Asked about the outcome of the Thorpe prosecution, Hetherington rejected any feelings of embarrassment and instead gave the verdict a sense of perspective by declaring that it would be stored away as evidence to guide his instinct when similar facts present themselves again for assessment. Asked whether given another chance he might have prosecuted on different charges, Hetherington insisted that the charges of conspiracy to murder were absolutely right on the evidence before him. More recently, speaking publicly on the legal dilemma concerning well-meaning doctors who deliberately accelerate the death of a patient, Sir Thomas Hetherington described as his most difficult prosecutorial decision the institution of a murder charge in 1981 against Dr. Leonard Arthur who admitted to taking steps to hasten the death of a mongoloid baby. If the prosecution had known in advance of the expert medical evidence to be produced by the defence "it might have changed the whole course of the trial. We might not have charged murder in the first place". The uncertainties of the criminal law had left no scope in which to bring a charge other than murder.

25. The Bristol Riot case, on the other hand, in retrospect appears to have been a genuine error of judgment on the part of the Director and he candidly admitted as

much after the original trial which produced eight acquittals and four jury disagreements. In a charge of riotous assembly, the legal requirement of establishing a common purpose among the various defendants illustrates the importance of the very first stage in the process leading up to a decision to prosecute. The jury's verdict at the original trial demonstrated the dangers of re-indicting those accused with respect to whom there had been jury disagreements, so that it came as no surprise to learn that the Director, after consultation with the Attorney-General, Crown Counsel and the chief constable of Avon and Somerset, had decided not to proceed with a second trial.

26. We turn next to the final stage in the process leading up to the ultimate determination whether to prosecute or not. That decision, it should be emphasised, is not sufficiently explained in terms of answering "Yes" or "No" to the question of prosecution. The decision may involve a choice between the following alternative dispositions: (a) to prosecute if no charge has yet been preferred by the police or other governmental authority; (b) to proceed with any charge(s) already laid; (c) to reduce (or increase) the offence already charged; (d) to charge any other person with the offence; (e) to ask the police to make further inquiries; (f) to discontinue further police investigations in favour of the decision not to prosecute for any offence. Having decided that the evidence is sufficient to justify criminal proceedings, the Director and his senior colleagues must then go on to consider whether the proveable facts and the whole of the surrounding circumstances are such that it is incumbent upon them, in the public interest, to institute a prosecution and with respect to what offence(s). This final decision is, without doubt, the most difficult of all since it involves a subjective attempt to determine what course of action will best reflect the interests of the community as a whole. No ready made yardsticks are available to solve the myriad circumstances recorded in the files submitted to the Director for his decisions. What is apt to be misleading is the impression conveyed in Sir Thomas Hetherington's written submission to the Phillips Commission and repeated in his public statements explaining how the Department functions. The description of the process as an orderly sequence of cumulative judgments, each separated from the other but each requiring an affirmative resolution in order to achieve the final judgment, ignores the impact that public interest considerations are bound to make in borderline cases. Rigid adherence to the separation of the evidentiary and public interest questions is a standard incapable of fulfilment and it is unhelpful to exaggerate the exclusive nature of the separate exercises.

The boundaries of relevant public policy factors

27. The boundaries of public policy factors that can properly be taken into account when making prosecutorial decisions are slowly becoming identified. This is a positive contribution towards public understanding and support for the substantial element of discretion that is involved in every such decision. Several of these factors are relatively non-contentious and can be described as exculpatory or mitigating in their possible impact. Staleness of the crime will likely influence the Director's eventual decision, it being stated that there is much hesitation to prosecute if three or more years have lapsed between the date of the offence and the probable date of trial. The gravity of the offence will naturally diminish the significance of the element of staleness and the same applies if the complexity of the case explains the prolonged police enquiries. A similar response will likely occur if the accused has contributed to the staleness by disappearing or covering his tracks. Lack of diligence on the part of the police, on the other hand, will tend to enhance the relevance of the time interval.

28. The youthfulness or advanced age of the accused will have to be taken into consideration in appropriate cases. In sexual cases, for example, high regard for the respective ages of the persons involved is generally regarded as a proper balancing of the values at stake. The consenting nature of the victim's participation and the issue of corruption will also bear heavily on the way in which discretion is exercised. In other cases, the younger the offender the greater must be the inclination to examine alternative possibilities such as a caution if the accused has no previous blemishes and, in addition, has a good home background and employment record. Against these positive qualities must be set the seriousness of the crime and the extent to which it has aroused public concern. With respect to a defendant who is of advanced age there must always be concern as to whether he is likely to be fit enough to stand trial. Apart from such a practical matter, there is general reluctance to prosecute anyone

who has passed his 70th birthday and is infirm, unless there is a real possibility that the offence will be repeated or, of course, that the offence is of such a grave character that a prosecution cannot be avoided.

29. Caution is called for when the mental condition of the accused is brought into the discussions preceding the decision to prosecute. Its relevance during court proceedings is unquestioned and the court has broad powers to authorise psychiatric examinations if called for in the particular case. No one can doubt either the importance of evidence of mental illness to the issue of criminal responsibility. What we are presently concerned with is the possible impact that evidence of mental instability should have in avoiding the subjection of the accused to a criminal trial. The initiative in this regard will usually come from the defendant's solicitor who may point to the dangers of a permanent worsening of his client's condition if the prosecution goes ahead. The possible spurious nature of any such claim can be met in part by ensuring an independent examination of the defendant's mental condition. The healthy scepticism that prevails in the Director's office in such matters is perhaps best captured in the view expressed by Mr. Peter Barnes that: "On the one hand it is somewhat distasteful to prosecute someone who is mentally subnormal but on the other hand that very subnormality or abnormality may itself increase the risk of an offence being repeated and so it may be necessary for us to prosecute in the hope that this may result in some form of effective treatment".

30. Perjury is an offence that the public might be forgiven for believing that it has become as much of a dead letter crime as, say, bigamy. In his evidence to the Royal Commission on Criminal Procedure, the Director of Public Prosecutions acknowledged that experience has shown that the modern tendency is for the judges to impose no more than a nominal penalty in cases of bigamy unless there are exceptional or aggravated circumstances. Faced with this reality very few prosecutions for bigamy are nowadays approved, the normal advice being to issue a caution against any repetition of the offence. With perjury, on the other hand, a far more serious view is taken of the crime and it is pertinent to note the principles that guide the Director in his approach to such cases. A clear distinction is drawn between alleged perjury by a witness and that sought to be laid at the door of the accused. In the case of the former, assuming there is sufficient corroboration as required by the Perjury Act, 1911 and a reasonable prospect of a conviction, the Director's office will sanction a prosecution if the perjured evidence goes to the heart of the issue before the original trial. On the contrary, should the evidence, whilst technically in breach of the Act, relate to a peripheral issue and the intent of the witness is more to protect his own skin than to prevent the course of justice, then it is most unlikely that a prosecution will be approved.

31. The position of a defendant who commits perjury is seen in a different light, especially if his effort is unsuccessful and a conviction has been registered in the case. In these circumstances, the Director's submission to the Commission stated: "... it is necessary to have regard to the punishment inflicted by the court and to assess whether a subsequent prosecution for perjury would be likely to result in any substantial increase of the sentence. It is also essential that the evidence should be so exceptionally strong that a conviction is virtually certain, because of the doubts which an acquittal would cast upon the verdict of guilty in the original case. Usually, although not necessarily, it is the emergence of some additional and compelling evidence, after the original trial, which removes the last trace of doubt. Even, however, where there is abundant evidence against a defendant who has unsuccessfully lied without involving others I would not normally think it right to prosecute unless there are aggravating factors". The imperative obligation to balance subordinate considerations one against the other is well illustrated in the further observation that the Director's office "will consider whether the lies necessarily involved an attack on the truthfulness (as opposed to recollection or ability to identify) of one or more prosecution witnesses; whether the lie was clearly planned before the hearing or arose on the spur of the moment during cross-examination; and the degree of persistence in maintaining the lie".

32. This kind of analysis of the conflicting considerations that must be taken into account when contemplating possible proceedings for perjury highlights the impracticality of ever laying down hard and fast rules that will confer a high degree of predictability as to the result of their application. The very nature of discretionary authority requires resistance to any attempt to develop rigid rules that cannot

encompass every possible contingency. Take another factor, that of public expense in maintaining a long drawn out trial. Any suggestion of imposing upon the police or the Director of Public Prosecutions a predetermined ceiling as to the costs than can be incurred in connection with different categories of prosecutions would be abhorrent to the principles of justice and law enforcement. At the same time, lack of any restraint in the face of predictable major expenditures in bringing accused persons to trial would likewise be regarded as irresponsible. Hence the careful balancing of costs against the purposes to be achieved through prosecution that must occupy the minds of the decision-makers in the Office of Public Prosecutions when the magnitude of the bill to be paid out of the public purse cannot be ignored.

33. As one illustration of this unusual factor reference can be made to the crop of potential defendants enmeshed in the Poulson affair. By mid-1974 the list of candidates for investigation and possible prosecution for corruption numbered around 300, most of whom were individuals in subordinate positions whose involvement was relatively trivial. In the event only the leading figures in the conspiracy were brought to trial. Commenting on the decision to single out the principal conspirators in this fashion, Sir Thomas Hetherington has stated: "It is not necessarily in the public interest to prosecute every minnow connected with an offence, provided the whales are tried ... In the Poulson case ... after the prosecution of John Poulson, Dan Smith, George Cunningham and other public servants there were still a number of leads which had not been investigated fully ... They were retired, old, and a lot more money would have to be spent. Was it really in the public interest to go ahead?". The Director of Public Prosecutions has frequently found himself the target of public criticism as a result of his authorising prosecutions that have involved enormous public costs and resulted in the acquittal of the accused. The implication, whether intended by the critics or not, is that it is acceptable to proceed if convictions are obtained, otherwise the ends do not justify the costs incurred. This is asking the impossible of the Director of Public Prosecutions and it is doubtful if there has been any serious criticism of the Director's judgment by those whose responsibility it is in government to guard against the extravagant use of public money.

34. Another amorphous factor that is difficult to pin down relates to the attitude of those who, directly or indirectly, can be said to have a special stake in the outcome of a prosecution. Mention has already been made of the indefinable relationship that occurs between the professional officers who have been in charge of the case up to the point where the papers are transmitted to the Director for decision. The imperceptible pressures engendered by this relationship cannot be dismissed, a senior member of the Director's office going so far as to admit the Department is reluctant to turn around a police decision to charge, unless the evidence is totally without substance. If there is some evidence to support the original police charge the tendency is to let the court make the decision not to commit for trial by soft-peddalling the evidence in support of the charge. The attitude of victims and complainants may not exert as powerful an influence, there always being the possibility that the accusation was made in the heat of the moment or as to the last straw in a relationship that has been simmering in intensity for some time. A change of heart on the part of the complainant, be it a person (in a case of assault) or a company (in case of fraud) will be assessed in the light of the seriousness of the offence and the harm inflicted, as well as exploring any suspicion that the withdrawal was actuated by fear. Then there is the current mood of the local community, which may have given expression to its concerns as to the prevalence of the offence in its area, or as in the Bristol Riot case where the views expressed by the chief constable of Avon and Somerset as to the detrimental effects which a new trial would have on racial harmony in the city appears to have been a powerful factor in persuading the Attorney-General and the Director not to pursue charges against the remaining four defendants.

35. There remains the sensitive aspect of the position occupied in society by the defendant, and his or her previous character. At times, it may be difficult to separate these variables and it may even be more of a challenge to demonstrate that equality before the law has been adhered to in the decision to prosecute or not to prosecute, as the case may be. The circumstances surrounding the handling of the prosecution of Jeremy Thorpe, and in particular the delegation by the Attorney-General to the Director of Public Prosecutions of responsibility for making the decision in that case, have already been examined in detail in his work. Apropos our present concern, it can readily be imagined that Sir Thomas Hetherington was acutely conscious of the public position occupied by the suspect, and at the same time sensitive to the enormity of the

charge of conspiracy to murder and the penalty for such a crime. Questioned by The Times representatives in the course of a wide ranging interview on the Director's handling of prominent cases during his tenure of office, Hetherington was asked what his response would have been if Mr. Silkin had instructed him not to prosecute Jeremy Thorpe. The Attorney's instruction, the Director replied, would have been "most unconstitutional". In the event of his proving unsuccessful in persuading the Attorney to change such a hypothetical ruling, Hetherington declared that he would probably have resigned. "It was a basic", he said, "that I wouldn't have been able to carry out my duties thereafter".

36. The position of the Director becomes more vulnerable where he decides against prosecuting and the proposed charge involves a prominent public figure. Allegations of bias and of protecting "the Establishment" will surface quickly in this kind of situation, presenting the Director and the Attorney-General with the choice of riding the storm in silence or responding quickly in a way that is calculated to dispel uninformed criticism. A case in point was that involving Sir Peter Hayman, formerly the U.K. High Commissioner in Canada. In 1978 a packet containing obscene literature and other written material was found in a London bus. The subsequent police investigation revealed the existence of correspondence of an obscene nature, involving young children, between Hayman and a number of other persons. Altogether a total of seven men and two women were named in the report submitted by the Metropolitan London Police to the Director of Public Prosecutions, as possible defendants to charges under section 11 of the Post Office Act, 1953. A further report revealed that one of the nine men, not Sir Peter Hayman, was also carrying on correspondence with another person which indicated that the two shared an obsession about the systematic killing by sexual torture of young people and children. In view of the extreme nature of this latter material the Director decided to prosecute them for conspiring to contravene the 1953 Act.

37. There was no evidence that Hayman had ever sent or received material of this kind through the post. Simultaneously with these inquiries, the police investigation into the activities of the Paedophilic Information Exchange resulted in a separate trial for conspiracy to corrupt public morals, the defendants being involved in the management or organisation of the body concerned. Hayman did not fall within this group. With respect to the original group of nine persons, which did include Sir Peter Hayman, the Director advised against the bringing of criminal proceedings, the principal factors being stated to be, first, that the correspondence had been contained in sealed envelopes passing between adult individuals in a non-commercial context and, secondly, none of the material was unsolicited. The Attorney-General defended the Director's decision in a full statement to the Commons, saying that he was in agreement with the decision. Previously, before Hayman's name was disclosed to the Commons by a Labour back-bencher, the Attorney-General had appealed to the M.P. concerned to spare Sir Peter and his family public humiliation in naming him when the decision had been taken not to prosecute Hayman or any of the potential defendants. Subsequently, the Director explained that the public position occupied by Hayman had had nothing to do with his decision. It had been dictated by the fact that the spirit of the Post Office Act offence had not been infringed, given that it is no offence to possess indecent material and the recipients had not been unwilling victims of the obscene literature in the sense of being shocked and disgusted by the contents.

Decisions not to institute proceedings - the need for restraint in public explanations

38. This kind of explanation, in such detail, has come to be expected from the present Director. It should be noted, however, that there is a general reluctance to elaborate on the particular considerations that led to a decision not to institute proceedings in specific cases. Such reluctance is explained on two grounds. First, whilst it is reasonably safe to expound in abstract terms on the kind of discretionary factors, reviewed in this chapter, which enter into the decision-making process, there is a marked resistance to disclosing publicly the specific in-house policies that have been developed to guide the professional staff in their approach to certain kinds of offences. The explanation for this resistance, departed from so visibly in the Peter Hayman situation, is that "it would not be in the public interest to risk it becoming known that certain offences of medium or minor importance can in fact be committed with relative impunity". This remark, on the part of the present Deputy Director, contains more than a hint of exaggeration in its basic assumption that the incidence of

criminal activity is directly related to the level of prosecutorial activity. The fundamental questions implicit in this assumption have been addressed in the parallel context of law enforcement activity with little evidence to support the proposition that a strong statistical nexus exists between levels of police action and the levels of criminal activity. This conclusion, it is acknowledged, does not control the public's perception of how the criminal justice system functions and it is these perceptions that principally influence individual behaviour.

39. As for the other ground on which the Director and his colleagues studiously maintain a veil of silence in relation to specific cases, the explanation is principally dictated by the ethics of the Director's relationship to the police, the undisclosed witnesses and the defendant himself. Pressed by the Select Committee on Deaths in Police Custody to go beyond the Department's customary resort to explaining its decision in terms of the insufficiency of the evidence, Sir Thomas Hetherington drew no distinction between police complaint cases and other cases. To make public the grounds on which the evidence was judged to be insufficient to secure the likelihood of a conviction would, in the first place, breach the confidentiality of police reports and statements taken by the police from potential witnesses. Disclosure of the reasons for not believing prospective witnesses might require revealing the criminal record of those witnesses. The same reasons would apply to making public details about the defendant with the result that there would be a public "trial" of the potential defendant without his or her having all the safeguards that are an integral part of a criminal trial in open court. Much as a very substantial body of public opinion might savour the opportunity to engage vicariously in this kind of trial by the media, the Director's adherence to the contrary principles favouring non-disclosure is to be preferred. This choice is not as easy to make as might sometimes be supposed, and the present Director has confessed to the frustration that he has experienced in the more emotive cases, such as Blair Peach and James Kelly, in not being able, because of the principle of confidentiality, to answer publicly the bombardment of criticism to which he and his Department have been subjected.

40. In its Report the Select Committee recommended that the Director of Public Prosecutions should make it his normal practice to supply a complainant with at least a summary of the considerations which led him to decide against prosecution. It also proposed that the police investigation report be made available to the legal representatives of the deceased when appearing at the ensuing coroner's inquest. Both recommendations were rejected by the Director, a decision supported by the Attorney-General for the same grounds as those explained to the Select Committee as governing established practice. That indefinable concept, the public interest, might in exceptional circumstances deem it sufficiently imperative to enforce full public disclosure but it would have to be done after the most careful balancing of the conflicting principles at stake, and with the necessity of requiring the Attorney-General to defend before the House of Commons a decision that runs counter to the general practice faithfully observed by the Director of Public Prosecutions.

Public disclosure of prosecutorial guidelines

41. Most of what has been written in this paper will have equal application whatever the jurisdiction in which the decision to prosecute or not to prosecute has to be made. There are growing signs too of a disposition to follow the example set by Edward H. Levi, an outstanding Attorney-General of the United States who, during his term of office in 1977, embarked on a programme of formulating the principles upon which prosecutorial decisions should be made. In his prefatory note to the document setting forth such principles Attorney-General Levi stressed that the materials being circulated were not to be construed as Department of Justice "guidelines" and that they imposed no obligations on United States Attorneys, their Assistants, or other attorneys acting on behalf of the United States Government. Ascribing the most modest of objectives to this pioneering initiative Mr. Levi said that it was intended solely for use by government attorneys to the extent that the principles were found to be appropriate in discharging their responsibilities as Federal prosecutors. The Attorney-General's "materials" covered such topics as the decision to prosecute, the election of charges, plea negotiations and, a procedural feature that is peculiar to United States law, opposition nolo contendere pleas. Not surprisingly, there is much common ground between the relevant factors that are said to guide the Director of Public Prosecutions in England and Wales, and those expressed in the Levi documents

as the advisable guideposts within the Federal criminal justice system of the United States. News from Australia indicates the imminent release by the Federal Attorney-General of prosecution guidelines that, presumably, will govern the actions of all counsel and solicitors whose authority derives from the senior Law Officer of the Crown. None of these prosecutorial blueprints is in the nature of hard and fast rules. Within any such sets of guidelines, including those issued by the Attorney-General of England and Wales on the effects of jury vetting and disclosure, there is a considerable measure of discretion as to how the relevant criteria are to be applied in the particular circumstances.

42. This discretion, moreover, attaches to each of the documents that have been referred to, irrespective of whether they are described as "guidelines" or "appropriate considerations that are not to be regarded as departmental requirements", and whether they emanate from the office of the Attorney-General in London, Canberra or Washington. They do not, it is true, carry the force of a "practice direction" similar to those issued from time to time by the Lords Chief Justice after consultation with the Judges of the Queen's Bench and Family Divisions. These latter statements of practice have the same binding force as all other rules of procedure that derive their statutory authority from the Supreme Court of Judicature Acts. Nevertheless, since the Prosecution of Offences Act, 1879, section 2 ordains that the Attorney-General is the minister responsible for the actions of the Director of Public Prosecutions and can issue directives to his subordinate official with respect to any of his functions, it cannot be doubted that there exists a secure statutory basis for the Attorney-General's emerging forays into the setting of guidelines concerned with subjects within the Law Officers' prerogative authority. In this respect, the approach favoured by the Attorney-General of the United States in expressly disclaiming any mandatory component for the guidance afforded to the United States Attorneys would be highly inappropriate parallel to use in describing the modest incursions of the Attorney-General for England and Wales into the same field. At the same time it is interesting to note that, as the Federal Minister of Justice in charge of the United States Department of Justice, Attorney-General Levi attached no qualifications to the series of formal guidelines that he imposed upon the Federal Bureau of Investigation when executing his policy of bringing that agency back into the fold of ministerial control and accountability. This fascinating exercise must regrettably be left to others to recount, as we move on to describe the substantial restriction on the powers of the Attorney-General of England and Wales, and by derivation those of the Director of Public Prosecutions, in the matter of preferring an indictment without prior resort to a preliminary hearing. This powerful discretionary jurisdiction, frequently exercised in such Commonwealth countries as Canada, New Zealand, and Australia is not available in England.

Preferring bills of indictment - British and Commonwealth differences

43. Prior to 1933 the Attorney-General or the Solicitor-General exercised concurrent jurisdiction with a judge of the High Court in sanctioning the presentation of a voluntary bill of indictment by a private citizen. These restrictions on private accusations were introduced by the Vexatious Indictments Act, 1859 to counter the abuse and hardship incurred by those accused of crimes who had no right to appear before or to be heard by the grand jury before it decided whether or not to return a true bill. Proceedings to determine whether leave should be granted, by one of the Law Officers or by a High Court judge, was always ex parte and the grand jury's subsequent involvement of returning a true bill became a mere formality. Under the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933 the grand jury was recognised as a useless anachronism and abolished. At the same time the discretionary power of the Attorney-General and the Solicitor-General to authorise the presentation of a bill of indictment, that would effectively bypass the procedure of a preliminary inquiry before examining justices, was likewise terminated.

44. The avenues remaining to a prosecutor who seeks to bring an accused person to trial by indictment are two fold. The first, and most regularly followed, is by way of committal to the Crown Court following either the taking of depositions as part of the preliminary hearing or by resort to the accelerated procedure which, since the coming into force of the Criminal Justice Act, 1967, section 1, allows a committal, in given circumstances, without consideration of the evidence. Briefly, the circumstances require that all the evidence be in the form of written statements or exhibits and that

no objection is voiced by the defendant or his lawyer to the effect that there is insufficient evidence to put the defendant on trial by jury for the offence(s) charged. What have come to be known as "section 1 committals" cannot be resorted to if the defendant is not legally represented. The second avenue open to a prosecutor is to circumvent the committal procedure altogether by way of seeking the leave of a High Court judge ex parte in accordance with the provisions contained in section 2(2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 which states: "... no bill of indictment charging any person with an indictable offence shall be preferred unless either - (a) the person charged has been committed for trial for the offence; or (b) the bill is preferred ... by the direction or with the consent of a judge of the High Court or pursuant to an order made under section 9 of the Perjury Act 1911." These powers merely replicate the jurisdiction originally conferred on the High Court under the terms of the Vexatious Indictment Act, 1859. It is this procedure which the Director of Public Prosecutions, like any other private prosecutor, has to invoke when faced with unexpected obstacles that arise in the course of seeking a normal committal by the examining justices.

45. A prolonged preliminary hearing, for example, with little prospect of an expedited committal, may prompt drastic action by the Director as occurred in the Terence May case in 1981 when 15 black youths were charged with a variety of offences including murder, affray, and riotous assembly following the death of a motor cyclist in South London. The conduct of one counsel representing the defendants at the committal hearing was the subject of a formal complaint made by the Attorney-General to the Professional Conduct Committee of the Bar Council, a step that was later repeated at the conclusion of the actual trial. In another recent situation, involving the unexplained death of Barry Prosser, an inmate of Winson Green Prison, Birmingham, and the second refusal of the examination magistrate to commit the three accused prison officers to trial because of the insufficiency of the evidence presented by the Crown, the Director of Public Prosecutions changed his mind after first stating that the case was closed. After consultations with the Attorney-General, ex parte proceedings were begun that resulted in the Director obtaining leave from Stephen Brown J., for the presentation of a direct indictment against the prison officers concerned. At the subsequent trial in Leicester Crown Court all three accused were acquitted of murder. In yet another case, R. v. Raymond, that eventually found its way before the criminal Division of the Court of Appeal, it was said that the defendant "gave such unmistakable indications of an intention seriously to disrupt the committal proceedings as to make a mockery of them" that counsel for the Crown decided to abandon them and to seek leave to prefer a bill of indictment from a High Court judge. The principal ground of the appeal against conviction of the accused for theft of currency worth more than £2 million from the storerooms of Heathrow Airport was the failure of the judge, hearing the ex parte application, to afford the appellant an opportunity to be heard if he wished to do so. After carefully reviewing the entire history of preferring bills of indictment, Watkins L.J., speaking for the court, rejected the argument that the 1933 Act had conferred any such right or that the elimination of the roles formerly associated with the Law Officers required the High Court judge to conform to the audi alteram partem rule. In his concluding remarks Watkins L.J. said: "There can be no doubt that the defendant is becoming, if he has not already become, a practised disturber of court proceedings. In agreeing to receive and consider the written representations made by his solicitor on the defendant's behalf, Michael Davies J., probably paid him much more regard than he ever deserved."

46. By English standards, the legislation of many Commonwealth countries confer extraordinary powers upon the Attorney-General and his agents who are empowered to prefer an indictment irrespective of whether a preliminary inquiry has or has not been held or that such an inquiry has resulted in the accused being discharged. There is, for example under the Canadian Criminal Code, the parallel procedure whereby a private individual can seek leave to prefer a direct indictment from a judge of a Provincial Supreme Court or from the Attorney-General. In some circumstances the Attorney-General may elect to proceed by way of seeking leave from a superior court judge, notwithstanding his having jurisdiction in his own right to prefer an indictment. Electing to proceed by the former route might be explained by the desire of the Attorney-General not to risk further criticism in unilaterally re-activating a prosecution that failed to secure a committal by the examining justice. There is a similar sensitivity evident in the accepted judicial view that "If the Attorney-General has definitely refused to prefer, or to consent to the preferring of a charge, the

Court should hesitate to order or consent to the laying of the charge as to which his refusal has been made, and should refuse its order of consent when it is made to appear that the administration of justice is being prejudiced or jeopardised by the proper action of that officer who by custom, tradition and constitutional usage, as well as by law is charged with the administration of justice in the Province". It is by virtue of the co-equal jurisdiction conferred upon the court in preferring indictments, under the provisions of sections 505 and 507 of the Code, that in this instance a departure is justified from the fundamental proposition that the Attorney-General's prosecutorial discretion is not examinable by any court but is subject to review by the legislature, to whom the Attorney-General is answerable.

47. This principle of judicial deference to the Attorney-General in matters pertaining to the institution of criminal prosecutions makes it totally unrealistic to contemplate the adoption in Canada and other Commonwealth countries of the law that now prevails in England and Wales in which, as we have seen, the leave of a High Court Judge is the only route open to the Attorney-General, the Director of Public Prosecutions or any private person who seeks to present a bill of indictment as the most expeditious procedure for commencing trial on indictment. Until the Criminal Law Act, 1967, there was always the possibility that the Attorney-General could invoke his prerogative authority to file an ex officio information, the origins of which are traceable as far back as the reign of Edward I. The Divisional Court's condemnation in R. v. Labouchere (1890) of the laxity with which, in the early part of the nineteenth century, the normal process of presentment and indictment was by-passed, exerted a powerful restraint upon holders of the office of Attorney-General in resorting to their prerogative discretion of filing ex officio informations. The last recorded instance in which a criminal trial was launched in this manner was R. v. Mylius in 1911 when Sir Rufus Isaacs, as Attorney-General, without resort to a preliminary inquiry, filed an ex officio information charging the accused with criminal libel against King George V. This special privilege of the Attorney-General survived the legislative scythe that in the Administration of Justice (Miscellaneous Provisions) Act, 1938, section 12, abolished outlawry proceedings, the exhibiting of articles of peace in the High Court, and criminal informations "other than informations filed ex officio by His Majesty's Attorney-General". The Criminal Law Revision Committee in its Seventh Report, observing that the procedure had not been used since 1911, described the Attorney General's prerogative right as "plainly unnecessary" and recommended that it should be abolished. The final demise of the Attorney's ex officio information was effectuated in the Criminal Law Act, 1967, section 6(6) of which declared that "Any power to bring proceedings for an offence by criminal information in the High Court is hereby abolished". No voices in opposition to this move were raised during the passage of the Bill through Parliament. We must presume, therefore that the Law Officers, as well as past holders of those offices, were reconciled to the need to obtain the leave of a High Court judge procedure for bringing accused persons speedily to trial.

48. One interesting postscript, from Australia, is the confirmation by its High Court in Barton v. R. (1981) that ex officio informations (or ex officio indictments as they are there described) are alive and well in New South Wales in accordance with the powers conferred by the Westminster Parliament in the Australian Courts Act, 1828, section 5. This law was intended to confer upon the colonial counterparts the same prerogatives as those practised by the Attorney-General of England. Due note was taken in Barton of the abolition in 1967 of the English Attorney-General's former privilege of filing an ex officio information in the Queen's Bench Division of the High Court, but there was no disposition to urge that similar action be instituted in the Australian legislative bodies. The remarkable feature of the High Court's decision was the lengths to which a majority of the Justices were prepared to go in according the accused a fundamental right to have the prosecution present its case through a preliminary inquiry. No suggestion was made that the Attorney-General's decision to commence a prosecution was examinable by the courts. Rather, the approach was more indirect in its adoption of the position that "a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair". According to the majority of the justices of the High Court "It is for the Courts, not the Attorney-General, to decide in the last resort whether the justice of the case requires that a trial should proceed in the absence of committal proceedings. It is not for the courts to abdicate that function to the Attorney-General, let alone to Crown Prosecutors whom he may appoint ... If the courts were to abdicate the function there is the distinct possibility that the ex officio indictment, so recently awakened from its long slumber, would become an active

instrument, even in cases in which it has not been employed in the past, notwithstanding the criticism which has been directed to it and the assertions of commentators that it was appropriate for use of in a very limited category of cases". Reconciliation of the two principles adumbrated by the High Court of Australia is to be found in the unanimous assertion that, notwithstanding the non-reviewability of the Attorney-General's decision to launch the prosecution, the courts may postpone or stay the ensuing trial on indictment in circumstances where such action is necessary to prevent an abuse of process and ensure a fair trial for the accused person.

49. Stephen and Wilson J.J., refused to subscribe to the theory that a prima facie case of abuse of process would arise whenever the accused was denied the essential prerequisite of committal proceedings. The detriments associated with a preliminary hearing, they maintained, could be overcome by resort to speedier and less cumbersome forms of pre-trial discovery. In each jurisdiction, except New South Wales, it is possible for the committal to rest on written statements. And in four of the Australian States, Victoria, Queensland, Tasmania and Western Australia, what is tantamount to the English procedure of "section 1 committals" (under the Criminal Law Act, 1967) is already in place.

50. This attention to the Australian High Court's ruling in the Barton case is less important for the actual decision, that pertains to the unique character of New South Wales law, than the deeper issues it explores in connection with the court's role in examining the procedural discretion exercised by the Attorney-General. The Australian justices adhered closely to the constitutional separation of powers doctrine that impels the English courts likewise to reject any jurisdiction by way of reviewing the Attorney-General's decision to institute criminal proceedings, to enter a nolle prosequi, to seek an injunction to prevent the commission or repetition of a serious offence, or the Director's intervention to take over a private prosecution and to end the proceedings by offering no evidence. The same general principles govern the approach of the Canadian courts in declining to become too closely involved, except when required to do so by express statutory provision, in questions that will decide whether a prosecution should be commenced. When the ultimate function of the court is to determine the accused's guilt or innocence it is rightly concluded that the judges should not be seen to be associated with the initial step of allowing the prosecution to take place. The broad consistency of the judicial approach to this problem is departed from in dramatic fashion under present English law when the issue of approving the presentment of a bill of indictment, without resort to a committal hearing, is conferred exclusively upon a judge of the High Court.

51. This extraordinary jurisdiction is of moderate antiquity dating back to the Vexatious Indictment Act, 1859, and it is doubtful whether its exercise has been so frequently resorted to as in the turbulent years of recent memory. The elimination in 1933 of the former jurisdiction of the Law Officers to grant leave concurrently with a judge of the High Court may well have been dictated by the desire to provide safeguards against the abuses associated with the filing of ex officio informations in the eighteenth and nineteenth centuries. In remedying one possible ground of public dissatisfaction with the criminal process, Parliament may unwittingly have laid the foundations for a future conflict of purpose between the judiciary and the Law Officers of the Crown.

THE DECISION TO PROSECUTE

Memorandum by the Commonwealth Secretariat
and a Discussion Paper by Mr. A.N.E. AMISSAH,
a former Attorney-General of Ghana

To complement the views of Professor John L.I.J. Edwards contained in LMM(83)5, a distinguished academic and well-known writer on the role of Law Officers, the Commonwealth Secretariat invited Mr Austin Amissah, a former Attorney-General, Director of Public Prosecutions and Justice of Appeal of Ghana, to write on the slightly broader topic, "The decision to prosecute".

2. Mr Amissah is the author of Criminal Procedure in Ghana, 1982 (Sedco, Accra) and The Contribution of the Courts to Government: A West African Viewpoint, 1981 (Clarendon Press, Oxford).

3. The paper is annexed.

ANNEX TO LMM(83)28

THE DECISION TO PROSECUTE

A paper by Mr A.N.E. AMISSAH, a former
Attorney-General of Ghana

Introduction

The basic problem with the decision to prosecute is a problem which besets the exercise of all discretions: in whom should the discretion be reposed; and what control, if any, should be imposed over the authority given the power to ensure that the discretion is properly exercised? The exercise of a discretion involves the exercise of human judgement. As such, it is liable to error. Often, however, when a mistake occurs, some of the criticism levelled, proceed on the assumption that any authority with such power, to be worth its salt, must be infallible. Recognising the limitations of man, the question is whether the discretion is better exercised if it is reposed in someone without responsibility to anyone else except his conscience and sense of duty, like a judge, or should the repository owe responsibility to some other authority. If so, then to whom? Should the repository be someone with tenure of office like a judge or with a fixed term without liability to removal during that period? Or should it be a person who holds office at pleasure, like a Minister or civil servant? The answer to this question leads to other questions on organisation of the machinery for taking the decision, for minimising the chances of error, for correction of mistakes and for accounting for the decision taken so as to preserve public confidence in the system.

2. The discretion under discussion is not confined to the decision to proceed with a prosecution. It is not exhausted when the decision to bring a case before the court or not to do so is taken. Its exercise is called for at the conclusion of investigations; and where the decision is to prosecute, may be called for at various stages of the whole trial. Thus, at different phases, the authority with the discretion may be called upon to decide whether or not to discontinue the prosecution commenced, whether or not to change the mode of trial, whether or not to accept a plea of guilty for a lesser offence than the one charged, or some other matter in connection with the trial. Who should be entrusted with these wide powers?

The Authority Exercising the Discretion

(a) The Attorney-General:

3. In Britain, the oldest Member of the Commonwealth, the discretion is by tradition placed in the hands of the Attorney-General. Having regard to the fact that he is the first legal adviser to the Crown, his claim to this power is as valid and strong as

that of any other person. He is the holder of political office. That solution is the result of historical development and, therefore, amenable to organic change through practice, even though such changes may take time, or otherwise through ordinary legislation. But such a system is difficult to reproduce. And the new Commonwealth countries have taken the course of providing their solution by constitutional regulation. That means change can come only through constitutional amendment; a process which may be difficult or easy, depending on the provisions for the amendment of the constitution. Further, the mechanism laid down by the constitution for prosecutions may make it impossible to subject the power to take decisions on prosecutions to control which is not recognised by the constitution. This point is of some relevance when considering the question of possible controls or changes of the authority exercising the discretion to prosecute.

4. In Britain, the Attorney-General, though a Minister, owes no responsibility to his colleagues in the Government in the manner of the exercise of this power. And though its unacceptable exercise has been known to affect a whole government adversely, the Attorney-General may be singled out for censure if any improper exercise can be laid solely at his door, or at the door of a subordinate for whom he is responsible. As is well known, his responsibility, and that of other Law Officers, for the exercise of this discretion is to Parliament. Of this, there has been recent powerful exemplification in the Scottish rape case, the decision in which led to a statement by Solicitor-General Fairbairn and questions in Parliament, and subsequently followed by his resignation from office. But not all Commonwealth countries follow this model.

5. Professor Edwards, in his paper entitled Emerging Problems in Defining the Modern Role of the Office of Attorney-General in Commonwealth Countries (hereafter referred to, with due apologies, as The Modern Role of the Office of the Attorney-General),² identifies no less than six different models in the institutions responsible for prosecutions in the various Commonwealth countries. This paper for convenience divides the types into two broad categories, namely, those cases where the authority for decision ultimately rests with a political appointee on the one hand, and the other cases where the responsibility lies with a public servant who is not subject to the direction or control of any other person or authority. For this purpose, the Solicitor-General or Director of Public Prosecutions or other officer, who takes decisions on prosecutions but, is under the direction or control of some superior like an Attorney-General or any other authority in the exercise of his powers, is in the end result not the ultimate authority determining the issue of prosecutions. The category under which that officer falls depends on the character of the ultimate authority in that particular country. In the various countries, the discretion is exercised by the Minister of Justice, the Attorney-General, the Solicitor-General, the Director of Public Prosecutions or a Crown or State Attorney, whether as the final authority or not. In this paper, for the sake of brevity and simplicity, unless the context otherwise justifies, the expression "Attorney-General" will be used as a generic term to cover all the other officers of State mentioned.

6. In spite of the British constitution, when its Government came to grant independence to Ghana, the first of its African colonies south of the Sahara to attain this status, it created an Attorney-General who was a public servant who was free from answering to any Cabinet as to the manner of the discharge of his function of the "initiation, conduct and discontinuance of prosecutions for criminal offences". As the Attorney-General was then not a member of Parliament, presumably, he was not answerable to that body either. Part of the explanation for this arrangement may have been historical. Up to the time of independence, the office of Attorney-General in the country was that of a public servant. And this must, to some extent, have influenced the type of Attorney-General chosen for independent Ghana. But it appears that the more substantial reason for the choice was to isolate the decisions of the Attorney-General from political influence. Ghana was not the only country which began with such an Attorney-General. But others who opted for a political Attorney-General created a different office, for example, a Director of Public Prosecutions, who was a public servant and who was made independent of political control. Whatever the title of this independent officer, such an arrangement, however well-intentioned, in a newly independent State with political authority vested in a strong majority party is likely to lead to friction, especially in politically flavoured cases. In a political atmosphere of newly acquired power, there may be pressures to bring prosecutions against political opponents against whom an Attorney-General may feel that there is insufficient evidence. Pressures may be brought not to proceed against supporters or allies against whom the evidence appears to the Attorney-General to be overwhelming. As long as the Attorney-General is a public servant with no particular terms as to tenure he will be in a weak position in case of serious conflict with the political authority. A displeased government can, if it is determined so to do, always ensure a resolution of the

argument in its favour by arranging an early compulsory retirement or by making the position of the officer so untenable as to cause him to voluntarily retire or to resign. How long a government can continue forcing the departure of a quick succession of Attorneys-General on the ground of incompatibility in the manner of the exercise of powers conferred by constitution on the officer is an open question. But apart from that, there is the question, to be raised again later, whether an Attorney-General whose decisions may sometimes result in political consequences of national import ought to be a person who does not have the political confidence of the government in power, is not a political appointee and is deliberately made independent of all political control or responsibility.

7. In the case of Ghana, it was not long after independence that strains were felt in the relationship of Attorney-General and Government. The first Attorney-General, who had achieved his position through service in the Colonial Civil Service, was replaced temporarily by another public servant, but one who had no such antecedents. The new Attorney-General supervised the drafting of a constitution which made the conduct of the Attorney-General's responsibilities, however he was appointed and whether he was a public servant or a political appointee, "subject to the directions of the President". Obviously, the political authority rightly or wrongly thought that the situation created by the independence constitution was intolerable. In a constitutional framework where the effective authority for appointment and removal of public servants and political appointees is the political head, the constitutional provision gave public expression to the realities of the time, stating what may otherwise have been the practice anyway, and relieving the head from adopting devious methods to achieve a desired objective.

8. When the office of Director of Public Prosecutions was subsequently created in Ghana, it was not because of thinking that there should be some officer other than the Attorney-General who should be finally responsible for all criminal prosecutions. It was more or less a revival of the old office which existed under name during the colonial administration as the most senior officer under the Attorney-General responsible for prosecutions. It gave the Attorney-General once more, an assistant, the highest assistant, in the discharge of his manifold functions on the criminal side. The new office of Director of Public Prosecutions was not created by constitution, Act of Parliament or instrument. It was just an administrative arrangement. Of course, it subsequently involved the expansion in the relevant Law Officers Act of the definition of a Law Officer to include the Director of Public Prosecutions. But that was another matter. The constitutional power of the Attorney-General to initiate, conduct and discontinue prosecutions remained with the Attorney-General, subject to the President's directions.

9. Under this constitutional arrangement, the prosecution of former Ministers Tawia Adamafio and Ako Adjei and former Party General-Secretary Cofie Crabbe was undertaken. A prosecution which led to a political upheaval in 1963 and further constitutional changes in 1964. No prosecution of such a highly sensitive political nature involving persons already detained could be started, whatever the powers of the Attorney-General or Director of Public Prosecutions at the time, without the instruction of the President. In any case, the prevailing constitution made him the ultimate authority on prosecutions. In the great majority of cases, the decisions on criminal prosecutions were, indeed, taken by the Attorney-General or the Director of Public Prosecutions. But in cases having political overtones, the President may step in with his directions. The atmosphere generated by and the consequences of this trial, including the dismissal of the Chief Justice who had presided over the panel of judges who tried the case, the taking of powers by the President through changes in the constitution to dismiss judges at pleasure, the nullification of the trial result by Act and the subsequent re-trial, were, two years later, when the regime was overthrown, given as some of the reasons for the coup d'etat.

10. Subsequent constitutions have removed the subjection of the Attorney-General's control over prosecutions to the directions of the President. Whether this is more than an expression of displeasure with things under the Nkrumah regime and involves a real change in outlook on the exercise of political power in relation to the important function of deciding on criminal prosecutions is a different question. Even under the other constitutions, it is difficult to imagine a prosecution of such political sensitivity, namely, alleged treason in conspiring to assassinate the President, being left entirely to the decision of the Attorney-General.

11. In none of the constitutional changes which have taken place in Ghana has it ever been suggested that the decision to prosecute should be taken out of the hands of the Attorney-General altogether and given to some other authority. Nor is the writer aware of

such a suggestion being made in other Commonwealth countries, except where the substitution of Director of Public Prosecutions or other institutional legal officer is substituted for a political Attorney-General. And yet there must be some competitors for consideration for this honour.

(b) Possible Alternatives:

(i) The Police

12. The Police conduct the investigations into reports of crime. A possible solution could be to extend their power so as to give them the ultimate responsibility for deciding which cases should be prosecuted or not. They already have some power in this respect when taking the initial decision on which cases have been successfully detected and should proceed to court. But it has not been suggested that their power be increased to make them exclusively responsible for the decision to prosecute. Perhaps their disqualifying feature lies in their close involvement in the investigation and identification of the alleged offender which often detracts from their ability to make an impartial assessment of the evidence, and in some cases, leads to the adoption of methods and practices calculated to secure a conviction of the accused person at all costs. The desirability for the separation of the investigation from the prosecution machinery which this observation suggests is strongly argued by a statement made by the Attorney-General of Ontario which is quoted in Professor Edwards' paper earlier referred to ³ The Attorney-General said:-

"...it is a contradiction, an incongruity to have a Minister of Justice charged with the administration of justice, who is expected to rule or act with an even, impartial attitude and to let no other attitude than impartiality, objectivity play a part, and to have him also with the other hand directing the investigating forces and the enforcement side which is necessary in the administration of justice."

The statement focuses attention on the degree of objectivity and impartiality which should go with the Attorney-General's decision to prosecute. And it underscores the undesirability in having this function discharged together with the function of investigation which may not require the same standard of objectivity and impartiality. And to that extent, illustrates the weakness of a body like the Police with their commitment to a case which they think they have solved being given the ultimate responsibility to decide on prosecutions. But that does not necessarily mean that ministerial responsibility for the Police as well as for the body dealing with prosecutions cannot be held by the same person. Assignment of responsibility for the Police to the Minister in charge of home or internal affairs rather than to the Attorney-General or Minister responsible for Justice is often a matter of tradition or practical management and not of principle.

13. This view draws some support from the Report of the Royal Commission on Criminal Procedure⁴ which recommends the establishment of a local prosecuting service for England and Wales. That recommendation, if accepted, would mean the creation of prosecution departments headed by "Crown Prosecutors" charged with the prosecution function in the local areas, while the Police is confined mainly to the investigative role. By that means, the roles of investigation and prosecution would be kept separate, although the roles of the Police and prosecutor would be interdependent. Recognising that there must be ministerial responsibility for the local prosecuting service recommended, the Commission considered which Minister should have it: the Home Secretary with his responsibilities for the Police, or the Attorney-General? The Commission's view was that the arguments in favour of each Minister were evenly balanced. Having the Attorney-General would mark the prosecution services' independence of the Police. But the Home Secretary could more easily absorb new responsibilities into his department. Principle would have ruled without question in favour of the Attorney-General. Putting the argument for the other side at all is evidence of the fact that the matter is capable of a solution which would combine the responsibilities in the hands of one Minister.

14. For most Commonwealth countries, the Attorney-General, or his counterpart of today, has developed from the colonial Attorney-General whose sole responsibility was for legal matters. Police duties encompass functions relating to aspects of internal security which do not come within that portfolio. Putting all home or internal affairs as well as the legal matters under one person may constitute too large a burden for him to carry. But it is not unknown to happen. Further, that those exercising the impartial judgement required for prosecution can properly direct and control the Police in their investigation of crime is evidenced by the call made by Attorneys-General and Directors of Public Prosecutions for

the involvement from an early stage of investigations of their officers to direct the Police on the nature and weight of evidence to be sought, if the case is to be successfully prosecuted in court. And if conflicts are to be avoided as to what must be done at any particular time in connection with a prosecution, it is necessary to indicate with clarity who has the overall authority in the sphere. Otherwise, the situation would occur, for example, where the Attorney-General's decision to proceed with or withdraw a case could be countermanded by the person responsible for the Police.

15. It is doubtful, therefore, that a proper exercise of the discretion to prosecute depends on the rigid separation of the investigative from the prosecutive machinery. What should be kept separate as far as possible are the actual functions of investigation and prosecution, with each function being allocated to different personnel.

16. The control by the Police of all prosecutions would also raise objections inspired by sensitivity to the dangers posed by the already wide powers of the Police and complaints about their abuse. It is sometimes heard that the Police improperly close case dockets on grounds such as "undetected", or "insufficient evidence", "no criminal offence disclosed", "offence trifling", or "complaint civil". Such complaints are coupled with a demand that better control ought to be exercised over the Police in these matters. These demands are not met not because they fall on unsympathetic ears but because of the sheer volume of work any system of outside control would produce.

17. Already, in some Commonwealth countries, the Police prosecute the bulk of cases tried by Magistrates' and Circuit Courts. Although they are, while doing so, acting on behalf of the Attorney-General, and subject to his directions, neither the Attorney-General nor his staff see the papers on most of these cases. The Attorney-General's control being exercised through his power to enter a nolle prosequi and call for the papers for advice and direction, if any error or wrongdoing is drawn to his attention. The argument may be put that if Police involvement in the investigation detracts from their objectivity and impartiality, and therefore disqualifies them from holding the ultimate responsibility for prosecutions, then why are they given such a substantial role in prosecutions? The answer is because of expediency and convenience. Countries which give this power to the Police do not, usually, have enough lawyers in the Attorney-General's department or at all to conduct the numerous prosecutions which have to be done. The cases prosecuted by the Police are of less serious nature. The Police carry on their prosecutions in court under the watchful eye of the presiding judge who is obliged to ensure that the processes of the court are not abused. Further, the control of the Attorney-General, however remote, means that if his attention is drawn to any irregularity or situation requiring intervention, he would exercise his powers of correction.

18. Some problems, however, could arise in connection with the relations of the Attorney-General and the Police. In countries with military-cum-police governments, for example, the enhancement of the political power of the Police may put them in a position to over-rule the Attorney-General in the higher councils of State. And they could defy, refuse to co-operate with or to subject their decisions on prosecutions to, the Attorney-General with impunity. That, of course, does great harm to the proper discharge of the objective function in the national interest. On another level, the desire of the Attorney-General's office to be put in the investigative picture at an early stage has led, in some cases, to schemes to have the Attorney-General's physical presence at the Police headquarters. The Attorney-General's representative so placed is thus on ready call to advise on matters when needed. But this may also create a problem of command when the representative becomes so identified with the Police that they may, when it suits them, want to run his opinion against the more detached view from the Attorney-General's office. The proper functioning of the machinery for prosecutions depend on the strict observance of relative powers of the Attorney-General and the Police.

(ii) The Courts

19. The courts' challenge to the Attorney-General is not really directed to becoming an alternative body performing the decision-making function. Their claim is to have the right to supervise the Attorney-General in his exercise of the discretion. Of this, more will be said later. But at this point, it is worth noting that the courts' general control over trials could raise a claim for an extension of functions to include the power to decide who should be brought before them. And indeed, there is one aspect of the prosecution function where the courts exercise a substantial influence, if not always a decisive one, on the decision of the Attorney-General or prosecutor before them with regard to the continuation of the case. Even though the Attorney-General's power to enter a nolle prosequi is unfettered, the

withdrawal or discontinuance of cases before the courts by prosecutors may be made subject to the court's consent. Sometimes, the courts refuse this consent. In Regina v. Emmanual⁵, for example, the Court of Appeal in England held that when a trial judge who was told by counsel that the prosecution was prepared to accept a plea of not guilty to a serious charge but guilty to a lesser offence had approved of that course, and the accused had so pleaded, there was not a material irregularity in the trial if the judge, on subsequently hearing of the background to the charges ordered that he would not accept the plea of guilty and that the trial of both offences should continue. And in the famous Yorkshire Ripper trial the judge declined to accept the plea of manslaughter by reason of diminished responsibility even though the Attorney-General was prepared to agree to it.

20. The courts' action in this respect is based on the inherent jurisdiction to prevent an abuse of their own processes. A jurisdiction which in the New Zealand case of Moewao v. Immigration Department⁶, Woodhouse J. described as "the independent strength of the judiciary to protect the law by protecting its own purposes and function", and Richardson J. said was a jurisdiction founded on two related aspects of the public interest: "ensuring that the courts' processes are used fairly by State and citizen alike" and "maintenance of public confidence in the administration of justice". But this broad jurisdiction has not been used to determine who should be brought before the courts.

21. In spite of the relations with prosecutions as described, the courts position as impartial arbiters between the State and the accused person is considered in the Commonwealth to be inconsistent with a role of active participation in the investigation or conduct of the State's case. As such the courts have not been put forward as an alternative to the Attorney-General as the authority to decide on the issues of prosecution.

(iii) The Ombudsman

22. The Ombudsman now poses a challenge to the Attorney-General's role of protecting the public interest. But that challenge does not really extend to the field of prosecution of offences. The Ombudsman was created not because of deficiencies in the Attorney-General's exercise of the discretion to prosecute. His office remedies deficiencies in the public administration system and supplements the forms of judicial redress by way of prerogative writs and orders available. He may have powers to order the prosecution of defaulting public servants. But this cannot be taken as serious competition to the powers of the Attorney-General.

(iv) The Jury

23. In the course of questioning the Attorney-General in the British Parliament over the decision not to prosecute in the Scottish rape case, one member (Mr. English) asked him, "Will he (the Attorney-General) also consider that it might be a good idea if we reverted to the ancient British system, which is still the American system, and allowed prosecution ultimately to be decided upon by a jury?" This may be a serious proposal where juries have discharged such functions before and may be relied upon to give satisfaction if given back the function. But in most of the new Commonwealth countries, juries have never performed such function. Indeed with even those limited functions which have been open to them, they have been attacked for not being the bulwarks of justice which British tradition makes them out to be. In these countries, this suggestion made by Mr. English would receive no serious consideration.

24. No viable alternative appears from the foregoing examination to the Attorney-General as the repository of the discretion to prosecute. A new office could be created to perform his functions. But such a creation would be no more than the Attorney-General by another name. The problems faced by the new office will not be dissimilar to the present problems of the Attorney-General. If that is so, then the question now deserving of examination is, if the discretion must be reposed in the Attorney-General, how can its proper exercise be ensured?

Control of the Discretion

(a) The Independent Attorney-General

25. The Attorney-General exercises his power on behalf of the people. And the democratic concept requires that he should be answerable to the people for that exercise. Britain fashioned the system of answering to the people through Parliament, their elected representatives. The test that the Attorney-General there has to meet is whether or not the power has been exercised properly in the public interest. And public interest must not

be confused with narrow political party advantage. The independence constitutions of the younger Commonwealth countries did not always conform to this machinery of accountability. While the test was the same, the attempt was made in these constitutions to avoid answering to Parliament or other representatives of the people. To begin with, the Attorney-General was a public officer, which may have been just a continuation of an office existing in the prior colonial administration. He was not a member of the legislature and therefore not normally present at its meetings to answer questions, unless there was a system of summoning public officers to answer before Parliament. But further, as is demonstrated by the case of Ghana, he was not answerable to the Cabinet which was the political body collectively answerable to Parliament for the administration of the country. In some countries, when the Attorney-General became a political appointee, his functions with regard to the conduct of prosecutions were handed over to a Director of Public Prosecutions or equivalent who was, like the public servant Attorney-General, protected from answering for his actions to the Cabinet or any other person. Thus, the Attorney-General appeared insulated from politics in the narrow sense of the word. There is no doubt about the wisdom and importance of conducting the prosecution function without fear or regard for political consequences of the kind discouraged. And any attempt to achieve this end is to be applauded. But as pointed out earlier, it is doubtful whether the device adopted provided this shield to the Attorney-General, so long as he had no tenure of office and could be removed by or through the instrumentality of the political authority. If that system is to be continued, a matter for consideration is whether the protection given the public officer would not be enhanced by putting him in the position of a judge with tenure, or some other tenure provisions be specifically devised for him. But such consideration ought to be given in the full awareness of the fact that conferment of tenure could amount to the conferment of absolute power on the officer. And whereas judges enjoy the same privileges, it must be remembered that the judicial system is designed to minimise errors through its appellate system which gives a greater number of judges the opportunity of pronouncing on the correctness of a decision, the higher it goes. And in any case judges normally give reasons for their decisions. All of which are safeguards which will not be present in the case of the independent Attorney-General. It must also be pointed out that the conferment of tenure does not do away altogether with other weaknesses as for example, where the public officer is interested in further preferment within the gift of the political authority.

26. Failing constitutional protection against removal, whether the public servant Attorney-General or Director of Public Prosecutions carries out his duties independently of the political authority depends on factors like the depth of respect paid for the independence of his office. For it is important not only that the Attorney-General or Director of Public Prosecutions should want to conduct the office without regard for political consequences but that it be appreciated by the government in power and the people that that is the way and manner in which the office should be conducted. Other factors would include how often interference had been resorted to before and with what consequences, how strong would public disapproval for the contemplated interference possibly be, how important to the political authority the case promoting interference is, the value or otherwise of the holder of the office to the political authority, and, last but not least, the character and integrity of the officer. For it is only this last factor which will determine whether considerations of personal advancement or cost will be cast aside when a decision, unpopular with the political authority, has to be taken.

27. But in any case, the question arises whether a person exercising a power on behalf of the people should not be answerable to anyone for the manner of exercise of the power. It puts great power in the hands of the authority concerned. A power which he may abuse, like any other human institution is liable to do. Then how does the State which gave him such power discipline him or correct the fault for the future? This argues for some degree of public accountability and explains why several countries have moved away from the system which confers the ultimate power of the decision to prosecute on a public servant.

(b) Responsibility to Parliament:

28. This or its equivalent is the usual control where there is a Parliament, and the Attorney-General is a political officer. That system was classically and most effectively demonstrated in the recent Scottish rape case mentioned earlier. Crown Counsel for whom the Solicitor-General was responsible had decided not to proceed with the prosecution of a case of rape and serious violence to the person against a number of youths. The reason for his decision was that he had considered a psychiatrist's report on the consequences to her health. Against that was the suggestion that there was adequate evidence otherwise available which implicated the youths and which ought to have been submitted for trial.

29. Solicitor-General Fairbairn was obliged to explain the circumstances and considerations for the decision to Parliament. In the course of the statement he had to apologise for making a statement to the press before his parliamentary statement. The answers he gave to members' questions were obviously found unsatisfactory because the decision in the case resulted in his resignation. A few days after the Solicitor-General's statement, the Attorney-General was himself questioned in Parliament about the wider implications of the exercise of the discretion. Concern was expressed by members for the possible consequences of recent decisions relating to prosecutions. One exchange was as follows:-

Mr. Nelson: Does my Right Honourable and learned Friend agree that it is of the utmost importance that the Director of Public Prosecutions should enjoy the full public confidence? Is there not a danger that, after recent cases, there may be a doubt on the part of the DPP and his officials about when to prosecute? If that were to be the case, would it not be regrettable? Will he give the House an assurance that the DPP will continue to base his policy on a careful analysis of the evidence and a balanced assessment of where the public interest lies?

The Attorney-General: I am sure that the Director of Public Prosecutions always applies those principles. The criticism that is levelled at him is that he does not prosecute in enough cases.⁷

Then later:

Mr Stokes: In any discussions that my Right Honourable and learned Friend has with the Director of Public Prosecutions, will he bear in mind that protection of the public from violent crime must be one of the foremost considerations in his mind if the Government are to continue to have the confidence of ordinary law-abiding citizens?

The Attorney-General: I have always taken the view that violence is one of the worst crimes in the calendar. When I sat in a judicial capacity I always made certain, so far as I could, that the sentence reflected my views about the crime.⁸

This last exchange is significant when related to the previous questioning of the Solicitor-General of Scotland during which it had been suggested that the manner of the exercise of the discretion in the rape case would encourage the commission of crimes of that nature, and especially to the taunt of Miss Jo Richardson (Barking) that the decision gave rapists licence to rape and cut up their victims, because they may then go scot-free. A charge which moved Mr. Fairbairn to reply that. "This is a unique case, unique in all my experience of such cases in the High Court".⁹

30. The case shows Parliament, the representatives of the people, anxious to understand the underlying reasons for the exercise of the discretion, expressing opinion as to what they thought some of the considerations which should guide the Law Officers should be. And their view of the possible consequences of a decision if that decision is wrongly taken. That is one form of control of the discretion found in parliamentary democracies.

(c) Responsibility through the Press:

31. It will be recalled that Parliament, in the Scottish rape case, expressed its displeasure of the Solicitor-General for making a statement to the press on the case before his statement to the House. But it is not unknown, even in parliamentary democracies, for a statement on the exercise of the power to be made by the responsible Law Officer to the press. The New Zealand Attorney-General in one such statement (see the Appendix) gave comprehensive reasons for declining to intervene to stop prosecutions before the courts involving industrial action taken by the accused. And presumably if there is no Parliament, as is the case from time to time in some Commonwealth countries, calls for explanation and statements to the press become the only effective alternative for keeping check on the exercise of the discretion. Such was the situation when the Attorney-General of Ghana, Mr Koranteng Addow, felt obliged in October 1976 to explain why he had withdrawn the case against the accused persons in the Republic v. El Helou and Others.¹⁰

32. The volume of decisions makes it impossible to contemplate the explanation of any significant number of instances of the exercise of the discretion. But the above examples show that there are situations when it would be unavoidable that the Attorney-General should explain. Situations where there is doubt or suspicion about the decision would make

this necessary. Pressure for the explanation may come from the press, or if there is a Parliament, from that source. And it may be advisable that in the types of cases which are likely to arouse this suspicion or doubt, the Attorney-General be prepared in advance with his explanation if it should be called for. Cases where members of the prosecutor's own department, for example in the Police, are involved, cases involving persons connected with the administration of justice, for example lawyers, cases involving high ranking officers of State or public figures or politicians supporting government, cases involving the rich, indeed, all cases which might give rise to the charge of protection of one's kind, the powerful or the rich. Cases in which the Attorney-General should be anxious in reassuring the public that the decision, especially if it is a decision not to prosecute, was taken fairly and without favour or prejudice.

(d) The Attorney-General and the Courts:

33. Parliament and the press are not the only institutions which seek to represent the public interest in calling for explanation of the Attorney-General's decisions. Some recent pronouncements of the judges have been directed towards that end. They have gone as far as to claim a power to exercise some supervision over the Attorney-General. The pronouncements have not been aimed particularly at the discretion to prosecute. But they have been wide enough to apply to it. Lord Denning who has led this assault on the Attorney-General's powers put the position with regard to relator actions in Attorney-General (on the relation of McWhiter) v. Independent Broadcasting Authority,¹¹ this way:

"... I am of the opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself."

It was a statement advocating the circumscription of the Attorney-General's hitherto unfettered discretion to grant or refuse consent in these matters. But earlier on in that same judgment, Lord Denning, in examining previous authority, had said this:

"It is settled in our constitutional law that in matters which concern the public at large the Attorney-General is the guardian of the public interest. Although he is a member of the government of the day, it is his duty to represent the public interest with complete objectivity and detachment. As the guardian of the public interest, the Attorney-General has a special duty in regard to the enforcement of the law."

And later:¹²

"In exercising his functions, the Attorney-General is not subject to the control of the courts. It was so laid down by the Earl of Halsbury LC., in London County Council v. Attorney-General,¹³ when he said: '... but the initiation of the litigation, and determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.'"

The Master of the Rolls pressed on with his claim for the control of the Attorney-General's powers by the courts in the famous case of Gouriet v. Union of Post Office Workers and Others.¹⁴ After Attorney-General Silkin had stated the position of the Law Officers as independent of control or supervision by anyone including the courts, Lord Denning said:¹⁵

"It has been submitted that the discretion of the Attorney-General is an absolute discretion which will not be enquired into by the courts. I agree with this when he has exercised it by granting his consent to his name being used. Even if he gave his consent in a trifling or unsuitable matter, the courts will not review it. That was made clear by Lord Halsbury LC., in his oft-quoted dictum in London County Council v. Attorney-General ¹⁶ in the House of Lords. But that dictum does not cover a case when he has refused his consent. I am sure that Lord Halsbury LC., did not have such a case in mind, for the simple reason

that it had never arisen for consideration at that time, and it has never arisen since until now. So it falls to us to consider it. The Attorney-General tells us that, when he refuses his consent, his refusal is final. It cannot be over-ridden by the courts. He is answerable to Parliament, and to Parliament alone. This is, to my mind, a direct challenge to the rule of the law."

The right of the citizen to question the exercise of the Attorney-General's discretion before the courts is so widely stated here that had it prevailed it could have been used to question every exercise of the discretion. If it results in the case coming before the courts, then the courts would be satisfied that it had been properly exercised. But if the result is against bringing the action before the courts, then the courts must know why in order to determine for themselves whether the discretion had been properly exercised. It would have left little of the discretion in the hands of the Attorney-General. However, Lord Denning's view on this did not prevail in Britain. Gouriet's case as decided by the Court of Appeal was reversed by the House of Lords and the Attorney-General's position vindicated.

34. An attempt to subject the exercise of the Attorney-General's discretion to the direction of the courts was also made in Ghana in the case of the Republic v. T.O. Asare.¹⁷ Section 179 of the Ghana Criminal Procedure Code provides that if it appears to any court at any stage of a summary trial of an offence which is also punishable upon indictment that the case is unsuitable for summary trial, the court has to inform the Attorney-General of this opinion, and adjourn the proceedings for 15 days to await his reply. If within that time the court is informed by or on behalf of the Attorney-General that it is proposed to prosecute the accused upon indictment, the court will switch over to the procedure laid down for preliminary enquiries into cases to be tried upon indictment. For this purpose all trial courts are given the power to hold preliminary enquiries. Should the Attorney-General not notify the trial court of his intention to take the case on indictment, the court upon resumption of the hearing has to proceed with the summary trial of the offence. The trial judge in Asare's Case, Anterkyi J., had taken the view that when the court informs the Attorney-General of its opinion, the Attorney-General, as an officer of the court, "must accept the opinion of the court and must proceed to the alternative procedure by indictment as borne by the opinion of the court and communicated to him;... it is, in this respect, the opinion of the court that carries, and not the desire of the Attorney-General." On appeal,¹⁸ the Ghana Court of Appeal held that the learned judge was wrong.

35. The Australian courts have also had recent opportunity to take a stand on the right of the courts to review the Attorney-General's decision to prosecute or not in a criminal case where those powers are dealt with by statute. In Alexander Barton and Another v. The Queen and Another,¹⁹ the High Court in the case where the appellants had alleged that the exercise of the Attorney-General's power had been for an improper and unlawful purpose, capricious or arbitrary, or at the direction of the Prime Minister of New South Wales, held, amongst other things, that the purpose of section 5 of the Australian Courts Act 1828, which authorised the prosecution of criminal offence by information in the name of the Attorney-General, was to arm the Attorney-General of New South Wales and Crown Prosecutors appointed by him with a power in all respects similar to that enjoyed by the Attorney-General in England and to extend the exercise of that power to all offences; that in cases where a statute confers an administrative discretion which is unlimited in its terms, the Court must concede to the repository a discretion unlimited by anything but the scope and object of the statute; that the courts cannot review the Attorney-General's exercise of the prerogative power to enter or refuse a nolle prosequi; that it cannot be said that the existence of judicial review of the Attorney-General's decision to prosecute by way of ex officio indictments is essential to the proper administration of justice, for the courts have other powers, such as the power to prevent an abuse of process, to ensure a fair trial.

36. Whether based on a better protection of the public interest, on natural justice or the fact that the Attorney-General as an officer of the court ought to carry out the wishes of the court, the judicial campaign to extend the control of the courts over the Attorney-General in the exercise of his discretion had not prospered. It has been killed by the courts' own hands. And indeed, there are questions which make the assumption by the courts of a supervisory role over the Attorney-General, difficult to justify. Who in turn is to supervise the courts in the exercise of this power? The fact that they criticise the Attorney-General is an admission that the Attorney-General like all human institutions, including the courts, is liable to err. That the

exercise of judicial discretion is allowed to rest finally with the highest court of appeal in the country is not an argument in favour of judicial infallibility, but an expression of the national interest in all litigation ending somewhere. What better justification, therefore, would the courts have for the supervision of an Attorney-General exercising a power on behalf of the people, when the institution of the courts is usually based on the premises that they should be independent of the people and not be subject to the opinions and pressures of the day?

(e) The Private Prosecution:

37. This could be put forward as the means whereby a case which the Attorney-General refuses to bring before the courts could nevertheless be prosecuted. But its use is limited. The difficulty of a private individual bringing a case before the courts by relator action where the Attorney-General refuses himself to take action or to lend his name to the individual's court proceeding has been exposed by the British House of Lords in Gouriet's case. Although it was said that the private prosecution had been used only three times this century before in Scotland, the rape case eventually took this route. But private prosecutions may be started in some countries only with the permission of the courts, a measure, no doubt, taken as a safeguard against frivolous prosecutions. Some other Commonwealth countries, however, give the right to the aggrieved person to proceed by way of private prosecution without permission either of the Attorney-General or the court. Even then, the procedure has its limitations. It may be confined by the law to summary trials and, therefore, in effect, only to less serious crime, simply by the fact that the indictment must be presented by the Attorney-General. And the more serious offences should be tried upon indictment. Further, even though the private prosecution may be started without permission of the Attorney-General, he has the right to step in at any time and take over the prosecution. Upon entering into the proceedings, he may determine it.

38. This recently happened in Raymond v. Attorney-General.²⁰ A person having changed his plea, was convicted with others of conspiring to pervert the course of justice, and was sentenced to imprisonment. After the committal proceedings and before the trial he laid informations alleging perjury against one of the Crown witnesses. The Director of Public Prosecutions was notified, and exercising his statutory powers, a member of his office appeared in court, explained that the evidence had already been canvassed at the committal proceedings, that the Director of Public Prosecutions was satisfied that the proceedings were vexatious and offered no evidence. The private prosecution, therefore, hardly affords a sure resort if the Attorney-General refuses to prosecute a case in court.

The Discretion Itself

39. What, then, is the substance of this discretion? Broadly speaking, it is to consider evidence collected through investigation and to decide whether in the public interest any crime disclosed should be prosecuted in court. The public interest requires that crimes be suppressed and that criminals be punished. The determination of guilt and the punishment therefore has been assigned to the courts. The question which causes difficulty is whether public interest also requires that all crimes disclosed must go through this court process, and if not which should be withheld. Do circumstances ever exist which would make the harm done to the national interest by a prosecution greater than the identification and punishment of the criminal?

40. The first point considered by the prosecutor is whether on the evidence discovered, there is a case to be put before a trial at all. Is the law satisfied as to the ingredients of the crime? Is the evidence sufficient to justify a prosecution? If the answer to these questions is a definite no, then no matter how reprehensible the conduct of the person involved, no court of criminal justice will convict him, and, therefore, there is no point in sanctioning a prosecution. Cases do occur where the law is not so clear. In which case the prosecutor has to take a hard decision whether to proceed with the prosecution or not. When the Attorney-General of Ghana made his press statement on the Helou case, this was the basis of his decision not to prosecute. As he said: ²¹

"Looking at the evidence which the prosecution had to tender and having regard to the law as it stands, and all other relevant factors, I decided that the prosecution would be inadvisable. I accordingly endorsed the recommendations of the Director of Public Prosecutions that the case be withdrawn."

The statement shows the decision being taken at the highest level. That press criticism of the decision continued after the explanation indicates that even on a question of law, on which the Attorney-General can claim superior expertise, his decision must command acceptance by the public. On this account, and because a Law Officer may feel that he would be open to unjustifiable and uninformed criticism if he followed his better judgement and ruled against prosecution, he is sometimes disposed to let a case proceed so that the court takes the responsibility of acquitting the accused.

41. In considering the evidence, there are at least two standards of satisfaction which a prosecutor may apply. These are brought out in the Report of the Royal Commission on Criminal Procedure, when it stated that under the present practice, the prosecutor, when deciding whether or not to launch criminal proceedings, has to satisfy himself that there was at least a prima facie case, the existence of which, if believed by a jury or magistrate's court, would justify a verdict of guilty. The Director of Public Prosecutions in England, however, applied a somewhat more stringent test, which was, whether there was more than a 50 per cent chance of conviction; that is, that it was more likely that there would be a conviction than an acquittal. The Commission recommended the adoption by all prosecutors of the latter test.

42. The "51 percent rule", as the Director of Public Prosecution's test has come to be known, may be more easy to state than to apply. But questions of sufficiency of evidence either to determine the factual issue or to satisfy the legal requirement of the commission of a crime may not be the most difficult questions the prosecutor has to decide. Take the Scottish rape case. It was quite obvious from Mr. Fairbairn's statement that the state or standard of the evidence was not the foremost consideration which led to the decision not to prosecute. And some of the most difficult problems likely to arise are those in which two equally conscientious officers may take different views of the public interest in the particular case.

43. The basic principle which governs the decision to prosecute was, as pointed out by Professor Edwards, stated by Sir Hartley Shawcross when Attorney-General in a speech to the British House of Commons in 1951. He then said, "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should ... prosecute ... whenever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest. That is still the dominant consideration." This would be the position of Commonwealth countries both old and new which have followed the British tradition in prosecutions. But what constitutes the public interest? That is the nub of the problem. There are certain basic considerations which every right thinking citizen would agree qualify as in the public interest. Considerations involving the protection of national security, relations of the State with a foreign State which may be harmed by a prosecution, protection of the constitution, are examples of this kind. Beyond these certain matters, argument develops over which course of conduct is or is not in the national interest. Such considerations as the staleness of the case, the youth or old age or mental age of the offender, and the relationship between the offender and the victim, all of which are legitimate considerations, may turn out to be relative factors, depending on their weight in the scales tilting a decision one way or the other on the attitude and make-up of the particular officer responsible for the case. The factors taken into account in arriving at the decision may also vary with the individual officer.

44. Public reaction and the known attitude of the courts to particular crimes may influence the decision. In a country where polygamy is the norm rather than the exception, the offence of bigamy may remain on the statute book as a dead letter. That juries almost invariably bring in a verdict of not guilty in a rape charge unless the evidence of violence to the victim is incontrovertible and of the strongest may raise the percentage certainty which the prosecutor may require before proceeding with the case. Confidence in the courts to return a fair and proper verdict on the evidence in a particular type of offence will naturally colour the consideration given to whether or not the charge be brought before a court. In some countries, such lack of confidence in security cases has been used as "justification of the institution of preventive detention."

45. But whatever the considerations taken into account, the rule is widely accepted, at least in countries with a multi-party system of government, that the national interest should not be construed to include the narrow political interests of persons or the party in power. Professor Edwards in the Modern Role of the Attorney-General puts the point nicely when he draws the distinction between the types of political considerations in the following passages:²²

"...anything savouring of personal advancement or sympathy felt by an Attorney-General towards a political colleague or which relates to the political fortunes of his party and government in power should not be countenanced if adherence to the principles of impartiality and integrity are to be publicly manifested. This does not mean that the Attorney-General or the Director of Public Prosecutions should not have regard to political considerations in the non-party political interpretation of the term "politics". For example, the maintenance of harmonious international relations between states, the reduction of strife between ethnic groups, the maintenance of industrial peace, and generally the interests of the public at large are legitimate political considerations in deciding whether (or when) to initiate criminal proceedings and, an even more sensitive question, whether (or when) to discontinue a criminal prosecution."

And then later:

"The basic question... is who should be the final arbiter of legitimate political considerations affecting prosecutions, the Cabinet, the Prime Minister or Chief Executive, or the Attorney-General (or Director of Public Prosecutions if the constitution has made the office truly independent). In my view, it is not only proper but desirable that the Attorney-General (or the DPP) should exercise both legal judgement and an appropriate degree of political sensibilities when assessing the weight to be given to relevant political considerations of the legitimate kind to which I have referred earlier. Where matters of high state or the general public interest are involved it makes eminent sense for the Attorney-General to consult his ministerial colleagues, including, if necessary, the Chief Executive, with a view to estimating their particular contributions to an understanding of the wider issues that may be involved."

Incidentally, these passages also go towards explaining why some countries object to a public service Attorney-General or Director of Public Prosecutions who is not accountable to any authority as the repository of the discretion under discussion. What sanction would there be, they would ask, if the Attorney-General or Director of Public Prosecutions refuses or omits to consult? Who has the responsibility for dealing with the political consequences of a wrong decision? The political authority whose responsibility it is to cope with whatever results flow from the decision may complain with some justification that it is made to carry a burden which is not of its making. And even where the Attorney-General is disposed to consulting on these matters, there may be some truth in the further complaint that if he is a public servant, he may not be so nicely attuned to recognising with sufficient alacrity and effectiveness a case with potential for damaging political consequences in a wider sense.

46. Another point which arises from the perceptive observations of Professor Edwards takes us back to the argument being made earlier on in this paper that however well the general rules are stated, their application has to be by individual personalities who may legitimately arrive at different conclusions after a proper consideration of the same problem. Professor Edwards mentions the consideration of maintenance of industrial peace as a proper subject to take into account. The New Zealand Attorney-General had this concrete problem in the cases which resulted in his press statement attached in the Appendix to this paper. Recalling the information that discussion by the Cabinet of the initiation and extent of criminal prosecutions was a common occurrence in New Zealand,²³ the press statement is of interest otherwise, because it says, amongst other things, "As required by such cases, my Cabinet colleagues have left it entirely to me to make the decision and have not interfered in any way; particularly bearing in mind the obvious overtones of this issue I am very grateful for that fact." But the relevant question at issue at this point is, would every Attorney-General faced with this particular type of problem mindful of the threat of further industrial strife, have decided the matter as the Attorney-General for New Zealand did? And if not, could an equally well-argued statement not be made for the opposite decision?

47. Few countries, it is surmised, have any guidelines issued on the various factors and the degree in which they weigh in the decision-making scales to the officers

dealing with the problem or to the public. Even though the Police conduct the bulk of prosecutions as agents of the Attorney-General, it is unlikely that any such guidelines, or guidelines on their relations with the Attorney-General, or on how to conduct the cases for the prosecution, would ever have been issued to them by the Attorney-General. And, although precise and comprehensive rules may be difficult, if not impossible to state, some general rules and observations are possible and necessary.

48. For example, it is believed that the public expects that the more difficult the decision, the higher the rank of the officer who should take the decision. But, presumably, in many cases the level of consultation leading to a decision is not a matter of written rule but of convention and intuition. Here again, it may be argued that not all problems announce their depth or complexity in advance. Nevertheless, a great majority can be regulated to some extent by rules. At the risk of being tedious, one more lesson may be drawn from the Scottish rape case. It would appear that a substantial reason for the attack of Members of Parliament on the Solicitor-General lay in the fact that the decision not to prosecute on the grounds given, namely, a ground not related to a usual legal question, especially having regard to the circumstances and gravity of the case, was taken not by himself or someone even higher, if that is possible, but by the Crown Counsel. The further implication in the Solicitor-General's statement that even more serious offences, such as murder, had been dropped without reference to the Law Officers, was in the circumstances bound to cause more anxiety to his inter-locutors. To them, it was quite disquieting that the system was such that very serious cases could be withdrawn without the reasons ever being known or approved by the responsible political officer.

49. This raises the question of how much of the day to day work of the Attorney-General's department ought to be known to him personally or to the highest officer responsible for prosecutions. No doubt the volume of work would make personal knowledge of the majority of cases impossible. The complaint implied in fact that Crown Counsel may take this most serious decision, may be levelled in many countries where prosecutions for the most serious cases, even murder cases are disrecommended, withdrawn or ended by the acceptance of a plea for a lesser offence, regularly by officers of that rank without prior reference to higher authority. The charges themselves may be the most serious in the criminal calendar. But if the reasons for the decision are more or less technical and non-controversial, this can hardly raise much public concern. Where, on the other hand, the reasons for the decision are "unique" or even unusual, then some system ought to be devised to ensure that the decision is taken or has the approval of the highest responsible authority.

50. This argues for the formulation and dissemination amongst prosecutors of a set of guidelines giving the types of cases and the considerations which should alert them to referring the matter to higher authority for decision. And in view of the public interest in the matter, consideration should be given by all Attorneys-General to the publication generally of a full statement on prosecution policy. The (1982) 8 Commonwealth Law Bulletin at page 826 notes the announcement of the Federal Attorney-General of Australia that he will be tabling in the Senate a statement setting out the Australian Government's prosecution policy, which will spell out the general principles which the Attorney-General and the officers of his department would apply in the institution and conduct of prosecutions. "The policy will deal with such questions as the decision to prosecute, the conduct of cases, questions of indemnities for witnesses and private prosecutions."²⁴ Unfortunately, the policy statement was not available to the writer before the completion of the paper. It is, however, hoped that the statement will be available to the participants of the Meeting. The idea behind the statement is laudable, and should be recommended to other Commonwealth Law Ministers. The Australian Federal Attorney-General thought it advisable to discuss aspects of the policy with legal authorities in the United Kingdom and the United States. It is suggested that a Law Ministers' Meeting would afford an ideal forum for consultations of this kind to determine the need for and the contents of such a document. The belief expressed by the Attorney-General that it was important that Federal Officers engaged in prosecutions should have clear guidelines before initiating prosecution proceedings, and equally important that every citizen should be aware of these matters, has validity far beyond the shores of Australia. In saying that, "I do not expect that the policy guidelines will cover every possible situation. However, I hope that by making the prosecution policy public, people will better understand why these decisions are made," the objectives and limitations which the Attorney-General recognised, are, it is submitted, realisable and realistic.

Conclusion

51. The case for the education of the public, law students and secondary school students on the nature and the office of the Attorney-General has been made in Professor Edwards paper earlier mentioned. That case is emphasised by the discussion in this paper. With particular reference to the decision to prosecute, one of the means open is the publication of the guidelines on prosecution policy. It is necessary not only to educate the ordinary citizen on this matter but also members of the government. Further, there is the need to inform and educate all subordinate officers, the Police and other personnel conducting prosecutions on their duties and their relations with the Attorney-General. The guidelines to these assistants and agents must attack the problem of sensitivity to the types of cases which need to be referred to higher authority and anticipation of public anxiety over particular decisions. The guidelines issued to the prosecutors will necessarily have to be more detailed and cover a wider field than the policy statement which is issued to the public. If the decision to prosecute is based on the public interest then everything must be done in getting the public to appreciate what is being done on their behalf. For it is through that that public confidence in the system can be retained.

FOOTNOTES

1. For the statement and questions, see Hansard Vol. 16 No. 40, 21 January 1982.
2. 1977 Meeting of Commonwealth Law Ministers, Minutes and Memoranda (1977 Meeting) p. 196.
3. Ibid p. 199, para 11.
4. Published, January 1981; Cmnd.8092.
5. The Times, 20 October, 1981. (1982)8 Commonwealth Law Bulletin 102. But see The Times, 31 July 1975, the report entitled "Judge and Prosecution in Dispute over Rape Plea" in which in spite of protests from the judge, the plea of not guilty of rape but guilty of unlawful sexual intercourse was accepted by the prosecutor. And see also the Ohene Djan Case in Ghana, Amissah, Criminal Procedure in Ghana, pp. 111-113 and the notes at pp. 165 and 166.
6. (1981) 7 CLB 96.
7. Hansard Vol. 16 No. 42, 25 January 1982, pp. 611-612.
8. Ibid, p. 612.
9. Hansard Vol. 16 No. 40, 21 January 1982, p. 428.
10. See Amissah, op. cit. p. 23.
11. [1973] 1 All E.R. 689 at 698.
12. Ibid at 697.
13. [1902] A.C. 165 at 169.
14. [1977] 1 All E.R. 696.
15. Ibid p. 715.
16. See note 12 above.
17. (1968) G.L.R. 93.
18. (1968) G.L.R. 727.
19. (1981) 7 CLB 527, 5 December, 1980.
20. [1982] 2 W.L.R. 849 (C.A), (1982) 8 CLB 977-978.

21. See note 10 above.
22. See note 2 above, pp. 201 and 202.
23. Ibid p. 202.
24. (1982) 8 CLB 826.

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**New
Zealand**

Exercise of Attorney-General's discretion to stay proceedings

Two industrial disputes resulted in a number of arrests and prosecutions. Several interested parties asked the Attorney-General to intervene. In a press statement he gave his reasons for declining to do so—

I have carefully considered the requests that I should stop the prosecutions in the Ravensdown and Mangere Airport cases; and I have this afternoon notified both the Federation of Labour and Ravensdown Fertilizer Cooperative Ltd. that in neither case am I prepared to stay the proceedings.

The result of this decision is that each prosecution will continue, the law will follow its course and that matters of innocence or guilt will be decided by the appropriate court.

Because of the very widespread public interest in the matter I am taking the unusual step of giving the reasons for my decision. I want to emphasise that in so doing I am in no way commenting upon, or prejudging, the merits of any of the prosecutions. That judgment is for our Courts; it is one of the cornerstones of our democratic system that they are, and must be seen to be, completely independent of any outside agency.

In reaching my decision I have considered very full reports given to me by the Police and the Aviation Security Service and the advice of the Solicitor-General. Naturally, I have also listened to the views of the Federation of Labour, the Employers Federation, my colleagues and advisers and, of course, the many members of the general public who have been in touch with my office. However, the final decision on the matter has been mine alone. As is required in such cases, my Cabinet colleagues have left it entirely to me to make the decision and have not interfered in any way; particularly bearing in mind the obvious political overtones of this issue I am very grateful for that fact.

Before dealing briefly with each of the two cases it is appropriate that I should make some general comments as to the circumstances in which stays of prosecution might be granted. The Attorney-General as a Law Officer of the Crown has wide powers to stay a criminal prosecution; in practice these powers are exercised infrequently by the Attorney himself—more often by the Solicitor-General. A good example is where a person has been tried on several occasions and the jury has not been able unanimously to agree on a verdict. In such situations it is commonly accepted that after several trials (usually two or three) the interests of justice are not served by putting the accused on trial yet again. Disagreements by successive juries might well be taken as an indication that the charges against the accused cannot be proved beyond reasonable doubt, and thus the common practice is to stay any further prosecution.

Such stays are entered only if it is in the interests of justice to do so and the action is never taken without careful consideration. The same approach must apply in respect of those thankfully rare cases that are regarded as more properly to be decided by the Attorney-General.

Clearly the interests of justice touching as they do the interests of the whole community involve something more than the mere convenience of two parties who, for whatever reason, now find it more to their preference that the rules of law and the ordinary principles of the legal process should not apply to them. In general terms I do not regard seeking to avoid the consequences of the law as a satisfactory way of resolving an industrial dispute. If I were to accept the proposition underlying that approach the general public might well conclude that every time the law is broken in the name of industrial action or of other protest action those who so act will be able to have their prosecutions stayed merely by threatening or exerting further pressure on the community.

The real ground which has been urged upon me for staying these prosecutions is that the Unions and the FOL disagree with the law under which the prosecutions have been brought. In the airport case even that may not be so. The FOL does not disagree with rules to preserve airport safety and security—it merely does not want them to apply to picketers.

Some public statements have indicated that industrial action would only be withdrawn if I stayed these prosecutions. I must say that that is not, and never could be, an acceptable proposition. It was made very clear by the Prime Minister following the meeting with the Federation of Labour on Tuesday that any decision by me was entirely separate from the issue of peaceful and legal picketing or any possibility that the law relating to this activity might be changed. In short, the decision that I make in this matter as Attorney-General is not and never could be the subject of a "deal".

In the Ravensdown case 33 people have been charged under s. 33 of the Police Offences Act which makes it an offence to use unlawful intimidation or violence with a view to restricting the freedom of another. The specific circumstances to which the prosecution are related involve an allegation that engineers were prevented from entering the Ravensdown works to attend to a sulphuric acid plant said to be potentially dangerous to life and property.

In this case the request that I should stay the proceedings has in fact been made by the Ravensdown company itself but is put forward not for any reason associated with the general interests of justice, but rather because the company has achieved its immediate purpose of obtaining access for its employees to the premises; it has in fact made its request to me in terms of the subsequent settlement bargain entered into with the Union. In other words, it now suits the convenience of both company and Union that the prosecutions should be stayed. As I have made clear, the interests of justice go well beyond such considerations.

I am also mindful of the fact that even if s. 33 of the Police Offences Act was not part of our law such action on the part of picketers could well still constitute an offence against the general criminal law. To stay a prosecution in those circumstances would to my mind be most inappropriate.

The 48 prosecutions arising from the arrests at Mangere Airport on Tuesday have been brought under regulation 15(2) of the Civil Aviation Regulations which make it an offence to "trespass on any part of an aerodrome beyond the areas set aside for public use".

New Zealand as a signatory to the conventions of the International Civil Aviation Organisation is required to take all practical measures to prevent unlawful interference with aircraft and facilities. Similarly the role of the Aviation Security Service which was involved in the Auckland arrests is to maintain airport security. The Federation of Labour clearly understands those facts.

The allegation on which these prosecutions are based (which again must be finally tested in Court) is that those arrested were in a place beyond the areas set aside for public use. The charges can therefore be seen to be directly related to the important purposes which the regulations are meant to achieve.

Although it has been suggested to me that those arrested were not hindering normal airport activities and that alternative measures to remove them from the area were not used by the authorities, neither claim is confirmed either by the Police and Aviation Security reports or from my viewing of a lengthy television film of the events leading up to the arrests (which particularly showed first where they took place and secondly made clear the warnings that were given prior to the action being taken). Obviously an incomplete television film would be an insufficient basis for any decision as to innocence or guilt; however it is one of a number of factors which would make it very difficult if not impossible for me to grant any stay of prosecution, because what it shows is directly at variance with the claims made to me on behalf of the arrested persons. I am also informed that the arrival of at least one flight at Mangere Airport was impeded by the actions of picketers.

Quite apart from that I have information which indicates that at least some of the picketers started out with the knowledge that they might well be arrested and that they appeared to be not unwilling that that should happen. It is hard to suggest that to stay prosecutions in such circumstances would be in the interests of justice. I can in fact find no good reason on which I could base a decision to stay these prosecutions. In those circumstances to do so would be the most transparent expediency.

The role of Attorney-General carries with it many difficult responsibilities, some of which require that I separate myself from the normal process of collective Cabinet decision-making but which nonetheless have very real political overtones. Thus the decision that I have made today has not been easy. However I do not intend to allow the office of, or the powers given to, the Attorney-General to be used whether by employers or employees or anyone else as a convenient means of avoiding the proper legal consequences of their own actions. These are criminal proceedings. There must be no place to which the criminal law and its consequences cannot reach—whether it be to Parliament, the streets, the homes of New Zealanders, the boardroom or the picket line. To seek to have the law changed is one thing; to break it with impunity, for whatever reason, is another.

**THE DECISION TO PROSECUTE: GUIDELINES
PRESENTED TO THE AUSTRALIAN FEDERAL
PARLIAMENT ON BEHALF OF THE FEDERAL
ATTORNEY-GENERAL**

Memorandum by the COMMONWEALTH SECRETARIAT

In December 1982 the Australian Federal Attorney-General, Senator the Hon. Peter Durack, QC, arranged for guidelines to be presented to the Federal Parliament setting out the basis on which the decision to prosecute, and other discretions in the prosecutorial process, should be exercised.

2. The purpose was to give guidance to officers of the Attorney-General's Department and other officers engaged in the prosecution of Federal Offences, and also to make the public aware of the considerations upon which these decisions are made.

3. As the annexed document shows, the Attorney-General intends to follow these guidelines himself as First Law Officer and to require other Federal officers engaged in law enforcement to do so.

ANNEX

PROSECUTION POLICY OF THE COMMONWEALTH

**Guidelines for the making of decisions
in the prosecution process and the
considerations upon which these
decisions are made**

Introduction

The Attorney-General's ministerial responsibility for the criminal justice system of the Commonwealth, as part of his general responsibility for law and justice, is clearly one of the most important features of his portfolio. In this connection I have been conscious for some time of the need for a clear statement of the prosecution policy of the Commonwealth.

2. It is important, I believe, not only that officers of my Department and other officers of the Commonwealth engaged in the prosecution of Commonwealth offences should have clear guidelines for the making of decisions as to prosecution action (whether it is the decision to prosecute or any other decision in the prosecution process) but also that the public generally should be aware of the considerations upon which these decisions are made. The Law Reform Commission in its recent Interim Report on Sentencing made observations to similar effect.

3. I have therefore decided that I should state the guidelines on prosecution action that I shall myself follow as First Law Officer and that I require to be followed by officers of my Department and other officers of the Commonwealth engaged in law enforcement. The principles set out in the statement do not, I believe, represent any substantial departure from those that have in the past guided persons responsible for Commonwealth prosecutions but this is the first time, so far as I am aware, that these principles have been gathered together in one statement.

4. I shall deal with the matter under the following headings:

- (i) who may institute and conduct Commonwealth prosecutions;

- (ii) the decision to prosecute;
- (iii) line of authority within my Department;
- (iv) the conduct of cases;
- (v) the granting of indemnities or pardons to witnesses;
- (vi) agreements to terminate prosecutions in return for guilty pleas to fewer than all charges or to lesser charges;
- (vii) the use of the Crimes Act 1914 in place of the provisions of a particular Act;
- (viii) the prosecution of minors;
- (ix) no bill applications;
- (x) Special Prosecutors and the National Crimes Commission
- (xi) conclusion.

(i) Who may institute or conduct Commonwealth prosecutions

5. The right of the private citizen to initiate a prosecution for a breach of law has long been regarded as "a useful constitutional safeguard against capricious, corrupt or biased failures or refusal of authorities to prosecute offences against the criminal law": Lord Diplock in Gouriet v. H.M.'s Attorney-General [1977] 3 All. E.R. 70 at p.97. This right is recognized by section 13 of the Crimes Act 1914 which provides:

"13. Unless the contrary intention appears in the Act or regulation creating the offence, any person may -

- (a) institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or
- (b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction."

6. Nevertheless, while this is the position in law, in practice, all but a very small number of prosecutions are initiated by officers of the Government or its agencies. The division of responsibilities among the Ministers of the Government means that responsibility for initiating investigative action in relation to a suspected offence ordinarily rests with the Department administering the relevant Act or regulation and, of course, only a limited number of Commonwealth laws are administered by my Department. Except in cases where a Department maintains its own investigation branch, investigations are usually carried out by Australian Federal Police. Putting aside cases of a very routine nature, where the prosecutions are handled by the Department concerned, a report on the investigation if an offence appears to have been committed, should be submitted to my Department; there it will be examined to determine whether a prosecution should be initiated. I should mention that my Department is available to provide advice to police and other investigation officers at any stage of an investigation where there is need for legal advice or legal policy guidance. In complicated or especially difficult cases, it will be desirable that advice of this nature be sought and obtained at an early stage.

7. I deal in a later part of this statement with the general considerations that should be taken into account in this examination; at this point, I explain that the views of the Department responsible for the administration of the law in question are carefully taken into account in the decision whether or not to prosecute and indeed it is very rare for a difference of view to arise at this stage. However, except in the limited cases where the consent of the responsible Minister or a specified officer to a prosecution is required by the terms of the relevant Act, the ultimate decision whether or not to prosecute is one for the Attorney-General or his Department. Even in those limited cases, it would not be appropriate for a prosecution to be commenced where the Attorney-General or his Department, because of the state of the evidence or other considerations, is of the view that it would not be in the interests of justice to proceed.

8. Prosecutions under the Crimes Act 1914, which is administered by the Attorney-General, require special mention. In the case of suspected offences against the general provisions of the Act, such as section 29B dealing with imposition on the Commonwealth, it is the practice for the Department directly affected by the suspected wrong doing to initiate investigative action. The decision whether or not to prosecute must lie with the Attorney-General or his Department.

9. The present general rule in relation to Commonwealth prosecutions is that all prosecutions, except those of the very routine nature mentioned above, are conducted by legally qualified officers of the Crown Solicitor's Division in my Department or by counsel briefed by the Crown Solicitor. The interests of justice are, I believe, best served by this practice although exceptional circumstances may arise from time to time requiring a departure from the rule in a particular case. Where officers of another Department conduct Commonwealth prosecutions I would expect them to observe the guidelines I am now indicating. It is also expected that Departments dealing with this limited class of cases will consult my Department where difficult questions of fact or law arise.

10. When a Commonwealth prosecution is instituted by way of summons or information, my Department, except in the routine cases mentioned above, prepares the summons or information. The great majority of Commonwealth prosecutions are so instituted. In some cases, however, the initial action will be arrest without warrant and this will usually be effected by an officer of the Australian Federal Police. However, a power of arrest is given by Commonwealth legislation to certain other Commonwealth officers, such as customs officers, and in appropriate circumstances this may be exercised. It should be noted that section 8A of the Crimes Act 1914 requires that, before effecting arrest without warrant for an offence against a law of the Commonwealth or Territory, a constable must have reasonable grounds to believe that proceedings against the person by summons would not be effective. A recent decision of the Federal Court establishes that this provision operates in the Australian Capital Territory to the exclusion of inconsistent Territory Ordinances. Of course, after the enactment of the Criminal Investigation Bill 1981, regard will need to be had to the changes that will be effected by that law.

11. Inevitably, cases will arise where it will be necessary and appropriate that a police officer should make an arrest without warrant and without an opportunity for consultation with my Department. However, in cases where difficult questions of law and fact are likely to arise, it is desirable in my view that there should, provided the exigencies of the situation permit, be consultation before the arrest between the responsible police officer and officers of the relevant Deputy Crown Solicitor's Office. To this end, there have been discussions between the Commissioner of the Australian Federal Police and officers of my Department and agreement has been reached on this need for consultation.

12. Where a prosecution is initiated by arrest, the Deputy Crown Solicitor bears the responsibility for deciding whether to proceed with this prosecution but he will consult with the police and the Department responsible for administering the law in question and I would expect that there will usually be no difference of view.

13. Special considerations apply in relation to prosecutions in the Australian Capital Territory. For example, these prosecutions include matters that, in a State, would be dealt with at municipal level. As a result, the Deputy Crown Solicitor, A.C.T., may be involved at a later stage than would be acceptable in the States.

14. There is a question whether the Attorney-General has the power to intervene in a private prosecution of a Commonwealth offence at the committal stage or during the hearing of a charge punishable on summary conviction. In the United Kingdom, by virtue of statutory provisions, the Director of Public Prosecution may, at any stage, intervene in a private prosecution and, by offering no evidence, terminate the prosecution. However, there are no equivalent Commonwealth statutory provisions and in my view it is highly doubtful that the Attorney-General has this power of intervention.

(ii) The decision to prosecute

15. The initial decision whether a prosecution should be instituted is clearly the most important step in prosecution action and in every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made.

16. In this regard, the initial consideration is sufficiency of the evidence available; at

least, it must be sufficient to establish a prima facie case against the defendant, that is to say, establish commission of the offence, having regard to the standard of proof in criminal cases. Additionally, a prosecution should not normally proceed unless there is a reasonable prospect of conviction; it should be rather more likely than not that the prosecution will result in a conviction. This, of course, may be a difficult question and it is recognised that there can never be an assurance that any prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation and by a person experienced in weighing the available evidence is the best way of avoiding the risk of prosecution of an innocent man and the useless expenditure of public funds.

17. The second major consideration is whether, in the light of provable facts and the whole of the surrounding circumstances, the public interest requires the institution of the prosecution. It has never been the rule in Australia or in the United Kingdom that all offences brought to the knowledge of the authorities must be prosecuted. Regard must be had by those responsible for a prosecution decision to many factors. These include the seriousness of the offence, the youth, age or special infirmity of the offender, the degree of his culpability in connection with the offence, whether or not he is a first offender and the need to provide a deterrent to similar offenders. Obscurity or obsolescence of the law in question is a further possible consideration. The more minor the offence, the greater the attention that should be paid to mitigating circumstances. On the other hand, regard may properly be had to the possible prevalence of the offence. No one of these considerations is overriding; in a particular case all relevant considerations must be taken into account.

18. In making a decision to lay or proceed with conspiracy charges against a number of defendants jointly, regard must be had to the practical difficulties, particularly the length of a hearing, involved in a trial of numerous defendants. Therefore, in cases of this nature, attention should be directed at the earliest possible stage to determining the persons most seriously implicated and the appropriate charges to be laid against those persons. Ordinarily it should be sufficient to limit the conspiracy charges to those persons.

19. A decision whether or not to prosecute, must clearly not be influenced by:

- (a) The offender's race, religion, sex, national origin or political associations, activities or beliefs;
- (b) a possible political advantage or disadvantage to the Government or any political party;
- (c) personal feelings concerning the offender or the victim; or
- (d) the possible effect of the decision on the personal or professional circumstances of the person responsible for the prosecution decision.

20. As regards the Attorney-General's own involvement, I accept the principle as laid down by Sir Hartley Shawcross as Attorney-General in these words quoted in Edwards Law Officers of the Crown at p.223:

"It is the duty of an Attorney-General in deciding whether or not to authorise the prosecution, to acquaint himself with all relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the government, and indeed, as Lord Simon once said, he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues. If political considerations which in the broad sense that I have indicated affect government in the abstract arise it is the Attorney-General, applying his judicial mind, who has to be the sole judge of those considerations."

The speech of the Prime Minister in the House of Representatives on 6 September 1977 clearly shows that his principle is accepted by the Government generally.

21. Where a decision is made not to prosecute, that decision should be appropriately recorded in the official papers.

22. As to the nature of the charge to be laid, the person responsible should take care to select the charge that:

- (a) adequately reflect the nature of the criminal conduct involved;
- (b) can be supported by admissible evidence sufficient to sustain a conviction; and
- (c) provides a basis for an appropriate sentence in all the circumstances of the case.

(iii) Line of authority within my Department

23. Decisions to prosecute in the great majority of cases conducted by my Department are made by Deputy Crown Solicitor's officers in each State and Territory. A Deputy Crown Solicitor is expected in specially important, difficult or doubtful cases to consult with his Central Office and, in very exceptional cases, the Attorney-General himself may be consulted. He may also be involved by reason of a special statutory requirement for his consent.

(iv) Conduct of cases

24. The conduct of a prosecution once initiated is subject to the control of the relevant court and it is unnecessary for these guidelines to deal in detail with this aspect. It is sufficient to state that the role of the prosecution is fairly to place before the court all facts relevant to the charge so that the court may justly resolve the issue of guilt or innocence. If the defendant is being sentenced, facts and matters relevant to sentence should then be placed before the court.

(v) Granting of indemnities or pardons to witnesses

25. In principle it is desirable that the criminal justice system should operate without the need to grant indemnities or pardons to persons who participated in offences with a view to these persons giving evidence against the principal offenders. However, it has long been recognised that in some cases this course may be necessary in the interests of justice. Indeed, two recent Royal Commissions (the Australian Royal Commission on Drugs constituted by Mr Justice Williams and the N.S.W. Royal Commission on the same subject constituted by Mr Justice Woodward) have pointed to the need for the authorities to be prepared to grant pardons or immunity from prosecution to ensure that evidence is available in appropriate prosecutions for drug offences. Discussions that I have had with prosecutors in the United States have also emphasised this need.

26. Nevertheless, before a decision is made to grant an indemnity or to recommend to the Governor-General the grant of a pardon, all possible alternative courses must be considered. One possible alternative which must always be considered is to proceed to conviction of the prospective witness in respect of at least some of the offences committed by him before commencement of the trial of the principal offender. In broad principle, this course is preferable to giving an indemnity in respect of all offences committed by the prospective witness that would be disclosed by his evidence. However, the course may not be practicable in some cases; for instance, time may not permit charges against the prospective witness to proceed to conviction before the trial of the principal.

27. Having regard to these matters, I require information to be placed before me as to the following matters:

Do the interests of justice require the case to proceed against the principal offender?

Is the evidence of the person in respect of whom the indemnity or pardon is sought essential to achieve the conviction of the principal offender?

Whether it would be possible to proceed to conviction of this person on at least some of the charges that would be disclosed by his evidence before the trial of the principal offender?

What is the degree of involvement of the person in the offence compared with the involvement of the principal offender?

What is the general character of the person and his previous criminal record? Was any reward or inducement offered to the person as a condition of his giving evidence?

28. The ultimate decision to grant an indemnity or recommend grant of a pardon is only made after the most careful consideration of this material. Assuming a decision is made to grant an indemnity, the scope of the indemnity should be no wider than the circumstances require.

(vi) Agreements to terminate prosecutions in return for guilty pleas to fewer than all charges or to lesser charges

29. In discussing this topic, I must first emphasize that I am not referring to agreements involving consultations with the trial judge as to the sentence he would be likely to impose in the event of the defendant pleading guilty to a criminal charge. In the past, it has not been unknown in Australia for this to occur but the High Court in the unreported case of R. v. Bruce (21 May 1976) indicated its disapproval of this practice. I am therefore of the view that a person prosecuting on behalf of the Commonwealth should not participate in any practice of this nature. Different considerations, however, apply in relation to proceedings of the kind brought under Part IV of the Trade Practices Act 1974 which are not criminal in nature.

30. My present remarks are directed primarily to agreements between the prosecution and the defence, not involving consultation with the trial judge, that, on the defendant pleading guilty to fewer than all of the charges or to a lesser charge, the remaining charges will not be proceeded with. Having regard to the care that should be taken in the settling of charges, it should not ordinarily be appropriate for the prosecution to enter into such arrangements and I would not wish anything I am now saying to be interpreted as suggesting that such arrangements are other than an exceptional course. Nevertheless, circumstances can alter and new facts can come to light after charges have been laid and, provided that proper constraints are observed, arrangements of this nature can be consistent with the requirements of justice. However, until now, there has been no attempt, so far as I am aware, to articulate the principles applying in these cases and the constraints that should operate, although I should mention that in the United States the Department of Justice has laid down guidelines to operate in these circumstances which I have found helpful.

31. In my view, the proper constraints on the making of arrangements of this nature are -

- (a) the prosecution should not initiate any negotiations leading to such an agreement
- (b) no proposal for acceptance of a plea of guilty to a lesser number of charges or a lesser charge should be entertained unless -
 - the proposed charge bears a reasonable relationship to the nature of the criminal conduct of the accused
 - the proposed charge provides the basis for an appropriate sentence under all the circumstances of the case and
 - there is evidence to support the charge

32. In deciding whether or not to agree to the proposal advanced by the defence, the person responsible for the decision on behalf of the Commonwealth must take into account all the circumstances of the case and other relevant considerations including -

- (a) whether the defendant is willing to co-operate with regard to the investigation or prosecution of others;
- (b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved);
- (c) the desirability of prompt and certain despatch of the case;
- (d) the defendant's history with respect to criminal activity;
- (e) the strength of the prosecution case;
- (f) whether it is in the public interest that the case should be publicly tried so as to ensure fuller publicity rather than be terminated by a guilty plea;
- (g) the likelihood of adverse consequences to witnesses;
- (h) whether the defendant, in cases where there has been a financial loss to the Commonwealth or any person, has made restitution or made arrangements for restitution;

- (i) the need to avoid delay in the despatch of other pending cases; and
- (j) the expense of trial and appeal.

33. I must emphasize that a decision to drop or reduce charges is an exceptional course; any such decision would need to take into account all circumstances, including those listed above by way of example. The existence of any one of these considerations is not by itself a sufficient basis.

34. If the defendant maintains his innocence with respect to the charges to which he offers to plead guilty, the prosecution should in no circumstances agree to the termination of a prosecution in return for a defendant's plea of guilty to fewer than all of the charges lodged against him or to a lesser charge.

35. Where the relevant legislation permits an indictable offence to be dealt with summarily, a suggestion by the defence that a plea be accepted to a lesser number of charges or a lesser charge may include a request that the proposed charges should be dealt with summarily and that the prosecution should either consent to or not oppose (as the legislation requires) the summary trial of the offence. Alternatively the defence may suggest that the defendant will plead guilty to an existing charge if the matter is dealt with summarily.

36. The decision of the prosecution on such a request should be determined by similar considerations to those that I have said should apply to defence proposals of the kind earlier discussed. There will be a significant difference between the upper limit of the penalty that can be imposed by the court dealing with matter on indictment and a court dealing with the matter summarily. Before deciding to accept such a suggestion from the defence, the prosecution must be satisfied that the penalty that can, and is likely to, be imposed by the court dealing with the matter summarily will be adequate in all the circumstances of the offence.

37. A full record should be made in departmental papers of an agreement to proceed with a lesser number of charges or a different charge or an agreement to allow an indictable offence to be dealt with summarily and the reasons why the agreement was made.

(vii) Use of the Crimes Act 1914 in place of the provisions of a particular Act

38. The general provisions of the Crimes Act, such as section 29B dealing with imposition on the Commonwealth, may cover the same as section 138 of the Social Services Act 1946 dealing with making of false statements in support of a claim.

39. Ordinarily, the provisions of the particular Act should be applied but circumstances of aggravation may justify the application of the Crimes Act 1914. Again, ordinarily the provisions of the Crimes Act should not be invoked to avoid a time limit provided under the particular Act but this course may be justified in special circumstances, for instance, where the proposed defendant has substantially contributed to the lapse of time. However, I have instructed that Deputy Crown Solicitors should not adopt the course of invoking the provisions of the Crimes Act for this purpose without prior reference to the Central Office of my Department and indeed a Deputy Crown Solicitor should consult his Central Office when in doubt as to any use of the Crimes Act 1914 in lieu of a special Act.

(viii) Prosecution of minors

40. Special considerations apply to the prosecution of persons under the age of 16 years. In many such cases a caution or reprimand will suffice. However, there are cases where, by reason of the previous criminal record of the child or the serious nature of the offence, the interests of justice and the community require use of the prosecution process.

41. I have made it clear to Deputy Crown Solicitors that a decision to prosecute a person under the age of 16 years should only be made after careful consideration of these matters and the alternative courses open to the authorities. Where a Deputy Crown Solicitor remains in any doubt as to the appropriate course, he is expected to consult his Central Office.

(ix) No bill Applications

42. After a person has been committed by a Magistrate for trial, applications are occasionally made to the Attorney-General by the defendant or his legal advisors that, regardless of the committal, the Attorney-General should decide that an indictment should not be filed against the defendant.

43. In my view, a decision not to proceed on a charge on which a defendant has been committed for trial should be an exceptional course. To justify the adoption of such a course, the defendant must point out some special feature of the case making it truly exceptional. It is not sufficient simply to assert that the Magistrate should not have committed the defendant for trial or that a jury would be unlikely to convict or that, if convicted, the defendant would receive no more than a nominal penalty.

44. Undoubtedly, circumstances are conceivable where it may be appropriate to apply to the Attorney-General not to proceed with a charge after committal, for example, where unusual events have occurred after the committal that make it no longer appropriate for the prosecution to proceed. However, these circumstances are very limited and an Attorney-General, in my view, should be very cautious in dealing with applications of this nature.

(x) Recent developments

45. The recent enactment of the Special Prosecutors Act 1982 and the introduction of the National Crimes Commission Bill should finally be mentioned.

46. It was made clear in the Minister's speech on the introduction of the Special Prosecutors Bill that appointments of Prosecutors under that Act would be confined to exceptional cases where the community should not be left in the slightest doubt that the prosecutions would be handled with the highest professional competence and with complete independence. A Special Prosecutor, when appointed, is therefore empowered by the Act to prosecute by indictment in his own name and, although he is required to report each year to the Attorney-General, is otherwise not subject to control by him.

47. The establishment of the National Crimes Commission, while representing a very significant innovation so far as the investigation of criminal offences and preparation of cases for prosecution are concerned, does not represent any departure from the general rule as to control by the Attorney-General of the conduct of prosecutions.

48. The Commission will have important functions in relation to the assembly of evidence for prosecutions in the cases handled by it but the conduct of ensuing prosecutions will remain clearly within the control of the Attorney-General. In a particular case, counsel may be selected to assist the commission with a view to his being the prosecutor if criminal proceedings eventuate, but the relationship between the Attorney-General and such counsel will be no different from that applying under present procedures.

(xi) Conclusion

49. These guidelines do not of course cover all questions that can arise in the prosecution process. However, they do, I believe, cover the more significant questions. There are few more difficult, and at the same time more significant, responsibilities than those vested in the officers of the Government concerned with the prosecution process. The purpose of this statement is to assist and guide these officers in the discharge of their onerous functions, to ensure consistency of approach, and to inform members of the public of the criminal justice processes and the considerations on which prosecution decisions, so far as the Commonwealth is concerned, are based.

CRITERIA FOR PROSECUTION

Memorandum of THE LAW OFFICERS OF THE UNITED KINGDOM

Introduction

The United Kingdom contains three different prosecution systems but two of these, those in England and Wales and Northern Ireland, have strong similarities. The first part of this memorandum is concerned with the position in England and Wales and the second part with that in Scotland. In Northern Ireland all prosecutions are under the control of the Director of Public Prosecutions for Northern Ireland.

England and Wales

2. Historically any citizen could initiate criminal proceedings. Indeed, where a police officer prosecutes he is exercising this historical right of any citizen. However, the term "private prosecution" is now reserved for those prosecutions which are brought by a citizen and not by or on behalf of any officer of the Crown.

3. By far the largest number of prosecutions are brought by the police. A police officer will take the decision to prosecute and unless it is a simple summary offence which the officer can present in court himself, he will send the papers to solicitors who will prepare for trial and, where appropriate, instruct counsel. The majority of police forces have their own prosecuting solicitors departments but a minority still use private firms of solicitors.

4. The Office of Director of Public Prosecutions was established by the Prosecution of Offences Act 1879 which gave the Director the duty "under the superintendence of the Attorney-General, to institute, undertake, or carry on such criminal proceedings... and to give such advice and assistance to chief officers of police, clerks to justices and other persons... as may be for the time being prescribed by regulations under this Act, or may be directed in a special case by the Attorney-General". The regulations specify the offences which have to be reported by the police to the Director. In general, the most serious offences and those which raise the greatest legal problems have to be referred to the Director. The fact that an offence has to be reported to the Director does not, in itself, rule out the possibility of a private prosecution. For example, some years ago the Director decided that there was insufficient evidence to justify a prosecution against a man suspected of committing a particular murder. Subsequently, the parents of the victim instituted proceedings against that man and when the magistrates committed him for trial on a charge of murder, the Director thought it right to take over the proceedings and present the evidence at the trial.

5. There are some offences which are subject to special statutory controls on prosecution. These fall into two classes - those which can only be prosecuted by or with the consent of the Director of Public Prosecutions and those, a smaller class, which can only be prosecuted by or with the consent of the Attorney-General. Examples of the latter class are offences under the Official Secrets Acts and offences of corruption. In practice, where the Attorney-General considers that there should be a prosecution he gives his consent and the proceedings are brought by the Director.

6. Over the years the Director of Public Prosecutions has established criteria which are applied by his staff in taking the decision whether or not to prosecute. Until recently the police have not received advice about the criteria which they should adopt in taking decisions.

7. The Royal Commission on Criminal Procedure, which reported in 1981, recommended that the police should continue to have the discretion whether to initiate proceedings but that once that decision has been taken the case should be dealt with by a statutorily based prosecution service which should have complete discretion whether to alter or drop charges. The Commission recommended that there should be a "Crown Prosecutor" for every police force area and that he should be accountable to a police and prosecutions authority which would replace the existing police authority and be similarly constituted.

8. The Government recognised that there was a strong case for establishing a prosecution service independent of the police in some form but questioned whether it was appropriate to

have a scheme organised on a local basis subject to some form of local control. The Government has appointed a Working Party on Prosecution Arrangements to advise Ministers on what would be the best model for the organisation of an independent prosecution service on a national, local or regional basis. The Government announced that, having accepted the case for an independent prosecution service, three interim steps would be taken in that direction in the light of the Royal Commission's Report. The first of these was that the Attorney-General would give to all who prosecute on behalf of the public some guidance on criteria for prosecution which will be closely in accordance with the spirit of the Royal Commission's recommendations. The second, was that the Director of Public Prosecutions would, with the approval of the Attorney-General, ask chief officers of police to consult him in every case in which the chief officer wishes to continue criminal proceedings contrary to the advice of the solicitor having conduct of the proceedings. Thirdly, the Government would continue to encourage the establishment of prosecuting solicitors departments for those areas where they do not at present exist.

9. All these steps have been taken. The guidance on criteria for prosecution, which has been sent to all police forces, appears as Annex 1.

Scotland

10. There are many differences in procedural law between Scotland and the rest of the United Kingdom, the most important in this context being that in Scotland, the police have no right to institute criminal proceedings. The position is currently regulated by section 17(1)(b) of the Police (Scotland) Act 1967 which states:-

"it shall be the duty of the constables of a police force... where an offence has been committed (whether within or outwith the police area for which the police force is maintained) to take all such lawful measure, and make such reports to the appropriate prosecutor, as may be necessary for the purpose of bringing the offender with all due speed to justice."

Sections 9 and 293 of the Criminal Procedure (Scotland) Act 1975 give the Lord Advocate (chief public prosecutor) power to issue instructions to chief constables of police forces with regard to the reporting, for consideration of the question of prosecution, of offences alleged to have been committed and it is the duty of the chief constable to comply with any such instructions.

11. Public Prosecutors in Scotland have virtually the monopoly of the discretion whether or not to institute criminal proceedings. Police have a duty to report cases to the Prosecutor where there appears to be sufficient evidence unless otherwise directed. There is close liaison between police and Prosecutor, which enables the police to appreciate the level of criminality required by the Prosecutor to justify proceedings. As a result the police do not report very trivial cases to the Prosecutor, but deal with such cases themselves by way of warning. Where the police do report a case to the Prosecutor they cannot insist he raises proceedings. This situation appears to have resulted from the fact that there was a system of Public Prosecution established in Scotland long before the introduction of police forces by the passing of various local Acts at the beginning of the 19th century. While the police play no part in the decision whether or not criminal proceedings should be taken in respect of crimes or offences reported by them to the Public Prosecutor, in practice the views of the police officer reporting a case may be taken into account by the Prosecutor in reaching a decision. Similarly where agencies other than the police report cases to the Prosecutor recommendations may be made but the Prosecutor cannot be forced to raise proceedings.

12. In the standard work Criminal Procedure according to The Law of Scotland by Renton and Brown (4th Edition),¹ the factors which ought to be borne in mind by prosecutors in Scotland in considering whether, in any particular case criminal proceedings should be raised are listed as follows:-

- (i) Whether the facts disclosed in the information constitute either a crime according to the common law of Scotland, or a contravention of an Act of Parliament which extends to that country.
- (ii) Whether there is sufficient evidence in support of these facts to justify the institution of criminal proceedings.
- (iii) Whether the act or omission charged is of sufficient importance to be made the subject of a criminal prosecution.

- (iv) Whether there is any reason to suspect that the information is inspired by malice or ill-will on the part of the informant towards the person charged.
- (v) Whether there is sufficient excuse for the conduct of the accused person to warrant the abandonment of proceedings against him.
- (vi) Whether the case is more suitable for trial in the civil court, in the respect that the facts raise a question of a civil right.

(The above criteria also appear in the first edition of Renton and Brown dating from 1909).

13. Should the information before the Prosecutor appear to warrant criminal proceedings, these must be taken in a court having jurisdiction to try the offence and, in the event of conviction, to impose an adequate punishment.

14. A defect in jurisdiction is a fatal nullity and a Prosecutor should not institute proceedings unless his court has jurisdiction to try the case.

15. Although the Scottish criminal justice system adopts an adversarial approach in trying criminal cases, a system of public prosecution operates within this framework and the private citizen has a very limited right to raise criminal proceedings. This is in contrast to the position in England where the private citizen has a much less restricted right to prosecute.

16. The Lord Advocate is responsible for and directs all public prosecutors in Scotland. His deputy is the Solicitor-General for Scotland. The Lord Advocate and the Solicitor-General are known as the Law Officers of the Crown, are appointed by the Queen on the recommendation of the Prime Minister² and demit office on a change of Government. The Law Officers are accountable to Parliament for their actions. They are assisted in their day-to-day non-political duties by 12 Advocates Depute, known collectively as Crown Counsel.

17. At a local level, public prosecutions are conducted by Procurators Fiscal. They have autonomy within their area in considering charges for proceedings and prosecuting crimes and offences at summary level subject to any general directions issued by the Lord Advocate. Procurators Fiscal cannot take any proceedings on indictment without obtaining the prior approval of Crown Counsel since all such proceedings are at the instance of the Lord Advocate.

18. In considering reports alleging the commission of minor crimes and offences Procurators Fiscal may decide to issue a warning to the accused person in appropriate cases. In May 1979 the Lord Advocate issued guidelines to Procurators Fiscal to assist them in deciding which cases merited the issue of a warning rather than the institution of criminal proceedings or required more than the mere marking of a case "no proceedings". This instruction was issued to standardise warning procedures which had been practised by various Procurators Fiscal for many years. As a result of controversy in the media following the issue of these instructions, the guidelines were debated in Parliament by the Scottish Grand Committee.³ In the light of this debate and experience gained revised instructions were issued to Procurators Fiscal in July 1980 and these have received extensive publicity. The issue of a warning letter to an alleged offender is considered the appropriate method of dealing with a case where there appears to be sufficient evidence that the person concerned has committed a minor crime but the case is not so trivial as to merit no action. Warnings therefore are an alternative to prosecution and are issued in cases where the Procurator Fiscal might otherwise be disposed to prosecute. In considering whether or not to administer a warning Procurators Fiscal should have regard to the following:-

- (i) In no case should a warning be administered unless the Procurator Fiscal has in his possession sufficient evidence which would in his opinion justify him in taking proceedings in court.
- (ii) A warning may be administered whether or not the accused person is alleged to have admitted or denied the offence or made no statement to the police.
- (iii) If the Procurator Fiscal gives a warning he will be regarded as having decided not to take court proceedings in respect of the case. Accordingly no warning will be administered on the understanding that if it is not accepted, the Procurator Fiscal will take proceedings in court.
- (iv) Any warning should avoid giving the impression that the Procurator Fiscal is adjudicating on the guilt or innocence of the person concerned.

Such warnings are normally sent to alleged offenders in writing but in exceptional cases Procurators Fiscal may administer verbal warnings.

19. As is indicated above where a warning is issued no criminal proceedings can be taken at a later date in respect of the same offence.

20. Where the Prosecutor has decided not to take proceedings he may be able to raise proceedings at a later date for example if further information comes to light so long as he has not intimated to the accused or publicly that he is to take no proceedings. In cases where the Prosecutor institutes criminal proceedings he may abandon the proceedings at any stage thereafter. The initial decision whether or not to institute criminal proceedings is usually taken by the Prosecutor solely on the information supplied to him by the reporting agency which in over 90 per cent of cases is the police. In some instances, the Prosecutor may make further inquiries of his own or request further information from the reporting agency before reaching his decision.

21. Once criminal proceedings are instituted the Prosecutor may come into possession of other information from a variety of sources, principally from the accused or his legal representative. As a result of this further information the Prosecutor may be disposed to review his original decision. The decision whether to prosecute is therefore a continuing one.

22. In the so-called "Glasgow rape case", the Prosecutor Fiscal at Glasgow, on receipt of information from the police, raised proceedings against four youths for rape and attempted murder. On reporting the case to Crown Counsel they, in the exercise of their responsibility as independent prosecutors, indicted 3 of these youths, on one charge of rape and one charge of assault to severe injury, permanent disfigurement and danger to life. The case was put out for a sitting of the High Court in Glasgow in June 1981. When the victim appeared it was apparent that she was not in a fit state to give evidence, and on the instructions of Crown Counsel she was examined by a consultant psychiatrist. The psychiatrist was of the opinion that the woman's medical history since the events complained of was such that a court appearance at that time to give evidence would be detrimental to her health and carried a hazard of suicide both before and after the trial, whatever the result. The case was therefore not proceeded with and thereafter the decision had to be taken whether the trial should be further postponed, or whether the Crown should proceed with the whole, or part, of the indictment in the absence of the woman's evidence or whether the case should be dropped altogether. Crown Counsel decided to take no further proceedings principally because of the likely effect on the health of the woman and also in the light of the information available that the prospect of improvement in the woman's health to alter the situation was not sufficient to justify keeping the proceedings alive any further.⁴

23. This decision received great publicity in the media in January 1982 and was debated in both Houses of Parliament on 21 January 1982. Because Crown Counsel's decision had been intimated to the accused, the Crown was barred from instituting fresh proceedings against the youths. In the event the woman recovered sufficiently for another psychiatrist to say in March 1982 that she was probably fit to give evidence. The woman applied to the High Court of Justiciary and was granted authority to proceed with a private prosecution which took place in May 1982 in the High Court at Edinburgh when one of the accused was convicted of rape and assault and sentenced to 12 years' detention and the other two accused were convicted of indecent assault and had sentence deferred in their cases for one year. This case represented the first successful High Court private prosecution in Scotland since 1909. A number of minor offences may still be prosecuted by private prosecutors but an ordinary citizen may only institute a private prosecution in the High Court when given authority by the Court and this authority is granted extremely infrequently since the Lord Advocate in exercising his duties seeks to act in the public interest.

24. The debate on 21 January in Parliament to some extent dealt with a report of a statement said to have been made to the press by the then Solicitor-General for Scotland. That part of the debate does not affect the present issue. The general position remains unchanged in that the Public Prosecutor at whatever level has the duty to decide in the first place whether or not to prosecute and thereafter whether or not to continue the proceedings until there is a judicial determination of the case.
place whether or not to prosecute and thereafter whether or not to continue the proceedings until there is a judicial determination of the case.

25. In a recent study carried out into the use of discretion whether or not to prosecute by Procurators Fiscal⁵ it was found that Procurators Fiscal exercised their discretion not to prosecute in only 8 per cent of cases. The reason why Procurators Fiscal were found to exercise their discretion not to prosecute comparatively rarely was considered to be due to some extent to the lack of alternatives to prosecution open to place whether or not to prosecute and thereafter whether or not to continue the proceedings until there is a judicial determination of the case.

25. In a recent study carried out into the use of discretion whether or not to prosecute by Procurators Fiscal⁵ it was found that Procurators Fiscal exercised their discretion not to prosecute in only 8 per cent of cases. The reason why Procurators Fiscal were found to be due to some extent to the lack of alternatives to prosecution open to Procurators Fiscal. (The research was carried out prior to issue of the Lord Advocate's instruction on warnings). It was found in fact that the Procurator Fiscal's discretion was much more freely exercised later in the proceedings to negotiate pleas and avoid trial. Recently the whole question of alternatives to prosecution has been considered by a Departmental Committee headed by Lord Stewart. Their first Report⁶ published in December 1980 considered motoring offences and has resulted in the enactment of provisions in Part III of the Transport Act 1982 which give Procurators Fiscal power to offer fixed penalties to offenders in respect of minor motoring offences in lieu of court proceedings. The second Report of the Committee, due out later this year, will consider more generally what alternatives to prosecution could be implemented to deal with minor matters at present dealt with by summary prosecutions.

26. In conclusion the criteria adopted by Prosecutors in Scotland in deciding whether or not to institute criminal proceedings are of long-standing and generally known and understood by members of the public. In recent years alternatives to prosecution have been more widely used and other alternatives such as fixed penalties have become available. As the system in Scotland is operated in the public interest Parliament has been involved as a forum of debate when important prosecutorial decisions have been questioned or procedures have been revised.

FOOTNOTES

1. 4th Edition edited by Gerald H Gordon and published by W Green and Son Ltd Edinburgh, 1972, page 19.
2. Criminal Procedure in Scotland and France by A V Sheehan. HMSO 1975, page 109.
3. Parliamentary Debates 22 January 1980.
4. Hansard Volume 16, 21 January 1982, Columns 423-34.
5. Prosecution in the Public Interest by Moody and Tombs, Scottish Academic Press 1982.
6. The Motorist and Fixed Penalties Cmnd 8027.

ANNEX I

CRITERIA FOR PROSECUTION

Introduction

1. Of all the decisions which have to be made by those with responsibility for the conduct of criminal cases, by far the most important is the initial one as to whether or not a charge should be preferred. Naturally the degree of importance depends to some extent on

the gravity of the offence but a wrong decision either way can have disastrous consequences affecting not only the suspect but, in certain circumstances, the whole community. If a guilty man is not prosecuted, he may go on to cause untold further harm; yet if an innocent man is prosecuted, he and his family may be seriously affected even if the offence is comparatively minor and he is ultimately acquitted.

2. Hence whenever there is some room for doubt as to whether the evidence is sufficient, every effort must be made to ensure that the decision is reached dispassionately after due deliberation and by a person experienced in weighing the available evidence.

3. Sometimes, of course, a degree of haste is inevitable if there is a danger that the suspect will disappear, commit further offences, interfere with vital witnesses or otherwise impede the investigation.

Sufficiency of evidence

4. When considering the institution or continuation of criminal proceedings, the first question to be determined by the prosecutor is whether evidence is sufficient to justify a prosecution. The Director of Public Prosecutions does not support the proposition that a bare prima facie case is enough, but rather applies the test of whether there is a reasonable prospect of a conviction; or, put another way, whether a conviction is more likely than an acquittal before an impartial jury properly directed in accordance with the law.

5. An even higher standard is set if an acquittal would or might produce unfortunate consequences. For example, if a man who has been convicted of some offence is subsequently acquitted of having given perjured evidence at his trial, that acquittal might be seen as casting doubt on the original conviction. Likewise an unsuccessful prosecution of an allegedly obscene book will, if the trial has attracted publicity, lead to a considerable increase in sales.

6. In such cases the Director of Public Prosecutions is hesitant to prosecute unless he thinks the prospects of a conviction are high. He also tends to adopt a similar high standard if the trial is likely to be abnormally long and expensive and the offence is not especially grave.

7. In reaching his decision as to sufficiency of evidence, the Director considers such factors as: availability, credit and credibility of witnesses and their likely impression on a jury; the admissibility of any admissions, if necessary having regard to the age and intelligence of the defendant; the reliability of any identification; and will draw on his experience to evaluate how strong the case is likely to be when presented in Court.

Public Interest

8. Having satisfied himself that the evidence itself can justify proceedings, the prosecutor must then consider whether the public interest requires a prosecution. There are some who feel that, where the evidence is sufficient, proceedings ought to follow; but the Director of Public Prosecutions prefers the view expressed in a House of Commons debate by Lord Shawcross when he was Attorney-General, and subsequently endorsed by his successors:-

"It has never been the rule in this Country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution. Indeed the very first Regulations under which the Director of Public Prosecutions worked provided that he should... prosecute 'wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest.' That is still the dominant consideration."

He continued by saying that regard must be had to "the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy".

9. The factors which can properly lead to a decision not to prosecute will vary from case to case, but broadly speaking, the graver the offence, the less likelihood there will be that the public interest will allow of a disposal less than prosecution, for example, a caution. The most common factors, and the attitude of the Director of Public Prosecutions towards them are:-

(a) Likely Penalty

When the circumstances of an offence, especially if triable on indictment, are not particularly serious, and the probable penalty on conviction would only be a conditional or absolute discharge, it would not normally be in the public interest to prosecute.

(b) Staleness

Regard must be had not only to the date when the last known offence was committed, but also the length of time which is likely to elapse before the matter can be brought to trial. The Director is slow to prosecute if the last offence was committed three or more years before the probable date of trial, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed. Less regard is paid to staleness, however, if it has been contributed to by the proposed defendant himself, or the complexity of the case has necessitated lengthy police investigation.

(c) Youth

The stigma of a conviction can cause irreparable harm to the future prospects of a young person, and careful consideration should be given to the possibility of dealing with him or her by means of a caution. Regard must be had to previous character, parental attitude and likelihood of the offence being repeated.

(d) Old age and infirmity

(i) The older or more infirm the offender, the more reluctant is the Director of Public Prosecutions to prosecute unless there is a real possibility of repetition or the offence is of such gravity that it is impossible to overlook. In general, it seems right not to prosecute whenever a Court is likely to pay such regard to the age of infirmity of the offender as to induce it to impose only a nominal penalty, although there may be exceptional circumstances, such as where the accused still holds a position of some importance, when proceedings are required in the public interest regardless of what penalty may be imposed.

(ii) One must of course also consider whether the accused is likely to be fit enough to stand his trial. For this purpose the Director of Public Prosecutions sometimes obtains from the defence solicitor any medical reports which have been made on his client and may arrange, through him, for an independent medical examination.

(e) Mental illness or stress

(i) The defence solicitor, knowing that the police are investigating his client's conduct, may sometimes send to the Director of Public Prosecutions a psychiatric report to the effect that the accused is suffering from some form of mental illness and that the strain of criminal proceedings will lead to a considerable and permanent worsening of his condition. This is nearly as worrying as, say, a report that the accused has a weak heart and that the shock of prosecution may be fatal.

(ii) Once again, the Director of Public Prosecutions will normally try to arrange for an independent examination and will in any event give anxious consideration to such reports as he may receive. This is a difficult field because in some instances the accused may have become mentally disturbed or depressed by the mere fact that his misconduct has been discovered and the Director of Public Prosecution is sometimes dubious about a prognosis that criminal proceedings will adversely affect his condition to a significant extent.

(iii) The Director of Public Prosecutions does not normally think it is right to pay much regard to evidence of mental instability which is not coupled with a prognosis as to the adverse effect of proceedings, as such instability may increase the likelihood that the offence will be repeated. The accused's mental state will, of course, be relevant in considering any issue of mens rea or fitness to plead.

(f) Sexual offences

Where the girl or youth has been a willing party to the offence the Director of Public Prosecutions takes into account her or his age, the relative age of the parties and whether or not there was any element of seduction or corruption.

(g) Complainant's attitude

In some cases, the Director of Public Prosecutions thinks it is proper to have regard to the attitude of a complainant who may have gone to the police in the heat of the moment - as in many husband/wife assault cases - but later expresses a wish that no action be taken. Usually in such circumstances he would not prosecute unless there was suspicion that the change of heart was actuated by fear or the offence was of some gravity. The Director of Public Prosecutions' attitude would be the same in the case of, for example, a comparatively minor theft or criminal damage if the owner of the property expressed a wish that there should be no prosecution.

10. Finally if, having weighed such of the above factors as may appertain to the case, the Director of Public Prosecutions is still in doubt as to whether proceedings are called for, he would throw into the scales the good or bad character of the accused, the attitude of the local community and any information about the prevalence of the particular offence in the area or nationally. Should doubt still remain, the Director of Public Prosecutions considers that the scales should normally be tipped in favour of prosecution as if the balance is so even, it could properly be said that the final arbiter must be the Court.

LEGISLATIVE DRAFTSMEN: THEIR TRAINING AND RETENTION

Memorandum by the Commonwealth Secretariat
and papers by Mr. G.P. NAZARETH, OBE, QC,
Law Draftsman, Hong Kong and
Mr. J.O. EWENS, CMG, CBE, lately First
Parliamentary Counsel, Australia

The vexed problem of selecting, training and retaining competent legal draftsmen has been a recurring topic on the Agenda of Law Ministers and is one which, more than any other single topic, has dominated the activities of the Legal Division since its inception as well as those of the Commonwealth Fund for Technical Co-operation.

2. Since its courses began, the CFTC has provided basic training in legislative drafting for over 200 law graduates from Commonwealth countries. But, despite such an influx into this most necessary branch of the profession, the dimensions of the problem remain much the same. The courses continue to be oversubscribed (indicating both a continuing need as well as the confidence of Ministers in them), and request for experienced law draftsmen to serve as field experts outnumber all other requests to the CFTC for technical assistance in the legal field.

3. To provide Ministers with the personal insights of two highly-experienced law draftsmen, the Secretariat has invited papers from Mr. Gerry Nazareth, QC, (presently of Hong Kong but with experience also in Kenya and the Solomon Islands) and Mr. Jock Ewens (lately the Australian Federal Government's First Parliamentary Counsel).

4. In respect of training, both papers highlight the desirability of a master-apprentice relationship and point to an area in which larger jurisdictions may be able to extend assistance to smaller countries by accepting their younger draftsmen to work with and learn at the elbows of those experienced in the field. In this regard, the arrangements being concluded in Australia for this to happen in both Federal and State drafting offices (in lieu of the formal training previously offered as part of that country's foreign aid programme by the Australian Legislative Drafting Institute) is particularly noteworthy.

5. The papers also point to ways in which co-operation between the offices of law draftsmen might be further improved in order to make maximum use of their services. The question, too, of the status of draftsmen and the rationale behind more favoured treatment for them, is also addressed.

6. Neither author lays claim to any radically new approach to what are problems of long standing, but each advances the debate and makes constructive suggestions for the future.

ANNEX TO LMM(83)6

LEGISLATIVE DRAFTSMEN: A CONTINUING DEARTH

Prepared by G.P. NAZARETH, OBE, QC,
Law Draftsman, Hong Kong;
FORMERLY Senior Crown Counsel (Drafting)
Kenya and Attorney General, Solomon Islands

Introduction

This paper examines the problem of the continuing shortage of legislative draftsmen in the developing Commonwealth, with particular reference to the training, recruitment and retention of draftsmen, and the sharing of available drafting resources. It is not based on

any recent survey, and is intended to reflect the views of a draftsman closely involved in the practical implications of the problem for many years.

Background

2. At their Meeting in January 1973, Commonwealth Law Ministers, who had for a number of years expressed their concern at the dearth of legislative draftsmen, considered ways and means of alleviating the shortage in this expert field. They agreed that -

Arrangements should be initiated under the CFTC for an assessment of specific needs for draftsmen in each country and for the identification of appropriate tutors with a view to providing, on a regional basis, training facilities in legislative and other legal training.

Shortly thereafter the Secretary-General sought information from Commonwealth Law Ministers in respect of each of their countries as to the number of draftsmen needed, the number of legal officers who could be released for training and the number of places that might be available for in-service training of officers from other countries.

3. Following receipt of the information sought, the Secretary-General appointed a number of Consultants to undertake appraisal tours in the various regions of the Commonwealth and ascertain, *inter alia*, individual needs of member Governments; to advise on suitable locations for regional training courses; and to make recommendations on the size of training courses, the arrangements and facilities that would be required and to identify experts who might be available to provide training. Finally, and in hindsight, perhaps most significantly, the consultants were asked, if invited by individual ministers, to consider the conditions of service in the countries visited in relation to the development of drafting services.

4. Subsequently a Seminar was convened by the Secretary-General in London in March 1974 to enable the Consultants and experts in the training of legislative draftsmen to advise on the structure and content of the proposed regional training courses and related matters. The report of the Seminar (1974 Seminar Report) prepared by the Commonwealth Secretariat and incorporating the individual reports of the Consultants, is unquestionably the most valuable document on the problem. Its conclusions and recommendations remain as valid today as they were in 1974. Since then the Commonwealth Secretariat has been active in promoting the training of draftsmen, in particular through the CFTC. It has mounted a succession of regional drafting training courses attended by no less than 184 trainees from some 33 jurisdictions. Nonetheless, the problem has not been solved, nor even significantly diminished. Surveys on legal resource needs in the Pacific, Caribbean and African Regions commissioned by the Commonwealth Secretariat in 1979 clearly established this; indeed in some territories the position is said to be no better and may actually be more acute than it was in 1974.

5. No useful purpose would be served in this paper by churning over ground that has already been thoroughly covered in the 1974 Seminar Report and in the subsequent surveys mentioned. But it is necessary to restate the following observations and conclusions -

(i) Legislative drafting presents special demands, significantly in excess of those in other legal disciplines. Draftsmen have therefore to be lawyers of above average ability and must in addition possess certain other qualities not all that commonly found, e.g. a constructive imagination, a meticulous and orderly approach, facility in the use of language.¹

(ii) Despite the additional demands and the more able or even exceptional lawyer required, legislative drafting does not offer commensurate attractions and rewards; on the contrary it is subject to some powerful disincentives.²

(iii) Substantial incentives are required if competent draftsmen are to be attracted and retained.

6. This is both the crux of the problem and the key to solving it. Every consultant appointed in pursuance of the 1973 Commonwealth Law Ministers' Meeting Communique recorded the necessity of incentives in one form or another. The 1974 Seminar concluded that "it was essential to recognise that no training programmes, however effective, could in the long term, solve the basic problem, which was how to attract the right kind of lawyer to the drafting profession and, after recruitment, how to retain the services of competent draftsmen" (p.9, 1974 Seminar Report; emphasis supplied). That

conclusion has been shown to be entirely accurate by the three surveys conducted in 1979 in the African, Caribbean and Pacific regions, and the continuing extent of the problem today.

Training

In-service training

7. Training of draftsmen is a protracted business, regarded ideally as stretching to six or seven years and more. On-the-job training, or in-service training, as it is also known, is recognised as the most effective, indeed some think, the only effective form of training. It is the standard form of training in the developed countries, and is recognised as such even where it is sought to be accelerated or refined by training courses. Of course, like any other form of training, the quality of in-service training can be variable. Not all draftsmen have the patience or disposition to be effective mentors. When pressure of urgently required legislation mounts, trainees and their training may be neglected. On the other hand, trainees progressively participate in drafting under pressure which is an essential part of their training. Despite its shortcomings, in-service training, in my view, remains the most effective form of training.

8. However, in the developing countries, particularly the smaller territories, it can only be regarded as a distant and meanwhile limited option. The urgency of the problem precludes general reliance on so lengthy a process. Not only are draftsmen of sufficient experience unavailable to undertake training but resources are said to be so sparse that suitable candidates cannot be found or made available in adequate numbers.

9. Ideally, in-service training should be carried out locally, in the office in which the candidate will ultimately have to work. This was recommended by the 1974 Seminar (at p.15 of the 1974 Seminar Report) and it offers major advantages. Employing Governments are not totally denied the services of the trainees, who produce legislation of progressively increasing importance. Their tutors, too, are able to continue to draft legislation, though on a reduced scale if training is to be effectively provided and accorded its due priority. In addition to acquiring drafting skills, the trainees will in the process acquire the considerable body of knowledge of local constitutional, statutory, administrative, political and procedural matters with which a draftsman must be familiar to discharge his functions effectively; they will also develop the working relationships within the civil service that so usefully oil the wheels of machinery that can be frustratingly sluggish.

10. If such in-service training is not available the most suitable alternative would be in-service training in a regional legal unit or centre of the sort contemplated in the 1980 Survey Reports ³ and proposed in the Report of the 1981 Meeting of Pacific Islands Law Officers ⁴. A part of such training might conceivably be undertaken in the trainees' own country and all of it should relate to relevant legislation and relevant circumstances. Indeed the scope for providing a measure of in-service training could prove a major bonus from regional legal units or centres.

11. Yet another form of in-service training that has been of considerable benefit, is attachment to the drafting offices of developed countries. To be effective, such training needs a considerable input by the staff of the drafting office and it can cause strains and stresses not generally appreciated. In the case of novices, attachment has to be for a substantial period to be useful, I would say for at least nine months to a year at the very minimum. Draftsmen with some knowledge and experience merely seeking to sharpen their skills could benefit from attachments of even a few weeks. I believe that assistance of this sort could be provided on a much greater scale than it is, not only by the developed countries, but by some of the developing countries with adequate resources and facilities.

Training Courses

12. For the purposes of this paper, these may be said to be of two sorts: ad hoc CFTC regional courses, and other drafting courses available in Commonwealth and common law jurisdictions.

CFTC Regional Drafting Courses

13. The genesis of these is explained in paragraphs 2, 3, and 4. in recommending them in the 1974 Seminar Report, the Consultants clearly recorded the inherent limitations of such courses and emphasised the necessity to attract and retain the right kind of lawyer (see paragraph 6 above). Likewise they drew attention to the importance of selecting candidates of suitable ability and experience ⁵.

14. Inevitably there has been some criticism ⁶ of the courses and some of the small States of the Pacific have not been overly enthusiastic about them ⁷. But there can be no question that the courses have, in substance, provided what was recommended. That the courses have not had a significant effect on the problem (which was revealed by the 1980 surveys, especially that conducted by Professor Patchett in the Caribbean) is not because of any inherent weakness in the courses themselves. On the contrary, if, as the Seminar recommended, candidates of suitable experience and ability had been provided, the courses followed by in-service training, and above all the trainees retained by suitable incentives, the 184 trainees, who over the years have participated in these courses, should by now have made a substantial contribution to meeting the problem.

15. It is understood that because of financial constraints the number of these courses has been reduced. The opportunity this presents should be taken of tightening selection procedures with a view to securing trainees who at least seem to have the requisite ability, aptitude, and commitment to a career in drafting; and not least for whom subsequent in-service training is assured.

Other Drafting Courses

16. There is an increasing range of drafting courses becoming available in the Commonwealth and common law jurisdictions, particularly in North America, e.g. Edinburgh University Legislation Course, Ottawa Legislation Training Programme, Columbia University Seminar. Of necessity these courses, which are designed to provide individual attention, can only cater for very limited numbers of students. It would be useful if, in addition to all the other assistance afforded by the Legal Division of the Commonwealth Secretariat, it could also provide information on the courses available and some assessment of them in the context of the special needs of developing countries. But given the extent of the problem it is difficult to conceive of any of these courses not being of some benefit. Besides many of them, conducted as they are by prestigious institutions and organisations, may well attract to a career in drafting able lawyers who might otherwise be lost to other disciplines. Use of these courses should therefore be encouraged.

Training of Graduates

17. Within the Commonwealth, subject to one significant exception, it seems to have always been the rule that draftsmen should be qualified lawyers. The exception referred to is the Barbados LL.M drafting course designed primarily for graduates and not professionally-qualified lawyers. Professor Patchett in his 1980 Report on Bermuda and the Caribbean strongly supported this approach, pointing out that there is no obvious reason why the career draftsman should need to complete the two-year professional course. He also stressed the necessity for an associated career structure and attractive remuneration.

18. I believe there are major advantages, particularly in the developing countries where drafting instructions tend to be rudimentary, in having as draftsmen qualified lawyers who have had some professional experience. This does not mean that law graduates, though not professionally qualified, should not make competent draftsmen. Given the difficulties, therefore, of attracting lawyers of suitable ability, Professor Patchett's view deserves strong support. Besides, not being professionally qualified, such draftsmen would not be directly exposed to the allurements of private practice or appointment to the Bench, not that that should be reason for denying them an appropriate career structure and attractive advancement prospects. On this basis there would be no reason why law graduates of suitable ability should not be sponsored for all available means of drafting training. This is obviously a limited option and would certainly not displace professionally-qualified lawyers as the overwhelming source of draftsmen; but it could prove useful and merits serious consideration.

Training - General Situation

19. In general though there must, as always, be some scope of improvement, the training situation does not seem to be unsatisfactory in the circumstances prevailing. If effective incentives were provided and attracted trainees of the necessary experience, ability, aptitude and commitment to a drafting career, they would have to be matched by a corresponding effort to effect all practicable improvements in training. In regard to CFTC drafting courses, I believe some minor shift of emphasis would be useful. Specifically, I think the courses could, where that was not already the case, be made more intensive, and have more emphasis placed on practical drafting. This is no reflection on the able and experienced Directors of the courses to whom all concerned must be indebted. In addition, the essential follow-up of in-service training should be assured, if necessary, as a pre-condition to admission of trainees to such courses.

20. In-service training, too, needs to be accorded higher priority and importance. All too often it assumes secondary importance to the drafting of urgent legislation. It is not unknown in my experience, for trainees to be neglected or to receive cursory supervision and instruction during periods of pressure for urgent legislation. It is not unknown in my experience for trainees to be neglected or to receive cursory supervision and instruction during periods of pressure for urgent legislation. Officers expected to provide in-service training should be afforded sufficient time to do so, which means a reduced workload of drafting. Ideally a particular draftsman should be charged with the responsibility of ensuring that each trainee is put through a programme designed to meet his particular requirements.

Recruitment and Retention of Draftsmen

21. This, as has been indicated, is both the crux of the problem and the key to its solution. Insufficient numbers of draftsmen are being recruited, particularly lawyers of appropriate ability and aptitude. And far too many draftsmen move on to other occupations. The surveys conducted by the Consultants in 1974 indicated that over 100 additional draftsmen would be required during the following three years. By all accounts that shortage persists.

22. The Consultants in 1974 saw the solution as being essentially the provision of suitable incentives. Their views were summarised at page 195 of the 1974 Seminar Report in the following way :

"14. All the Consultants examined the conditions of service of legal draftsmen in the countries visited and their Reports go into considerable detail about such matters as salary differentials, working conditions and promotional prospects. The Consultants emphasise that the training schemes by themselves, however efficient, are unlikely to remedy the serious shortage of draftsmen. Among the suggestions made are the following :-

- (a) there should be an increased recognition of the status and the central role of the draftsman in the legislative and law reform processes;
- (b) attractive salaries, perhaps with special incentives, should be offered both at recruitment and throughout the working career;
- (c) promotional opportunities should be improved;
- (d) suitable working conditions (principally proper office accommodation and support staff, adequate library and research facilities, planned drafting programmes) should be provided;
- (e) attempts should be made generally to improve the standard of written instructions issued to draftsmen on the legislation they are required to draft."

23. One of the Consultants, Mr J.Ö. Ewens, CMG, CBE (formerly First Parliamentary Counsel, Australia) expressed himself in these forceful terms :

".....the chances of arranging any course in legislative drafting in the Pacific area in the near future are slight. The reason is, of course, that there are no, or few, candidates in sight. This illustrates what I have been saying for years, namely, that the problem of legislative drafting is not in training people but in attracting people to the work. Legislative drafting is specialised and difficult work. It requires lawyers of the highest attainments. Those who are capable of becoming legislative draftsmen can command a high income in other fields of legal work. The need is to increase the status and remuneration of drafting work, as has been done in Australia, the United Kingdom and, I think, New Zealand and is in course of being done in Papua New Guinea. The status of the top draftsman can be improved by making him responsible directly to a Minister, not to another law officer, such as a Solicitor-General or similar officer. His salary should equal that of the Solicitor-General or other officer in charge of a Law Department. It should not be less than that of a puisne judge. In Australia, a deliberate decision was made to pay first Parliamentary Counsel more than a puisne judge. By paying a high salary to the top man, those below him can also be paid higher salaries. Good draftsmen are scarce and they should be encouraged to make their work a life-time job. For promotion, they should not have to look to other legal work, such as that of Crown Counsel or Solicitor-General, or to judicial appointments. (Emphasis supplied)

The other Consultants were no less forthcoming ⁸.

24. Substantial improvements to incentives had in fact preceded the surveys conducted by the Consultants in 1974. However, an unfortunate feature of these was that they were centred upon improving the status and emoluments of the senior or chief draftsman, to the point that one Consultant was moved to observe that "it is not just the salary of the senior post in the drafting service which needs to be attractive" ⁹. But even these improvements only succeeded in bringing the emoluments of the senior post in some instances to the level of those of judges. As the Consultants observed, judicial careers are more attractive to lawyers than those in drafting. This has been demonstrated by some loss of senior draftsmen to judicial office. The need for some additional incentive is therefore obvious. It is difficult to see what realistic alternative there is to the better remuneration suggested by the Consultants. It is no less difficult to foresee other incentives and fringe benefits proving effective without better remuneration. Having regard to the largely wasted training over past years, it may well be cheaper to provide effective monetary incentives than to sustain the continuing cost of training and the damage resulting from the inability to produce much-needed legislation.

25. Despite the unanimity of expert advice on the necessity for effective incentives, these have not really been provided. Little wonder then that the shortage of draftsmen persists. I believe that it will not be solved until suitable monetary incentives are provided. I believe also that the major obstacle to the provision of monetary incentives is the view of establishment and civil service departments of Governments that this will produce unacceptable distortions of civil service remuneration relativities. If this is so, is the preservation of these relativities not too high a price to pay? And would something in the nature of an inducement allowance for drafting work necessarily damage such relativities? Even if that were so in principle, would not such an allowance readily been seen to be what it is? This incentive, the most effective if not the only effective incentive, should not be ruled out without careful consideration or reconsideration if need be.

26. But although in my view necessary, monetary incentives within the limits that can be realistically contemplated, are unlikely to prove effective without more; working conditions and other incentives need also to be considered. The Consultants listed the incentives they encountered or thought appropriate ¹⁰. These remain so comprehensive that in all the eight years that have followed the 1974 Seminar, the only additional incentives that I have heard suggested are extension of the retiring age to that of judges at the option of the draftsman, and recognition of the status of senior draftsmen by permitting them to appear with the law officers in court cases concerned with constitutional and similar issues (of which they tend to have special knowledge).

Sharing of Drafting Resources

27. By and large, trained draftsmen are locked into the Public Services of their employing Governments. And with virtually every Government short of draftsmen or without any to spare, the matter of sharing draftsmen simply does not arise save in exceptional cases.

28. A few countries have seconded the odd draftsman or two, to other countries or have offered to do so. It would seem that the possibilities are neither fully explored nor exhausted on an on-going basis.

29. Also, as I have mentioned, a trickle of experienced draftsmen does seem to come on to the market. Hong Kong, for instance, has been able to recruit a few and has been approached by several over the last few years.

30. As far as I can see it is only in relation to these two categories that any scope for sharing arises. Legislation can always be divided into two classes: the relatively simple, usually less important and generally straightforward; and the relatively difficult, usually more important and complex. It is the latter that demands the attention of experienced, skilled draftsmen. The sharing of such draftsmen may well produce the optimum use of their services and certainly the most equitable. How that should be achieved is another matter. The only scheme I know of that offers possibilities is that of regional legal units or centres which I believe the Legal Division of the Commonwealth Secretariat has under consideration ¹¹. There must be formidable practical difficulties to be overcome, but there are obvious merits. The constraints of national civil service remuneration relativities will be avoided, which should enable experienced draftsmen to be recruited. The serious limitations and drawbacks of long range drafting will also be contained. In-service training could be provided. Above all sharing of the services of the draftsmen concerned could be achieved.

31. If a draftsman is available to assist more than one small country, and it is not possible to arrange for this through a regional unit or centre, then it may be possible for him to be based in one of those countries and to visit the others as judges have for long done in the Pacific Islands. I do not see this as a particularly effective or convenient arrangement, but I believe it could be made to work. I doubt whether it would be possible to obtain personnel, even unmarried personnel, on a wholly itinerant schedule; they would need to have a base. A draftsman's visit to the other countries would have to be long or often enough to enable the drafting of measures to be completed without undue delay. He would also require some secretarial assistance. The apportionment of them, costs, priority and so on are likely to pose considerable problems. Nevertheless, given the acuteness of the problem and the necessary will to make such an arrangement work both on the part of the draftsmen and the countries concerned, there is no reason why it could not be made to do so.

32. Drafting services have, in the past, been provided for very small and isolated dependent territories by draftsmen based overseas, using ordinary postal services for the purpose of communication. Those drafting services were never very satisfactory and were never called upon to meet anything like the present-day demands of even the smallest independent countries. I need hardly say that I do not consider that such arrangements would be satisfactory. Without the severe constraints of long distance communication and despite their sophisticated resources, even the developed countries experience difficulty in furnishing their draftsmen with adequate drafting instructions. It is therefore idle to suppose that small developing countries without such resources should be able to do so by corresponding through the mail.

Summary of Conclusions and Recommendations

33. (a) In-service training is the most effective form of training. (para. 7)
- (b) It should be undertaken (in order of preference) in the trainee's own country, in a regional legal unit or centre, or on attachment to a drafting office in any country willing to provide facilities. (paras. 9, 10 and 11)
- (c) Countries with adequate facilities could probably make more places available for in-service training to other countries that lack such facilities. (para. 11)
- (d) CFTC drafting courses should be continued, but selection procedures tightened to secure trainees who are suitable and for whom subsequent in-service training is assured. (paras. 14 and 15)

- (e) The Legal Division, Commonwealth Secretariat, should, if feasible, provide information on other drafting courses which may be available, use of which courses should be encouraged. (para. 16)
- (f) Law graduates, even if not qualified to practice, should, if of suitable ability and aptitude, be sponsored for training as draftsmen. (paras. 17 and 18)
- (g) Although existing training facilities are not unsatisfactory, there is probably some scope for improvement. (paras. 19 and 20)
- (h) The basic cause of the shortage of draftsmen is not training but the inability to recruit and retain lawyers of suitable ability. (paras. 21 to 26)
- (i) The solution is to provide appropriate incentives, of these suitably enhanced remuneration would be the most effective, but other incentives concerned with status and working conditions are probably also necessary. (paras. 21 to 26)
- (j) Sharing between small countries of draftsmen seconded or recruited ad hoc would probably best be achieved through regional legal units or centres, but a similar arrangement without the establishment of a unit or centre might also prove feasible. (paras. 27 to 32).

FOOTNOTES

1. "..... the work of the draftsman is central to the whole process of government. it calls for individuals with exceptional legal ability and all-round competence, ... it involves specialist skills and techniques which have to be learned but for which some, perhaps even most, have neither aptitude nor interest. The present shortage of legal draftsmen in the Caribbean is not so much the result of any general shortage of lawyers, nor the consequence of an absence of a training programme: it is directly related to the widespread failure to recognise the crucial importance of the work and, therefore, to agree upon a priority policy of trying to recruit the quantity and quality of persons actually needed, to provide conditions of service which are commensurate with their responsibilities and to make the conditions of work attractive to the more able young lawyer faced with a number of professional choices." Professor Keith Patchett - 1974 Seminar Report, p.78.

"It was generally agreed that in view of the difficult discipline of legislative drafting, aspiring draftsmen should be selected from the best of lawyers available. After considerable discussion the Seminar felt the following were the qualifications and qualities which should be looked for:-

- (a) Above average basic professional qualification in the legal field.
 - (b) Experience in legal practice, preferably in the legal service of the Government.
 - (c) Facility in the use of the language of legislative enactments.
 - (d) Interest in drafting as demonstrated in the trainee's practice; a systematic mind, orderliness in the formulation of thoughts, meticulous attention to detail and ability to work with accuracy under pressure.
 - (e) An inquiring, critical and imaginative mind.
 - (f) Ability to work with colleagues and those skilled in other disciplines, and a disposition to give and take constructive criticism and advice.
 - (g) Commonsense and social awareness." 1974 Seminar Report, p.12.
2. "..... drafting work itself imposes great demands upon its practitioner: there is no room for error, nothing can be left to chance or to be dealt with off-the-cuff. It requires special skills and techniques which are not quickly learned: job satisfaction is for that reason perhaps slow to come. It can be exceptionally hard work. In recent years, with the overall shortage it has often come to involve long hours of unremitting pressure and urgency where shortcomings or mistakes evoke criticisms by the politician, the judiciary and the legal professions which cannot be publicly answered. It is hardly surprising, therefore, that many officers introduced to this work have concluded that other parts of the legal service give at least equal possibilities of advancement with less drawbacks, whilst established officers wonder whether a different kind of appointment might not be better for themselves and their families. Thus I was informed that in one country in the last ten years some thirteen persons had been brought into the drafting service at the trainee level: only one has remained."

"The lawyer is seen as one whose work is primarily in or about the courts, whose success is judged by forensic achievements and whose professional life carries a certain glamour enhanced by the special dress for court and by photographs and mentions in the daily press. It follows, for those who hold such views that a job which entails full-time devotion to desk-work and the preparation of documents and which is anonymous and unpublicised is not "proper lawyer's work" and is within the competence of any ordinary person with a legal background. There is a regrettable tendency to see the office of draftsman as suited to those who cannot make a success of court practice and for that reason as less demanding work." Professor Patchett, ibid, pp.78 & 79.

"In the developing countries in particular, the attractions of private practice are very considerable. Apart from financial considerations, it must be borne in mind that the private practitioner is his own master and can live and work when he likes. Moreover, many young lawyers enjoy the prestige and publicity which attaches to private practice. Even if a young lawyer is attracted to the public service, he will often seek work in a department which is in the public eye or where the work does not make such heavy demands on his time and energies. There are so many opportunities open to young men and women of the very high calibre needed to make good draftsmen. Some do not wish to enter into a field which requires them, in effect, to become pupils again." Mr. Justice K.T. Fuad, then Director, Legal Division, Commonwealth Secretariat, ibid, p.140.

"Most West African lawyers are generally averse to any specialisation which confines them to chamber work. To most people within and without the legal profession, legal practice is synonymous with advocacy. There are very few lawyers who derive inherent satisfaction from legal drafting simpliciter, and who would therefore be content to devote their whole professional career to drafting. The strong cultural bias in favour of drama and public ceremony in West Africa also militates against engrossment in the back-room chores which are associated with drafting." Dr. S.K.B. Asante, ibid, p.180.

3. Bermuda and the Caribbean, Professor Patchett.
East, Central and Southern Africa, Mauritius and Seychelles, G.C. Thornton, OBE, QC.
Some Pacific Jurisdiction's, Dr G.P. Barton
4. Commonwealth Secretariat, 1981
5. "A scheme for training is unlikely by itself to remedy the shortage of draftsmen." p.110, 1974 Seminar Report.

"... officers should not be proposed as candidates for the course until they have had at least two years relevant experience"

"... the success of the whole scheme depends on the careful selection of candidates ... it should not be too difficult to determine whether he has the intellectual calibre, application and imagination required. He must, whatever else he is, be a good lawyer first and foremost" ibid p.137.
6. 1980 Report on Bermuda and the Caribbean: Professor Patchett, para. 4.45
1980 Report on East, Central and Southern Africa, Mauritius and Seychelles: G.C. Thornton, OBE, QC, para. 148.
7. 1980 Report on Some Pacific Jurisdictions: Dr. G.P. Barton, para. 131.
8. "The point was however continually made that it was much easier to find a person for appointment as a Judge than to find an efficient draftsman. For this reason the holder of the latter post either was already, or is about to be, paid a salary equivalent to, or higher than, that paid to Judges; this should assure the draftsmen that their chances of promotion are not prejudiced and should encourage them to remain as draftsmen." Mr. R.M.M. King - "Report on Asia", 1974 Seminar Report, p.48, para. 45A.

".... it was heavily impressed upon me that conditions of service and the present shortage were so inextricably joined that there was little value in offering

training facilities if officers were not likely to join or stay long in the drafting services once trained because more attractive alternatives existed elsewhere. Indeed it was suggested that training could actually improve the marketability and usefulness of these officers in other places. In my view, each Government for whom officers are trained will have to examine seriously whether training will have any substantial impact on establishments given the present conditions of service." Professor Patchett - Report on the Caribbean, ibid, p.79, para.2, see also pages 78-80.

"There is, I suggest, a strong case to be made out for a salary structure that is untrammelled by comparisons with other positions in the public service. Both the image and the status of the draftsman needs to be enhanced if any worthwhile and lasting progress is to be made." Mr. Justice Faud - Report on East and Central Africa, ibid, p.140, para.42, and see also paras. 39-44.

For inducements suggested by Dr. S.K.B. Asante in his Report on West Africa, see ibid, pp.180-181.

9. Ibid, p.140, para. 42.
10. See the Appendix to this Paper.
11. See paragraph 10 above.

APPENDIX

Incentives mentioned in the 1974 Seminar Report

1. Conditions of Service

- (a) The provision of more attractive salary scales which -
 - (i) offer financial rewards for those who have undertaken extra training and have acquired specialist qualifications which are at a premium;
 - (ii) encourage officers to choose to stay with drafting rather than to transfer elsewhere in the service merely to obtain an increased income;
 - (iii) are at least as good as, and preferably better than, found in other parts of the public service.
- (b) The provision of a career structure in legal drafting which involves a sufficiently large number of intermediary grades to allow early promotion to be gained by those who prove their quality and to offer regular promotion prospects for those who elect to stay with drafting.
- (c) The creation of a separate department or division of the public service for legal drafting, headed by a senior officer with salary and perquisites on a par with those enjoyed by those in high judicial office.
- (d) Where an officer in the drafting service is regarded as qualified for promotion to a post outside that service, a system of "notional promotion" whereby he may be offered additional pensionable emoluments personal to him so long as he remains a draftsman and equivalent to those which he would have gained on transfer.
- (e) Where a draftsman is appointed to the judiciary, the possibility of secondment back to the drafting service without loss of judicial status or perquisites.
- (f) Where the establishment of a drafting service is not feasible, the provision of special additional emoluments for the officer primarily responsible for drafting and provision for special payments to other officers whilst substantially engaged in drafting.
- (g) In connection with the training programme -

- (i) the payment during the period of training of additional emoluments over and above the normal legal service salary;
- (ii) immediate recognition of the successful completion of training by appointment to the special salary scale for the drafting service or at least by the payment of additional increments.

2. Standing and Prestige

- (a) The use of appropriate titles for the officers associated with legal drafting, e.g. "Chief Parliamentary Counsel" or "Director of the Legislative Service".
- (b) Equal treatment with other senior public legal officers for the award of honours, the conferment of Silk or similar status.
- (c) Affording opportunities for involvement with prestigious activities, e.g. international conferences.
- (d) Governmental recognition on public occasions of the essential importance of the work and the value to the community of the drafting service.
- (e) Full involvement of the draftsmen at all stages of the preparation of legislation with Government Departments and Committees and its enactment by Parliament

3. Working Conditions

- (a) The provision of a satisfactory working environment, especially the proper kind of office accommodation which allows concentration undisturbed by external activities; each draftsman should, whenever possible, be given an office of his own.
- (b) Discussions in connection with the draftman's work should as a rule be conducted in his own office.
- (c) Whenever numbers permit, draftsmen should be encouraged to work in pairs, a procedure which has been found to produce better drafts and to contain a useful training element.
- (d) The provision of supporting non-professional staff of good quality.
- (e) The provision of adequate library facilities by -
 - (i) the allocation of sufficient capital and recurrent funding (if necessary with the assistance of technical aid);
 - (ii) arrangements for interchange of legislative materials with appropriate Governments.
- (f) The reduction of "emergency" conditions in which urgent legislation is sought, by the institution by the Government of planned drafting programmes for a Parliamentary session.
- (g) Improvements in systems for the communication to draftsmen of the policies for new legislation and for the provision of adequate drafting instructions.
- (h) The institution of "workshops" involving draftsmen and senior public officials in order to discuss the technical problems involved in the drafting process and the methods by which these can best be obviated.

**LEGISLATIVE DRAFTSMEN:
SOME THOUGHTS ON HOW TO PROVIDE
AN EFFECTIVE SERVICE**

Prepared by
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For an effective Legislative Drafting service a number of conditions must be satisfied. These include-

- (a) obtaining the right sort of people;
- (b) giving them the right sort of training;
- (c) furnishing them with the right sort of instructions;
- (d) providing them with the right tools of trade.

The Right Sort of People

2. I believe that legislative draftsmen are born and not made. I also believe that an adequate number of lawyers with the right sort of talents exist in the profession. The problem is to find and recruit them and then to retain them. A competent draftsman needs a number of qualifications, many of which are not widely represented in the profession but nevertheless do exist.

3. First, a draftsman needs to be a good all round lawyer. This is so obvious that it scarcely needs argument. He will almost certainly have to deal with every branch of law and specialisation is to be avoided. Specialisation leads to lack of flexibility in the availability of staff. It can also lead to staleness. A trainee draftsman should preferably have had several years in practice as a barrister or solicitor. A young person straight from University does not make the best material. Secondly, a draftsman needs command of the language in which he is writing. He needs to be able to distinguish between fine shades of meaning of words - a dictionary should always be at his elbow. Allied with this must be an ability to write grammatically. To write well, he must read widely. Next, a draftsman needs a clear and logical mind. It has rightly been said that legislative drafting is "mathematics in words".

4. A draftsman also needs the right temperament. He must be patient with impatient "clients". He must be capable of good work under pressure - which will be inevitable. The late Sir Cecil Carr, Counsel to the Speaker in London, but not himself a draftsman, described draftsmen as "the key men of Whitehall, the hardest worked, the most severely tried". Regrettably, a draftsman must be prepared to work irregular hours, to the detriment of his family and personal life. A draftsman must also have the capability of resisting pressure by those who ask him to do something that is wrong or inadvisable. He must not allow himself to be "shouted down" by his "client".

5. A draftsman needs an understanding of politics and of the working of his legislature; to quote Carr again, "Having no politics himself he must nevertheless know every move of the political game". "Bills", it has been said, "are made to pass". The most perfectly drafted Bill is useless if the legislature cannot be persuaded to accept it. All legislatures have their likes and dislikes and the draftsman must take them into account.

6. Searching out the right sort of person to become a draftsman is rather a hit and miss affair. One reads their paper qualifications and then interviews them and does one's best to select those who seem to have the right characteristics. But the failure rate is high - very high. The person selected must be given a long period of probation, during which his ability, or lack of it, must be discovered in practical work. There should be a clear understanding with him that if he turns out not to be a draftsman either his services will be dispensed with or he must accept transfer to some other form of legal work. If the latter is what happens, his new colleagues must be prepared to accept him as an equal who, although not a draftsman, may well be as

professionally competent as they; they must be discouraged from looking on him as 'a failed draftsman'. Once a competent draftsman has been found, he should be encouraged to make this his life's work. His conditions of service should be such that it is not an advantage for him to leave drafting and go to some other form of work. To this end, it is a good idea to have - as a number of jurisdictions do have - a separate "Office of Parliamentary Counsel".

The Right Sort of Training

7. I believe that the only wholly satisfactory way of training a legislative draftsman is by the "apprentice method" - that is, the newcomer works with or alongside a more experienced officer and learns from him by watching the way he goes about his work. In some jurisdictions, draftsmen work in pairs, senior and junior, with the latter learning from the former. Alternatively, there need be no formal system of pairing, each junior working more or less at random with a senior officer. In a form of class or school, legislative draftsmen can be trained to a limited extent. But one cannot teach the idiosyncrasies of the draftsman's "clients", of members of the legislature or of Ministers.

8. The respected and experienced Professor Reed Dickerson disagrees with my view about this; see the review of his Materials on Legislative Drafting in the (1982) 8 Commonwealth Law Bulletin, at p.847, from which it appears that he is a "steadfast believer in the need to teach legislative drafting to large classes of students within a law school curriculum". He regards it as a myth that "a student can learn only by personally supervised doing". Perhaps the difference between United States and the Commonwealth methods of government accounts, at least in part, for this difference of opinion. Further, I think it is a mistake to try to teach "legislative drafting" to students who are not yet qualified lawyers.

9. The recently-disbanded Legislative Drafting Institute in Australia, although well-meant and competently conducted, was based on the assumption that drafting can be taught in a class. Its teaching, although useful, was necessarily limited. It was used in the main by Commonwealth countries that are suffering from an acute shortage of draftsmen and are unable to make satisfactory arrangements for on-the-job training. Undoubtedly they have benefited significantly from the training their personnel received, but I understand that the Commonwealth Secretariat has been informed that in place of the formal teaching once offered at the Institute, the Australian Government now proposes to arrange attachments in Federal and State Law drafting offices as a part of its aid programme.

The Right Sort of Instructions

10. Good draftsmen are so rare that it is essential that their time be spent to the best advantage. A Bill is to give legislative or legal force to a pre-determined policy. A draftsman should not be concerned directly with policy. It is not his function to prepare plans or schemes of legislation. It is a waste of a draftsman's time to ask him, for example, to draft a Bill to control air pollution. It is for his client to determine the policy and to work out as many of the details as he can before an approach is made to the draftsman at all. But this statement needs some qualification. A client may not be versed in legal matters - for example, he may not know what penalties are appropriate for offences, how the laws of evidence will apply and what courts are appropriate to be given jurisdiction with respect to matters arising under his proposed legislation. The draftsman is in a position to help with matters such as these, although he may prefer that they be decided by policy makers in the Law Department. Further, a draftsman can often help with formulating a practical scheme of legislation to achieve the desired policy. He may be aware of similar legislation in other jurisdictions. Nevertheless, nothing is more frustrating to a draftsman than to have to sit for hours on one side of the table while his "clients" on the other side of the table thrash out among themselves what it is that they really want.

11. There has been a suggestion made to the Commonwealth Secretariat that if draftsmen in jurisdictions that produce legislative programmes were to circulate these programmes as soon as they were in a position to do so, this would be a great help in promoting mutual assistance between jurisdictions and the use made of comparative material. The extent to which such programmes are produced is perhaps limited. In Australia it would be difficult to discover anything that might usefully be explored and a greater degree of co-operation between draftsmen around the Commonwealth would be sure to return significant dividends to their governments. The formation of a "Commonwealth

Association of Parliamentary Counsel", along the lines of those of other Commonwealth professional associations, might be one way of bringing this about.

12. Even more useful would be to devise some machinery by which particulars of enacted legislation were systematically sent by draftsmen or by Law Departments to some central place to be recorded - perhaps by computer - and made available on request to those contemplating similar legislation. Thus, if Australia completely re-wrote its law relating to bankruptcy, it might be helpful in other jurisdictions - helpful to both the client and the draftsman - to know of this. Perhaps the second-reading speech on a Bill could be used as a basis for the description of its contents.

13. Over the years, considerable resort has been made to comparative legislation, although to a variable extent and perhaps in rather a haphazard fashion. Thus, United Kingdom Acts such as the Sale of Goods Act, the Bills of Exchange Act, the Partnership Act, and the Marine Insurance Act have been substantially copied in other Commonwealth jurisdictions. The spread of the Torrens system of land title from South Australia through the common-law world is well known. Often legislation will be based on a report prepared by an ad hoc committee or by some form of law reform body. Obviously, these reports should accompany the legislation to which they relate.

14. For many years before the 1939-45 War the Society of Comparative Legislation was sent particulars of legislation in many Commonwealth countries. These particulars were published in the Society's journal - the Journal of Comparative Legislation. However, the quality of the material supplied was variable and in some cases of little value. Further, there was no systematic way of digesting the material and making it known to enquirers.

15. It may well be that the systematic collection and digesting of legislation is something that could be undertaken by the Commonwealth Secretariat. Probably one legal professional officer would be sufficient for this purpose.

16. At the present time the Commonwealth Law Bulletin has an excellent, although limited, review of legislation. In effect, what I am suggesting is that this should be systematically expanded and become a separate publication. An example of the lack of system can be seen in the April 1982 issue, which mentions new Food Acts in Queensland and New Zealand but makes no attempt - probably because of lack of resources - to relate one to the other.

17. A word needs to be said about the danger of uncritical copying. What is suitable as a bankruptcy law in Australia may be totally unsuitable for, say Sri Lanka. Moreover, every Bill must take into account the existing law of the jurisdiction concerned, particularly its Interpretation law. Expressions may be used in e.g. an Australian Act without definition because they are defined in the Australian Interpretation Act, and they may need the same or different meanings to be expressly given to them in the law of some other jurisdiction.

18. There are, of course, additional sources of information about what is going on in the larger Commonwealth jurisdiction by way of legislation as their law journals usually have articles dealing with new and important legislation.

Tools of Trade

19. It goes without saying that a draftsman should have ready access to a comprehensive law library. In particular, there should be available to him a selection of current law reports and law journals. The Commonwealth Law Bulletin is extremely useful.

20. A word processor is a great help. It saves many hours of checking and proof-reading drafts. It has other advantages - such as making a search for a particular word wherever used in a draft.

General

21. Apart from the suggestion that the Commonwealth Secretariat might be invited to collect and collate particulars of legislation and that draftsmen around the Commonwealth be encouraged to assist each other to a greater degree than they do at present, there is little in the foregoing that has not been said before, but the writer is not at all sure of the extent to which the practices described are carried out. Nevertheless it can confidently be said that adherence to these practices is the best way not only of securing an adequate supply of legislative draftsmen but also - and this is perhaps even more important - of using their services to the best advantage.

LEGISLATIVE DRAFTING AT THE UNIVERSITY OF WEST INDIES: LL.M. COURSE

Memorandum presented by
THE GOVERNMENT OF BARBADOS
(Prepared by Professor James Ryan)

Introduction

The Legislative Drafting course was started in the University year 1979-80 at the instigation of the then Dean of the Faculty of Law, University of the West Indies, Cave Hill Campus, Barbados, (now Mr. Justice Telford Georges of Zimbabwe). The course was to be part of a Master of Laws degree and had been some time in the planning. It was to be sponsored by three Caribbean Commonwealth countries in co-operation with the University. The University would supply the instructors, space and other requirements, the governments would provide financing and students for a three-year trial or experimental period.

2. The governments concerned were naturally interested in the nature of the course to be sponsored by them. They each reserved four places each year for their own personnel. When a country could not fill its quota in any year, it would sponsor a student from another country in the Caribbean.

3. It had been intended that Professor E.A. Driedger of Ottawa be the person invited to establish the legislative course after he had retired from Ottawa University in 1979. But that could not be arranged and I was invited by the Dean to establish and teach the course in drafting. The three Governments concurred in this arrangement and the Barbados Government assigned me to the University for that purpose. The assignment, however, was an additional function to be undertaken with as little interference with my contractual duties as possible. No extra expense was incurred under this arrangement. Dr. Driedger (a long-time personal friend and colleague), helped with materials and explanations in two weeks of talks with him in August 1979 in Ottawa. It was on the basis of what was known of his course that it was begun in October 1979 with six students from five States in the region. The course was to be on the model of the Ottawa Course.

4. After twenty-six years drafting legislation in Canada (both provincially and federally) and two years in the Caribbean for the Federal Government of the West Indies and Trinidad, I was not too confident that much could be learnt from a drafting course, even one based on the methods developed by Professor Driedger. This is a common opinion of career drafters and not surprising. It was some consolation to know that even Dr. Driedger felt that the best one could do with such a course was to reduce by six months or so the amount of time required to train a drafter in-service in a good drafting office.

The Legislative Drafting Course

5. Master of Laws Degrees

The Legislation Drafting option consists of the following:

- (a) Legislative Drafting;
- (b) Public Law I, or such other subjects as the Faculty Board prescribes;
- (c) Public Law II, or such other subject as the Faculty Board prescribes;

In addition the student must submit an acceptable thesis to the University.

The Public Law courses cover Constitutional law in the West Indies and Administrative Law.

6. Diploma in Legislative Drafting

- (a) The Diploma may be awarded to a candidate who has passed all the coursework and examinations for the LL.M. degree but who fails to submit an acceptable

thesis within the regulatory time. If a candidate fails Public Law I or II, but passes the Legislative Drafting Course, he may be awarded a diploma.

- (b) A Diploma in Legislative Drafting may be obtained by a candidate who pursues only a course of study in that subject over a minimum of three terms, without attempting the LL.M. degree course.

Qualifications for the Legislative Drafting LL.M. Degree Course

7. The following are eligible for admission to the drafting course:

- (a) Graduate of the University holding an LL.B. degree or of another University holding a degree that includes such law subjects as to satisfy the Board for Higher Degrees;
- (b) Graduates of the University or of an approved University who, having obtained a professional legal qualification, are admitted to practice in any part of the Commonwealth; and
- (c) In the case of the Legislative Drafting option, persons who having obtained a professional legal qualification, are admitted to practice in any part of the Commonwealth and who have also been certified by a senior public officer in the legal civil service of any Contributing Territory as having had two years post-qualification experience of legislative drafting.

Qualifications for the Legislative Drafting Diploma

8. The admission qualifications for the Diploma are similar to the admission requirements for the LL.M. Legislative Drafting option set out above.

Results of the Three-Year Period of the Course

9. In January 1983 the first LL.M. degree of Legislative Drafting was awarded. A Diploma has also been granted by the University. Several trainees have submitted theses and are awaiting acceptance or rejection.

10. Numbers of Trainees:

Including the present year, in which there are two students in attendance, one each from Jamaica and St. Lucia, a total of 18 students passed through the course. All but one were government employees. That one was sponsored by CIDA in the first year, who would have otherwise gone to the Ottawa course.

11. States Represented:

The following eight Caribbean States have sent students: The Bahamas (1); Barbados (5); Belize (1); Dominica (1); Guyana (1); Jamaica (4); St. Lucia (1); Trinidad and Tobago (4).

12. It is understood that all but four of the trainees continue to be employed in government services as drafters.

Seven of the eighteen trainees were women. All trainees were qualified to practice locally but a few had no LL.B. degree or similar law degree from any University.

13. In the year 1981-82 three faculty members monitored the legislative drafting course for varying periods. In that year the number of trainees sent by governments fell to two; another person, who was to be on a scholarship from the UNDP failed to qualify for the LL.M. in time and did not come for the Diploma course.

14. In the first year, 1979-80, there were six trainees; in 1980-81 there were eight; two (plus three faculty members) in 1981-82; and in 1982-83 there are two trainees.

Expectations for the Continuation of the Course

15. The legislative drafting course has since its inception been a year-by-year matter, because of the conditions under which the instructor for that course is

retained. If a UN contract is not renewed in any year, the instructor is lost to the course; if the Barbados Government re-assigns the instructor to other duties, he is lost to the course.

16. While this situation has provided economy of operation, it has also created some uncertainty about continuity.

17. However, the three sponsoring Governments have agreed to finance the course for a further three-year period, which will end with the University year 1984-85.

Contents of the Legislative Drafting Course

18. This course deals with more than the "writing" or composition of legislation, for "legislative" drafting involves more than composition. Nevertheless if one cannot write, one cannot draft. Similarly, if one cannot form a legislative plan, one cannot draft. If one does not fully understand where he fits within the legislative process, he will not have the self-respect he needs to be a competent draftsman.

19. The course attempts to be intensive and fully rounded, but concentrating on imparting as much information and skill as possible in the hope that the trainee will be attracted to continuing his development and, if otherwise suitable, take up the discipline as a career.

- (i) Where and for whom, Legislative Drafting is done: This discusses such matters as Legislative Institutions and the various classes of the institutions.
- (ii) How to analyse the legislative problem: This process is taught through individual exercises in drafting as well as by the many statutory examples in the various statute books. The course faces up to the reality that much legislation is "copied", either poorly or well, while much else is "adapted" (copying plus necessary modifications to meet the client's). It is essential that drafters understand how to do this well because in small jurisdictions it may be the only way to obtain legislative ideas. And adapting extends beyond the precedent into an analysis of its contents, while on other occasions it may provide only the spark to ignite an idea. But the technique is important. This topic includes such mundane matters as how to make the best use of the information sources to determine the legislative purpose, background, on the factual side. How to use one's own or scanty library facilities to "research" what law one can on a given subject. This introduces the need to develop the skill of knowing what question to ask to find out what is required. It is recognised that not infrequently a drafter will have to train people to give him proper instructions or learn to elicit them in other ways.
- (iii) How to put the matter together in a legislative plan: This is the creative part of drafting and very, very difficult to teach. But some guides are developed and in a small way, some exercises are developed. Some drafters believe this skill can be acquired only by experience and instinct; and, while there is much truth in the belief an attempt must be made to give some reliable guide so that the skill can be developed.

20. In addition to practice sessions, the course attempts to prepare the trainee for the real world of drafting by describing the many differences in drafting services and how they developed. There are mostly lectures, talks or spontaneous explanations of how things can happen in a House, committee, ministry, etc.

21. A comparison of drafting services is made between, e.g. New Zealand, Canada, Australia, Barbados, Antigua, etc.

22. The relationship of the drafter to the Executive, Parliament, Law Clerk, and other Government agencies is examined.

23. The methods that can be used to save the most of a drafter's time for drafting. In this regard, available technical equipment is used to introduce modern ones such as computers, infra-red copying and stencils.

24. The legislative process, as it relates to legislation is discussed: Public Bills, Government Bills, Private Member's Bills, Private Bills, Hybrid Bills, etc. and the standing orders that drafters should be aware of.

25. Also the advantages and disadvantages of Omnibus Bills, the glossing method of amending statutes and other like matters.

26. Some instruction on revision methods, consolidation, preparing tables, cross-reference records and other aids to a drafting office to keep up with statute law are also brought in.

27. A summary of the legislative drafting subjects is set out hereunder, but it must be emphasised, that most time is taken up with routine practice of putting together and taking apart legislative measures.

28. The course attempts to get 200 hours of instruction, exercises and discussions into a course year. A test or exam is also devised, though this is difficult as the subject does not lend itself easily to "testing" a skill that is not yet developed and won't be developed without considerably more use.

29. In the instructing an effort is made to emulate Driedger's methods as much as possible.

Subjects of Legislative Drafting Course

30. (i) Legislative Institutions and classes
- (ii) Drafting environments
- (iii) Common law drafting
- (iv) Composition of Legislation: The legislative sentence, grammatical structure, critical elements of the sentence, Coode theories, Driedger's supplements
- (v) Exercises in writing of comprehending legislative provisions
- (vi) Preparing draft legislation: Policy, analysis, research, synthesis, revising, editing, checking, dialogue with own work, etc.
- (vii) Drafters role in various processes, legislative, executive and mechanical
- (viii) Statutes: Acts, Statute books, Revision, Codes
- (ix) Management and operation of Drafting Office
- (x) Interpretation of Statutes - Drafter's perspective - cause and effect

Conclusions Drawn from the Three-Years of the Course

Effectiveness

31. The effectiveness of the legislative drafting course will be fairly demonstrated only if a sufficient number of trainees remain in government drafting service. One should not anticipate more from a drafting course that it can deliver. All of the trainees will have acquired some knowledge of the techniques of drafting. They will also be able to make better use of the texts on drafting written by Driedger, Dickerson and Thornton and others, if they learnt nothing else.

32. That drafting is much more than writing may also have been grasped by the trainees, a discovery that should be of value to them in the future, despite the fact that, to them, there may have been an inordinate amount of time spent on writing exercises on statutes as well as on their own practice material.

33. One other thing became apparent: it is virtually impossible to set satisfactory tests or examinations in legislative drafting. The extent of the subjective judgements is too large, and the drafting process does not lend itself easily to testing in the usual law school manner.

How to keep the course in existence

34. The most critical aspect of the UWI course at this time is how to obtain trainees in a regular, reliable manner. How can one determine the number of students to prepare for in advance of the new University year? Unless there is a solution to that problem, the course will certainly come apart.

35. Some proposals for keeping the course alive are given in the following paragraphs:-

(a) Scholarships

The Ottawa course has depended upon scholarships to keep a flow of students year after year. But Ottawa was fortunate in that it could accept foreign students. Scholarships might encourage graduate law students to pursue legislative drafting for an LL.M. before trying the certificate course.

(b) Integration with CFTC Courses

Since the UWI gives a Diploma in Legislative Drafting, as well as an LL.M., it is possible to conceive a plan whereby the CFTC could supplement the supply of trainees for the Legislative Drafting Course instead of running its own course in the Caribbean. It is also conceivable that other international aid agencies might become involved. Initiatives such as that shown by the UWI and the three sponsoring Third World Countries should be encouraged.

So long as the reserved places on each year's course were protected for the sponsoring countries, Commonwealth trainees from within or outside the Caribbean would help in both keeping not only the drafting course available but also whatever teaching skills the course had developed or might develop.

The numbers would have to be controlled. The course should be intensive and of about 200 class hours. The optimum number per instructor appears to be six in the present circumstances. Efficiency falls off as the number goes over six trainees.

(c) Admission of students from other common law areas when space is available

The costs would be high for the trainee and this option is probably not practicable unless the fees were lower.

(d) Integrating the Legislative Drafting Course with a Regional Law Centre for Legislation

This would require a more drastic change in the present structure of the course and need only be considered if a Legislative Research Centre were set up within the Law Faculty on a Columbia University model.

Some Suggestions for Improvement in the Course

The following suggestions are made following some reflections on three years of instructing the legislative drafting side of the LMM Course in Legislative Drafting:-

1. More Law Faculties' members ought to be able to take the course in depth. This could assist the dissemination of information about legislative drafting within the academic community and strip from that discipline some of its mystique and much of the suspicion that surrounds it even now. There is altogether too little known about legislative drafting and too many myths and misconceptions. An abyss exists between law educators and drafters that should be closed for the good of social and economic development in developing countries.
2. A method requires to be devised to weed out the trainee who is not really interested in legislative drafting, whose interest lies with acquiring a post-graduate degree, or who is not intellectually or temperamentally suitable. This test should only be used in the case of government sponsored trainees on whom much time and money will be spent without benefit to the government. Purely academic applicants fall within another category. The drafting instructor ought to have more effective control over admissions so that classes can be tentatively organised a year or so in advance. As it is now one never knows whether there will be trainees or not until they show up.
3. A special effort should be made by both the instructor and the Law Faculty to provide a legal drafting course, based on the conventions of legislative drafting, for the practising legal community. A number of practising lawyers have displayed

an interest in finding out more about legislative drafting. It would help remove the veil of mystery and suspicion that ordinarily surrounds the subject within the profession.

4. A suitable instructing room, together with facilities for mini-computers, printers, screens, projectors, film transparency makers and other equipment to be used in teaching the course or in supporting it, with a controlled environment, ought to be made available for the legislative drafting course. In the last three years, the instructor's accommodation has been moved three times, and his instructing equipment has to be moved twice for each class.
5. A back-up instructor ought to be available to the course. Too much depends upon the good health and presence of one instructor. The back-up might be a member of the faculty who has taken the course or a local legal officer who has done so. Learning the teaching method takes time. Too much can depend on one individual and if he is replaced much time will be lost while another teaches himself how to instruct, even with the teaching manuals recently published by both Driedger and Dickerson.
6. The drafting instructor ought to be drafting consultant for Faculty members who are preparing legislation for other Caribbean jurisdictions, as well as for other governments in the region, so long as that consultancy does not interfere with the instructing function. It is important to the course that the value of know-how in drafting be shown more often to those who need to use it; and useful to the instructor to keep his head and heels in the real world of the legislative process.

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DEVELOPMENTS IN STATUTORY INTERPRETATION

Memorandum by
THE GOVERNMENT OF AUSTRALIA

The annexed discussion paper, "Extrinsic Aids to Statutory Interpretation", was tabled in the Australian Parliament on 14 October 1982. It was tabled with the intention that the paper be studied and debated inside and outside the Parliament before any of its proposals are put forward as legislation.

2. The paper examines the extent to which, in interpreting Acts of Parliament, regard can properly and usefully be had to reports, explanatory memoranda and other materials that do not themselves form part of the Act. For this purpose the paper examines the extent to which the courts already use such extrinsic materials. It goes on to consider whether the range of such extrinsic materials need to be broadened, and how that could be brought about in a way that would be satisfactory and acceptable from the point of view of the courts and of the audience to which the Act is directed. Finally, the paper sets forth for consideration and discussion a possible procedure and programme for the use of specially prepared explanatory memoranda limited, initially at least, to selected Acts considered by their sponsors to be appropriate for this purpose.

3. The discussion paper arises out of an initiative announced by the Attorney-General in 1981 at the time he introduced the Bill to insert section 15AA in the Acts Interpretation Act 1901 (Act No.61 of 1981). At the time of introducing that measure the Attorney-General stated that an examination would be undertaken of the topic, with a view to developing proposals that would be brought into the Parliament for further consideration. There has also been considerable interest in the exercise by groups outside Parliament and indeed overseas as well, and it is hoped and expected that the paper will produce a vigorous and fruitful debate.

4. No official examination of this kind has taken place since Federation in 1901, although there have been some distinguished precursors. The paper is also timely in view of the quite remarkable way in which the problems of statutory interpretation have engaged the attention of both Australia's highest courts and the wider Australian community in recent times.

5. One thing that clearly emerges from the paper is that the courts already can refer to extrinsic materials in certain cases under the existing rules of interpretation. Legislation is not made in a vacuum and each Act must be read in its context. Courts may, and on occasion do, look at reports and other materials leading to the legislation in question. Recently, individual judges of the High Court have gone to the extent of looking at Hansard to identify the problem the Act addresses or even to ascertain directly what was the parliamentary intent. The judicial developments are of great significance. However, other judges take a more restricted view, and this in itself raises a problem. There are other problems. Often these materials will not be readily accessible to the ordinary users of statutes. They are not necessarily self-explanatory and often require a difficult exercise of evaluation. Finally, overall there has been much greater reluctance to use parliamentary materials than to use other materials, such as reports, that in fact are more remote from the law-making process than Hansard.

6. In these circumstances, the paper proposes for consideration the use in selected cases of a specially prepared explanatory memorandum or statement that would be submitted to Parliament along with the legislation in question. The memorandum when approved would be made as accessible to the users of the legislation as the legislation itself. One of the most interesting points that emerges from the paper is that the idea of such a special explanatory statement has received wide interest or support over a considerable period as is outlined in Chapter IV of the paper.

7. There has not yet been parliamentary debate on the paper. However, the Opposition's initial reactions to the paper are supportive of the initiatives taken. It is likely therefore that the debate will concentrate on the principles involved in the proposals and the translation of those principles to legislative form.

EXTRINSIC AIDS TO STATUTORY INTERPRETATION

Chapter 1: Introduction

Terms of reference

1.1 The terms of reference of this discussion paper are to consider what extrinsic materials should be taken into account in the interpretation of Acts of the Federal Parliament.

The scope and nature of the problem

1.2 No official examination of this kind has taken place since Federation in 1901. The volume and complexity of legislation by the Federal Parliament has increased enormously in recent years. In the year 1950 there were eighty Acts, running to 281 pages in the annual volume of Acts. In 1980 the number of Acts had grown to 177, covering 1859 pages. The range of topics covered by the legislation has undergone a similar growth. The interpretation of statutes has become a major part of the judicial function. The recent volumes of law reports give ample evidence of the importance of statutory interpretation and of the extent to which it now occupies the attention of the courts.

1.3 The ideal would be a situation in which the words of every Act were in themselves precise and unambiguous in all the circumstances to which its provisions applied. There is little basis, however, for believing that this ideal corresponds always or indeed often with reality. It may be said that this is due in measure to defects in drafting, but the fact is that modern legislative texts are drafted by skilled people whose aim is to spell out in a logical and consistent manner the full detail of the legislative scheme, with a strong reliance on the literal rule of interpretation. The Federal Parliament has been well served by the level of professional competence of its Parliamentary Counsel. While no doubt there is always room for improvement, there are practical limits to what can be done in this regard, when account is taken of the inherent frailty of language and the difficulty of foreseeing and providing for all contingencies.

1.4 Moreover, it is an oversimplification to look solely to the drafting of Acts without regard to the rules of interpretation which have been developed by the courts. There is an interaction between the form of a communication and the rules by which it is to be interpreted. The intelligibility of Acts from the point of view of both ordinary citizens and their expert advisers cannot be disassociated from the rules of interpretation followed by the courts. The ability properly to understand an Act depends in ultimate analysis on intelligent anticipation of the way in which it would be interpreted by the courts.

The framework of Acts

1.5 An examination of extrinsic aids to the interpretation of Acts should begin with a description of what matters actually form part of the Act itself. The body of an Act consists of numbered sections introduced by the enacting formula - 'Be it enacted by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows.' Each Act also contains one or more of the following subsidiary elements:

- (a) a heading, called the long title, consisting of the introductory phrase 'An Act to' or 'An Act relating to', followed by words very briefly describing its object (at one stage the long title was not regarded as forming part of the Act, but now a different view is taken)¹;
- (b) in rare cases, a preamble giving the reasons why the passing of the Act has become desirable² (The preamble precedes the enacting formula, which is altered to read 'Be it therefore enacted');
- (c) headings of the Parts, Divisions and Sub-Divisions into which the Act is divided³; and

(d) a schedule or schedules. ⁴

In appropriate cases regard may be had to each of these subsidiary elements in interpreting the operative sections of an Act. They are, or are deemed to be, part of the Act.

1.6 A long tradition has it that punctuation is not part of an Act. It may rest, to some extent at least, on a judicial misconception that punctuation may be supplied in whole or in part by the printer or proof reader ⁵, whereas in fact it is carefully supplied by Parliamentary Counsel responsible for the drafting of the Act and is in the text of the Bill considered by Parliament. Marginal notes and section headings are not part of an Act, although they too are supplied by Parliamentary Counsel and are in the text of the Bill considered by Parliament. ⁶ The General view has been that these potential aids to interpretation are to be completely disregarded but there has been a shift by judges on their use, particularly in the case of punctuation. ⁷

Revision and reform

1.7 There has been growing appreciation of the importance of statutory interpretation and a growing concern to identify shortcomings with a view to correcting them. Under our legal traditions, the principles of interpretation have rested largely on a body of flexible doctrine developed by the practice of the courts. In this regard, the judges have shown in recent times an awareness of the responsibilities involved in exercising the function of interpreting Parliament's intent. ⁸ This has been one significant development. However, a development of at least equal significance is the quite remarkable way in which the problems of statutory interpretation have engaged the attention of the wider Australian community in recent times. This can only be regarded as a healthy development, but it does raise the question of what are the proper limits of revision and reform in this area.

1.8 Under the constitutional provisions that apply to Federal legislation it is the function of an independent judiciary to interpret the law. Clearly, no proposals could or should be implemented that would undermine the freedom that this function requires. However, this is quite consistent with a limited degree of statutory intervention in the process of interpretation. The Acts Interpretation Act 1901 and its numerous amendments since that date provide many examples that show the legitimacy of such measures. Section 15AA, inserted in the Acts Interpretation Act in 1981, is the most recent example. ⁹ The effect of the provision is to confirm that in interpreting provisions regard is to be had to the object or purpose underlying the Act in question. It reads in full as follows:

"Regard to be had to purpose or object of Act

15AA.(1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(2) Nothing in sub-section (1) shall be construed as authorizing, in the interpretation of a provision of an Act, the consideration of any matter or document not forming part of the Act for any purpose for which that matter or document could not be considered apart from that sub-section"

1.9 This provision was not intended to affect the existing position in relation to the use of extrinsic materials to assist in the interpretation of statutes and sub-section (2) of section 15AA was enacted to make this clear. The second reading speech of the Attorney-General introducing section 15AA indicated, however, that an examination would be undertaken of what extrinsic aids should be able to be used in interpreting statutes beyond those allowed under present judicial practices, and that proposals in that regard would be brought forward for consideration. ¹⁰ The present discussion paper is part of that exercise.

1.10 Sub-section (2) is therefore limited to negating what section 15AA(1) might be thought otherwise to have authorised. It left judges free, in the meantime, in the application of the flexible principles of interpretation embodied in the practice of

the courts to enlarge, or for that matter to narrow, the range of extrinsic materials to which regard might be had. As will be seen in what follows, there has, over recent times, been greater use by judges of extrinsic materials, quite independently of any legislative direction on the matter.

Chapter II: The Process of Interpretation

The role of interpretation

2.1 Every occasion for taking decisions by reference to the applicability or the non-applicability of an Act to a particular situation involves the process of statutory interpretation, even if no dispute has arisen as to how the Act should apply. Whether the decision is taken by a private citizen or a public servant, by a company or by a public authority, he or she or it is engaging in the process. Statutory interpretation is not the preserve of lawyers or the courts. It directly concerns all those whose activities are affected by Acts of Parliament. In modern society this means, in effect, everyone.

2.2 The particular group affected by a particular statute may be called the audience or the users of the Act. Another 'special interest' group needs to be identified. It consists of the law makers - those responsible for the drawing up and enactment of statutes. Under our constitutional system, the initiative for most, though not all, Acts rests with the government of the day. In other cases, the initiative will be that of a private member of Parliament. The Office of Parliamentary Counsel is responsible for ensuring, as far as possible, that government Acts give effect to the intention of the government and, to the extent that the resources of the Office permit, they perform the same role for private members' Bills. Members of Parliament are obviously and properly concerned that Acts passed by them give effect to their understanding and expectations of what the Acts mean. Ultimately, the legitimacy of the concern of the law makers in statutory interpretation rests upon their role in communicating the will of society, as articulated by democratic processes, to society's members, telling them how they should and should not behave or what consequences are to attach to certain actions or events.

2.3 The special role of the courts is that, under our constitutional arrangements, only they can give a final and authoritative interpretation of statute law. All groups affected - whether the law makers responsible for the Act or the audience of the Act - need to take account of the answers that would be given when and if the interpretation of the Act comes before the courts. However, this does not seem to be a one-way relationship. Courts should, and do, take account of the intention of the law makers and also of the interests of the Act's audience, within proper limits. The problem, in a sense, is: what are those limits?

Choice between 'intent' and 'meaning'?

2.4 It has been said that a choice has to be made between following the 'legislative intent' and seeking instead the 'meaning' of the words of the statute.¹ If 'legislative intent' is the criterion for interpretation, the primary emphasis should rest on the intention of the law makers. Inquiry as to the 'meaning' of the statute suggests greater concern to find out how the statute is understood by the audience at which it is aimed. The difference between these two criteria is obviously important for present purposes because of the way in which the criterion adopted may influence what extrinsic materials will be used as aids for interpretation. It seems to be a mistake, however, to regard these two approaches as being necessarily opposed, with the unsatisfactory consequence that an absolute choice has to be made between them. In principle, there should be a correspondence between what the law makers intend and what the audience of the statute perceives. If there are breakdowns in communication, this would be one of the strongest arguments for the availability, in appropriate cases, of satisfactory extrinsic aids that would make that correspondence more likely to occur. On the other hand, questions of balance and degree are obviously involved.

2.5 More recent pronouncements of the High Court of Australia have illuminated, but not exhausted, this question. These pronouncements have rightly rejected too rigid an application of the literal construction rule under which the meaning of the language of

an Act is to be applied - however improbable it was that the Parliament intended the result that meaning produces. However, while acknowledging unequivocally that a statute is to be expounded according to the intent of the Parliament that made it, the emphasis remained on ascertaining that intention by reference to the 'meaning' of the words in the context of the Act in question.²

2.6 Two particular matters call for further examination. One is the extent to which, notwithstanding the emphasis referred to, our courts in fact seek assistance in interpretation from materials and considerations extrinsic to the Act itself. The other matter is whether the range of admissible extrinsic materials needs to be broadened, and if so how that could be brought about in a way that would be satisfactory and acceptable from the point of view of the courts and the audience of the statute.

Divining the legislative intent

2.7 Before these matters are examined, it is as well to recall a basic principle to be applied to the interpretation of all written instruments, including statutes. The object is to see what is the intention expressed by the words used.

"But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."³

2.8 This was said in the courts in 1877, and reaffirmed in 1975 in similar language⁴ :

"One must first read the words in the context of the Act read as a whole, but one is entitled to go beyond that. The general rule in construing any document is that one should put oneself 'in the shoes' of the maker or makers and take into account relevant facts known to them when the document was made. The same must apply to Acts of Parliament subject to one qualification. An Act is addressed to all the lieges and it would seem wrong to take into account anything that is not public knowledge at the time. That may be common knowledge at the time or it may be some published information which Parliament can be presumed to have had in mind."

2.9 The courts are not, if they ever were, confined to the four corners of the Act. The desirability that extrinsic materials that are taken into account should be not only publicly available but readily available is taken up below. The main point to be noted at this stage is that words must be read in their overall context.

2.10 Thus, words in a statute have to be read in the context of the whole Act in which they appear. It is elementary that no one should profess to understand any part of a statute or any other document before he has read the whole of it, and that until he has done so he is not entitled to say that it or any part of it is clear or unambiguous.⁵ Also, the courts can take into account the wider context in which the Act is placed. Legislation is not made in a vacuum, and a judge, in interpreting it, is entitled to take judicial notice of information relating to legal, social, economic and other aspects of the society in which the statute is made and in which it is to operate.⁶

2.11 In drawing attention to the need to consider the context of the Act, it should be emphasised that the problems of interpretation are not solved by simply relaxing the restrictions on the range of contextual material to which the courts may have resource in construing a legislative provision. The point is well expressed in the 1969 Report on the Interpretation of Statutes by the English and Scottish Law Commission.⁷

"One of the difficulties which sometimes faces the courts in interpreting statutes is the lack of any material about the underlying policy of the statute in question. When the meaning of a provision may vary according to the view taken of the general purpose of the legislation, such a lack of information may put a court in an invidious position; it may have to

make a choice between rival social assumptions, argued before it, with little fuller guidance than can be derived from those matters of which it can take judicial notice and such indications, which may be indecisive, as can be gathered from the language of the statute. In the result the interpretation of a provision may seem to depend on the choice and pattern of the language of the Act, when these may in fact have been chosen in the light of instructions to the draftsman which did not, and perhaps could not, anticipate the point being argued. In reality the court may have had to reach its decision as best it can, even if it is expressed in terms of an analysis of the language used. Thus the question arises whether the courts and the public should, where appropriate and practicable, be provided with some further authoritative aid to the construction of statutes."

Chapter III: Existing Use of Extrinsic Materials

Categories of materials

3.1 In considering what extrinsic materials are used by the courts at present, a distinction must be made between Parliamentary and other materials. These other materials will be considered first. Paradoxical though it may seem, there has been much greater reluctance to use Parliamentary materials than to use other materials that are more remote from the law-making process.

Reports of committees

3.2 The courts can consult the prior reports of committees of inquiry, law reform commissions and other similar bodies that have investigated the subject matter of the legislation to ascertain the 'mischief' which Parliament is concerned to remedy. The term 'mischief' comes from the celebrated resolutions of the Barons of the Exchequer in 1584 in *Heydons case*¹, in which judges are enjoined to consider the mischief or defect being dealt with, the remedy appointed by the Parliament, and then to make such interpretation as shall suppress the mischief and advance the remedy according to the true intent of the makers of the Act *pro bono publico*. These propositions, though they have an archaic flavour, are recognised by Australian courts as rules of continuing validity and practical importance.

3.3 While the admissibility of such reports is beyond question, difficult refinements and disagreements have developed in relation to their use. Thus, the balance of judicial opinion is that such reports can only be used to ascertain the mischief being dealt with and not for the direct purpose of ascertaining what Parliament meant in its statute.² Some judges have found this distinction unreal and unhelpful - since ascertaining the mischief is part of the process of ascertaining the legislative intent it is pointless to draw a distinction between the two.³

3.4 The limitation on the use to be made of the report becomes particularly troublesome where, as is frequently the case, the report contains recommendations or annexes a draft Bill to give effect to the report. This has led some judges to decline to look at recommendations or the Bill annexed to the report, even though the report is otherwise regarded as admissible. However, Australian practice seems to be developing in favour of looking at the Bill if only for the negative purpose of ascertaining whether the Act so departed from the draft Bill as to make reference to the report irrelevant.⁴

Other non-Parliamentary documents

3.5 The range of non-Parliamentary materials extends beyond such reports, and can include in appropriate cases other non-Parliamentary materials that must be taken to have been within the knowledge of the Parliament when passing the Act or which otherwise illuminate the mischief Parliament was dealing with. On this basis, in recent times reference has been made, in relation to 19th century Acts, to Colonial Office records, to despatches of Colonial Governors and to the opinions of Law Officers.⁵ These instances are all the more interesting because they related to documents that on the whole emanated from the executive branch of government. In principle, such reference could not be confined to materials that are dignified by the

passage of time and that relate to Acts passed a long time ago, and there is no suggestion in the judgments that there is any such limit.

3.6 Reference to such materials will be facilitated where the Act expressly refers to them. Thus, the record of a premiers' conference has been looked at where the preamble of the Act referred to the conference.⁶

3.7 Also, if an Act purports to give effect to an international convention, the courts are at liberty to look at the convention in an endeavour to resolve any ambiguity. The convention may be referred to although it is not expressly mentioned in the Act that has to be interpreted and even where the Act is enacted before ratification of the convention.⁷

3.8 Under the international rules of interpretation, recourse may be had to the preparatory work (travaux préparatoires), leading to the conclusion of an international convention to confirm the meaning of the convention or where the meaning is otherwise ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.⁸ There can be no doubt in principle that in interpreting an Act that implements a convention a court should have regard to the meaning the convention has under international law, and it seems inevitable that the courts will thereby become involved in examining travaux préparatoires. English courts have already given approval to cautious reference to such materials⁹ and it seems highly likely that Australian courts will adopt a similar approach.

Parliamentary materials

3.9 The rule of exclusion: The established rule has been that courts will not look at proceedings in Parliament or to Parliamentary debates as an aid to the interpretation of a statute¹⁰, though it is to be noted that this rule of exclusion was a relatively modern development in the legal system we have inherited from England.¹¹ Under the rule of exclusion as usually stated, no distinction is made between using such references to ascertain the mischief being dealt with and as direct evidence of the legislative intent.

3.10 References to Parliamentary debates: The fact, however, is that some Australian judges have, notwithstanding the currency of the rule of exclusion, referred to debates to ascertain the mischief, and the practice, though still exceptional, seems to be growing.¹² If reports which are even more removed from value as evidence of the intention of Parliament are admissible, the Minister's speech would be equally admissible on the same basis.¹³ In at least one instance, Parliamentary debates have been used as direct evidence of the intention of Parliament, but with the caution that such evidence should be disregarded unless it clearly discloses the legislative intent.¹⁴ The material in question consisted of the Minister's second reading speech introducing the Act being interpreted. If the rules of interpretation consist of the practice of judges on the matter, there is no longer any rule of absolute exclusion.

3.11 Amendments to Bills: It has been noted judicially that there could be profit in knowing what amendments were made to a Bill between introduction and passage.¹⁵ Such amendments constitute legislative history in the strictest sense, and would provide cogent evidence of legislative intent. Existing provisions contained in section 7 of the Evidence Act 1905 facilitate proof of both the original Bill and any amendments that are made; the latter are published in the Votes & Proceedings of the House of Representatives and in the Senate Journals. In practice, such materials are normally excluded except for one major exception, consisting of the draft Bills leading to the enactment of the Australian Constitution.¹⁶ However, legislative history has also been looked at to confirm whether a report which annexed a Bill was in fact used as the basis of the legislation.¹⁷

3.12 Explanatory memoranda: Explanatory memoranda are normally circulated in the Federal Parliament on the introduction of a Bill for the purpose of explaining to legislators the purpose and details of the provisions of the Bill. They are not prepared or settled by Parliamentary Counsel. They are available for purchase, and are used by legal publicists to explain the legal effect of legislation, particularly in the tax field. While it has been noted judicially in England that such material could be useful in assisting the courts in their task of interpretation¹⁸, the general practice of the courts is to exclude such materials but there have begun to be exceptions. One recent High Court judgment referred to the explanatory memoranda

circulated in the Parliament and mentioned in the Minister's second reading speech. It was used as evidence of the mischief aimed at by the legislation.¹⁹

Legislative references

3.13 The above are instances where extrinsic materials have been referred to as a matter of judicial practice. Instances are now emerging of legislative authorisation of references to extrinsic materials in interpreting Acts.

3.14 A proposal to this effect was moved, but after debate withdrawn, in the United Kingdom Parliament in 1968 in the debate on the Theft Bill.²⁰ The proposed amendment was moved by Lord Wilberforce and read:

"Reference may be made, for the interpretation of this Act, to the notes on Draft Theft Bill contained in Annexe 2 of Command 2977[i.e. the 8th Report of the Criminal Law Revision Committee] but this commentary shall be for guidance only and shall have no binding force."

In 1969, Lord Wilberforce moved to amend the Animals Bill 1969 (since lapsed) by adding the following²¹:

"In ascertaining the meaning of any provision of this Act, regard may be had to the Report of the Law Commission on Civil Liability for Animals (Law Commission No 13)."

Professor Reed Dickerson has commented²²:

"This approach avoids many of the pitfalls of a blanket adoption of legislative history and, by referring to a specific factual study, impliedly supports the conclusion that the Bill is intended to implement the objectives of that study and not some variation of them. (Where a variation has been made, its extent could be defined.) Also, having predated the legislative process and been found to be satisfactory, such a study is likely to throw light mainly on legislative purpose and not to include the type of interpretative materials, often found in committee reports, that tend to compete with the working provisions of the Bill and whose self-serving aspects undermine their credibility."

3.15 The Members of Parliament (Register of Interests) Act 1978 of Victoria enacts a code of conduct for Members of the Victorian Parliament. The code is set forth in section 3(1) of the Act, and is Mosaic in its brevity though containing nine commandments rather than ten. Sub-section (2) provides:

"(2) Without limiting the generality of the foregoing in the application and interpretation of the code regard shall be had to the recommendation of the Joint Select Committee of the Victorian Parliament appointed pursuant to The Constitution Act Amendment (Qualifications Joint Select Committee) Act 1973 presented to the Legislative Assembly on the 23rd day of April, 1974 (D.14/1973-74) contained in paragraph 12 of that report."

3.16 The Civil Jurisdiction and Judgments Bill 1982 which at the time of writing is before the United Kingdom Parliament deals in part with the implementation of certain European Conventions. Clause 3(3) of the Bill provides that in interpreting the conventions - which are given the force of law in the United Kingdom by the Act - reference may be made to specified reports that were specially prepared to explain the Conventions. These reports go in some detail into the reasons for the various provisions in the Conventions. The sub-clause reads:

"(3) Without prejudice to the generality of subsection (1), the following reports (which are reproduced in the Official Journal of the Communities), namely -

- (a) the reports by Mr. P. Jenard on the 1968 Convention and the 1971 Protocol; and
- (b) the report by Professor Peter Schlosser on the Accession Convention.

may be considered in ascertaining the meaning or effect of any provision of the Conventions and shall be given such weight as is appropriate in the circumstances".

3.17 These are instances of provisions referring to specific extrinsic materials. The Ghana Interpretation Act, 1960 referred to further in Chapter IV contains a provision of a more general character, which comes from a time when there was a great deal of activity in the field of codification and re-enactment of law in Ghana. Section 19 provides:

"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 enquiry 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."

3.18 This provision was itself explained in the memorandum to the Bill in the following terms:

"Clause 19 is new to statute law and rationalises the present judicial principles governing the use of external aids to interpretation. The present rules regarding the use of text-books are vague and unsatisfactory. A Court may have regard to a text-book written by an author of established reputation. It is, in practice, much more difficult to gain acceptance for a living than for a dead author. The rational solution is to allow the Court to make formal use of text-books generally, just as they are in fact consulted by judges and practitioners for the purpose of informing themselves as to the law on a given subject, attaching such weight to the opinion of the writer as the merits of his book seem to warrant. For the same reasons, and because of the scarcity of text-books, it is proposed to extend the rule to the use of other works of reference, such as legal encyclopaedias and legal journals, to the reports of commissions of inquiry into the state of the law and to official memoranda. The reports of commissions of inquiry are of particular value in showing the state of the law prior to the making of the enactment in question and indicating the particular mischief and defect which the enactment was made to cure."

"It is expressly enacted that reference may not be made in Court to the debates in the National Assembly. There are two cogent reasons for their exclusion: first, it would not be conducive to the respect which one organ of State owes to another that its deliberations should be open to discussion in Court; and, secondly it would greatly interfere with the freedom of debate if members had to speak in the knowledge that every remark might be subject to judicial analysis."

3.19 The normal practice in Ghana is that the memorandum to a Bill is not published when the Bill becomes an Act although, in the case of the Interpretation Act, 1960, itself, the memorandum was reproduced and published together with the Act as a note on the Act. The operation of section 19 does not appear to have been the subject of any adverse comment. Especially in cases arising under the Ghana Companies Code, 1963, counsel have freely used the Report of the Gower Commission on the Administration of the Company Law.

3.20 The above examples serve to illustrate the possibility of reference to extrinsic materials on a more organised basis than at present, either generally or in selected cases. They provide a suitable introduction to the next chapter of this paper, which considers a number of proposals that have been made in that regard.

Chapter IV: Proposals for Use of Special Explanatory Material

A recurring theme

4.1 In discussions for reform in relation to extrinsic aids to interpretation, the proposal that has had greatest currency has been the use of an explanatory statement, either for all Acts or at least in specially selected cases. It should be added that some of the proposals have been tentative or exploratory in character.

1932 Report of the Committee on Ministers' Powers

4.2 In an annexe to the 1932 Report of the Committee on Ministers' Powers, Professor Harold J Laski suggested that a memorandum of explanation might set forth the purposes of a Bill and that authority could be conferred on the courts to utilise the memorandum as an aid in the work of interpretation, a judge not being bound thereby but having it available 'as an invaluable guide'. He said ¹:

"In the absence of any guidance beyond the words of the statute itself, I venture therefore, to doubt whether the judge has in fact a sufficient clue to the policy which is behind the legislation. He must as Heydon's case sought to insist, take proper account of the end the statute was intended to serve. Our legal tradition assumes that training in the law alone will enable him to do this; a proposition I have difficulty in accepting. But I agree that the strength of that tradition would make it difficult to persuade the judiciary to embark upon the examination of material for the elucidation of that end to which neither judicial nor legislative authority attaches. Indeed the result of such an adventure might be to widen, rather than to narrow, the present discretion of the judge."

"But it seems to me that there is a middle way. If statutes do not plainly avow their intention by their words, the desirable thing is, I submit, to attach to them an authoritative explanation of intention. This could be done in one of two ways: (1) as was so often the case in the Tudor period, by way or preamble to the statute itself. There would here be set out, as clearly as draftmanship will permit, the end the statute has in view; or (2) by way of memorandum in explanation of the statute. It is well known that it has become increasingly the practice in modern legislation to issue to members of Parliament a memorandum in explanation of any complex legislation that is laid before them: a good example is the explanatory memorandum which accompanies the Children's Bill now under discussion by Parliament. The value of these memoranda is great, and they would, I suggest, be of real assistance to the judge in discovering the purpose the statute is intended to serve."

4.3 Professor Laski envisaged that the memorandum could be revised after a Bill had gone through all its stages, so as to take account of any changes made during passage.

1961 Australian Legal Convention

4.4 The former Chief Justice of the High Court of Australia, Sir Garfield Barwick, delivered a paper at the 1961 Australian Legal Convention which contained a survey of proposals in this area. ² He referred to Professor Laski's proposal and to the Ghana Interpretation Act, 1960 ³ and also to comments by Professor C.K. Allen referring to an article by Sir William Graham Harrison, former British Parliamentary Counsel. ⁴ Professor Allen said of the article ⁵:

"Any Bill which imposes a charge on public funds must, by the rules of the House of Commons, be accompanied by a memorandum of this kind, or by a White Paper in the case of a pure Money Bill. White Papers and Notes on Clauses are issued in connexion with certain highly technical measures. Sir William Graham Harrison asks, with much reason, whether the courts might not look at least for guidance to such carefully regulated aids, without any serious danger of becoming lost in a wilderness of loose speculations. He asks, again, whether the courts could not, with propriety, take cognisance of certain Parliamentary rules of procedure which in some cases would be conclusive evidence of the true scope of statutes or clauses..."

"Whether or not new expedients would really assist interpretation would depend upon the spirit in which judges accepted them. If they were regarded as friends and guides in a process of interpretation which was liberal without being loose, they could render good service, and there seems to be no reason why they should not do so. If, on the other hand, they were regarded with suspicion (as some judges would certainly regard them) as being too vaguely 'extrinsic' or 'extra-legal', or even 'tendentious' or as 'usurpation', they would be either neglected or treated with hostility; and certainly, if they were regarded as additional specimens for the judicial microscope, they would merely add another stage to the rigours of literal interpretation."

4.5 Sir Garfield Barwick concluded 6:

"The provision of a memorandum explanatory of a Bill well drawn may, of course, permit of a fuller expression of the purposes of the Legislature than the language of a properly drafted statute permits."

"The question I leave with you is, does the expedient which has been adopted in Ghana, and which is not so far from preamble, perhaps, not so far from other practices to which I have called your attention, offer any promise as an aid to interpretation - not, of course, as a binding command to the court, but as an assistance in times of ambiguity or doubt, or where policy may govern the meaning to be assigned to some operative words?"

"Who doubts that the ascertainment of the legislative intent is at times an exercise in divination? And is there not some room to increase the material by reference to which the judge may discover the parliamentary intent and not be left to imagine it, or to give rein to what he would himself do if he were the legislator, and legislating in the times that he knows, or perhaps in the times which he but remembers?"

1969 Report on the Interpretation of Statutes

4.6 The 1969 Report on the Interpretation of Statutes by the English and Scottish Law Commissions recommended legislation to encourage the preparation in selected cases of explanatory material for use by the court. To this end, it proposed standing legislation providing that, in ascertaining the meaning of any provision of an Act, the matters which may be considered shall include, inter alia, the following: any document which is declared by the Act to be a relevant document for the purposes of the legislation. It would also be provided that the weight to be given to any such matter was to be no more than is appropriate in the circumstances. ⁷

4.7 The Report stated that the basic rationale of such a proposal is that an explanatory statement available with the Bill on its introduction could be a useful aid in determining the meaning of its provisions. It would enable the interpreter of an Act to take into account considerations which were before the legislature when the relevant Bill was under discussion. The Report considered that it would not give rise to the problems of availability that existed in connection with the use of parliamentary history of a Bill, as a statement could without undue difficulty be made available to the users of statutes. ⁸

4.8 The Report points out that such explanatory statements would be even more useful if they could be amended at successive stages of the Bill's passage in the light of amendments made at the committee and report stages. It added that it would be more valuable still if the amended statement could be given some form of Parliamentary approval. Therefore, it considered possible procedures for amending the explanatory statement in the course of the Bill's passage and for obtaining a measure of Parliamentary approval for its contents, pointing out at the same time that these were matters ultimately for Parliament itself to consider and decide. The Report set forth four possibilities with comments thereon ⁹ :

- (a) The explanatory statement might be incorporated in the Bill by way of a comment on the Bill as a whole or on particular provisions or groups of provisions. It would be amendable in consequence of changes made in the substantive provisions of the Bill and would be transmuted into a statement of the intention of Parliament. Thus, it would in effect be treated in the same way as a preamble under present Parliamentary procedure, and would have

the same degree of authority on the courts. It is clear that this proposal would give the highest degree of Parliamentary approval to the statement. On the other hand it would involve a radical departure from the accepted conventions as to the content of preambles and it could not be assumed that Commons practice (which precludes amendments to preambles other than those consequential on amendments to the body of the Bill) would be appropriate. Accordingly, at least in a case where a relatively lengthy and detailed statement might be needed (e.g. a commentary on a code), the burden on Parliamentary time might be unacceptable.

- (b) The statement, originally published with the Bill, might be revised after enactment by officials for the limited purpose of bringing it into line with the final Act. The revised statement, certified by the Clerk of the Parliaments, would be published by the Queen's Printer. The precedent for this responsibility would be the semi-editorial functions which draftsmen and Parliamentary officials already exercise in respect of such matters as headings, marginal notes and punctuation. But the precedent is inexact: the adjustment of an explanatory statement might have more far-reaching consequences on the ultimate interpretation of a statute and therefore require a closer degree of Parliamentary control.
- (c) The statement, after adjustment by officials to take account of amendments to the Bill in each House, might be submitted for approval by each House on Third Reading. While this procedure would like proposal (a) ensure Parliamentary control, it might similarly raise problems of Parliamentary time, especially if provision were made for debating amendments to the statement.
- (d) It might be the responsibility of the promoters (or of some specified authority, such as the Lord Chancellor) after the enactment of the Bill to lay before both Houses a draft of the adjusted explanatory statement, possibly under a procedure which would allow for approval with modifications. The pressure on Parliamentary time might be alleviated by the prior scrutiny of the revised statement by a Joint Committee of both Houses.

4.9 The Report went on to point out that, even if the explanatory statements were amended during the course of the Bill's passage and given some measure of Parliamentary approval, it would be no more binding on the courts than are other contextual material. It considered that initially at least such explanatory statements, having regard to the time and labour that would be involved if they had to be prepared for all legislation, should be used only as a selective device to be adopted in relation to Bills considered by their sponsors to be appropriate for this purpose. The Report had particularly in mind Bills giving effect to the reports of the Law Commission or to those of comparable bodies, such as the Law Reform Committee and the Criminal Law Revision committee. This would facilitate the preparation of a satisfactory explanatory statement.¹⁰

4.10 Finally, the Report acknowledged that a standing provision was not required in order to enable the Parliament to follow the recommended practice in relation to selected Acts. It would be possible to authorise reference to the explanatory statement in the particular Act in question. The Report added¹¹:

"But we think that anticipatory provision in a statute of a possible course of action by Parliament in a future statute may be not without value, particularly as regards bodies such as the Law Commissions; they may thereby be encouraged to prepare their reports in a way facilitating the preparation of an explanatory statement for use with Bills based on the draft clauses attached to the reports. Moreover, if a particular Bill included provision for an explanatory statement as an aid to interpretation, Parliament would have the advantage of an earlier debate on the technique in principle and be able to give more attention to its propriety in the particular instance."

1975 Report on the Preparation of Legislation

4.11 This Report was prepared by a committee appointed in the United Kingdom to review the form in which public Bills are drafted, with a view to achieving greater simplicity

and clarity in statute law. The committee considered the provision of explanatory material external to the text of an Act, either at the Bill stage or later, and commented ¹²:

"The degree of complexity in legislation and the specialisation of its subject matter vary greatly. So too.... does the nature of the audience to whom aids to its understanding have to be addressed. Whereas in all cases due weight must be given to the needs of Parliament, the range of other persons whose needs require to be taken into account may extend from members of the public who want a broad, general picture of what is involved, to specialised, professional or trade interests which require a highly technical and precise explanation to enable them to assess the detailed legal effect of the legislation. The question whether any, and if so, what kind of external explanatory material should be provided is best considered separately for each statute, and we are told by the Lord President of the Council that this is the Government's practice."

4.12 However, while making these recommendations about the development of specially prepared explanatory materials, the committee thought that in general such materials should not be declared to be admissible for the purposes of judicial interpretation. It said ¹³:

"to do so would be to create what Professor Reed Dickerson has called a 'split-level statute', of which only the primary level would have been fully debated in Parliament, and would, as a distinguished member of the judiciary put it, be asking the courts 'to ride two horses, to construe technical draftsman's language and layman's language'."

4.13 That is to say, the committee took a different view from that recommended by the 1969 Report on the Interpretation of Statutes. It also differed from the 1969 Report in relation to the desirability of enacting a standing provision as proposed by the 1969 Report for facilitating reference to such explanatory material in particular cases. The 1975 Report considered that such a provision may be 'superfluous' in that Parliament can in any Act declare specific material outside the Act to be admissible for interpreting it. Also, however, it thought that this power should be exercised 'with restraint' for reasons of the kind quoted above. ¹⁴

Suggestion by Sir Stanley Burbury

4.14 The use of an explanatory statement was taken up by Sir Stanley Burbury, on the occasion of his retirement as Chief Justice of the Supreme Court of Tasmania in 1973 to become Governor of Tasmania. He said ¹⁵:

"More fundamentally, I would like to have had the time to put into detailed form some ideas which I have had for many years about the court's proper role in the interpretation of Acts of Parliament. It is, I think, not sufficiently realised that with the ever increasing legislative activity of Parliament, the daily work of the courts is now much more concerned with interpretation of Acts of Parliament than with the common law precedents. The legal problems which mainly arise in the courts, are concerned with disputes about the meaning of words in statutes. Broadly, the courts are still bound to interpret statutes according to their literal construction, and words remain our masters - even though they are but labels for ideas. We are still beset by the demon of formalism in this area of the law. The application of traditional principles of interpretation frequently leads to decisions which laymen most understandably regard as technical rather than just. I have thought for a long time that without sacrificing the basic principle that Parliament makes the law and the court interprets and applies it, it should be possible by appropriate legislation to emancipate the courts from the tyranny of words in their literal meaning and to enable the courts on a broad basis of justice to give effect to Parliament's purpose. A proposal by the late Dean Roscoe Pound has always appealed to me: that there should be attached to every Act of Parliament an official memorandum approved by Parliament itself, setting out the purposes of the legislation, and that the court should be required to interpret the Act in the light of those purposes, even if departure from literal meanings of words is involved."

Attorney-General's speech: "Ruling the Regulators"

4.15 In an address by the Attorney-General, Senator Durack, to the Australian Society of Senior Executives in Sydney on 19 September 1980, the theme of the use of an explanatory memorandum was again taken up:

"The draftsman's search for exactness of expression is due to the fact that legal rights and duties depend upon which side of a given statutory expression a particular set of circumstances falls. It is also very much related to our system of government under which the courts, as a non-representative body, should not make but only interpret the law. The greater the generality of expression the greater the discretion in the courts. Nevertheless exactness of expression may produce complexities. Complexity in turn creates its own difficulties in interpretation of the law. This is particularly so in the case of regulatory legislation. It is also of course the case with the Income Tax Act. The truth is that the capacity of words to convey meaning is finite."

"And so the draftsman has a problem. If he chooses a simple but general expression it may be that circumstances never intended by Parliament to be caught by the legislation will in fact be covered."

"Suggestions have been made that the problems of complexity could be minimised to some extent if legislation is expressed in more general terms setting out the purpose to be achieved and the courts were left to work out the details. Courts would have to be permitted to use to a greater extent than at present extrinsic aids to interpretation."

"I would not wish to comment upon that possibility at this stage except to note that we would not want a proliferation of material for the courts' consideration. But I do wonder if a more selective application of this idea would not be of greater effect."

"There is particular legislation, regulatory in nature, where we might be able to reduce complexity by the insertion of a provision in the Act directing the courts to have regard to an explanatory memorandum which would be submitted to the Parliament and attached to the legislation."

"The words in the memorandum would not be controlling. But it may be that the draftsman when faced with the difficult choice in inherently complex legislation of either using general language which might however be construed too widely or of introducing lengthy qualifying provisions could feel some security in choosing the former course if he knew that a memorandum approved by Parliament would embody its intent. The courts, although not bound, would be obliged to have regard to it in construing the general provisions."

4.16 In commending the Attorney-General's suggestion, the Australian Law Journal made one caveat, namely that the courts should be debarred from construing the explanatory memorandum itself; 'the memorandum should be regarded as self-speaking'.¹⁶

Professor D. C. Pearce's comments

4.17 Professor D.C. Pearce commented on the proposal, in a seminar on Statutory Interpretation in March 1981, as being one that addressed an issue that had to be faced up to by law makers, by policy makers and the courts.¹⁷ He said¹⁸:

"What one needs to recognise is that there are problem areas for draftsmen and interpreters. One of the difficulties about purposive approaches, and I think that it is one of the difficulties that objects clauses give rise to, is....you've got a 200 page Act and you are supposed to say in five lines what its purpose is and hope that it has some magical effect on interpretation..."

"I thought that it was interesting that the Australian Law Reform Commission Report on Alcohol, Drugs and Driving had a try at this by including in the draft Ordinance a provision that said that in

interpreting this Ordinance and the regulations a court may have regard to the report by the Law Reform Commission on alcohol, drugs and driving tabled in the House of Representatives on such and such a day. That provision was not in the Act or the Ordinance, and I wonder why. I think that, if one is going to oblige courts and users of legislation to place meanings on expressions of this vague nature, then surely they ought to be given some guidance about the intended effect of the words. ICI 19 would, I am sure, dearly love to know before they got underway whether their salt extraction process was mining because obviously the taxation implications would be enormous. I think that we've got to realise that by use of these sorts of vague expressions, many and perhaps unfair obligations are being imposed on persons who are subject to the Act....."

4.18 He referred to the problem of who was to issue and approve such a memorandum 20:

"Ideally of course it should come from the Parliament, because it's a document that is relating to an Act which the Parliament has passed, and the UK Law Commission talks about this and talks in terms of the possibility of it being in a sense passed or approved in the same way as the Bill is, and I think that's totally unrealistic - you are just not going to find Parliamentary time for that sort of document that has got to be debated the same way as the Act. The UK Law Commission has proposed a variation that may be possible and that is that the document be prepared in advance and as a statement of the Government's policy, the Government's understanding or explanation of the Bill, and that it only needs to be altered if the Bill is altered in the course of the passage through the Parliament. As a further variation, it might be possible to table the statement and to have it subject to disallowance or referral to a Parliamentary Committee. I think these are possibilities....."

"Another alternative is of course just for the Government to issue a statement of its understanding and explanation of legislation..."

4.19 The comments went on to refer to objections to the proposal 21:

"I think these are the three most important ones. One is the question of the workload in the preparation of a document of this kind...I would have thought...that it would be based on the notes on clauses or the explanatory memorandum which is prepared in regard to legislation..."

"The other, and I think perhaps the major problem, or perhaps there are two major problems, is what is often termed the split level statute - that you are really going to end up with two documents that you have to look to, to find your law. The Law Commission recognised this and had this to say about it and I think it's worth just reading the passage in its entirety, if you'll bear with me. It says 'Even if the explanatory statement were amended during the course of the Bill's passage and given some measure of Parliamentary approval, it would be no more binding on the courts than much other contextual material, for example, other provisions of the statute, earlier legislation dealing with the same subject-matter and non-statutory material dealing with the mischief which under the existing law the courts are entitled to take account of. It might, however, give assistance to the courts in making more explicit the contextual assumptions which at present have to be gleaned sometimes with great difficulty from a number of sources of varying reliability. No interpreting device can relieve the courts of their ultimate responsibility for considering the different contexts in which the words of a provision might be read and in making a choice between the different meanings which emerge from that consideration. The existence of an explanatory statement would not prevent a court from regarding the meaning of the words in an Act or provision in the light of other relevant contexts as so compelling that it must be preferred to a means suggested by the statement. In other words the Act obviously must prevail. 22 But if you've got the capacity to go one way or the other then the statement will give the guide to the direction to proceed.

"The third major problem is the question of the prolongation of court hearings and of the task of interpretation. Would the position be that all counsel would have to analyse two documents with the meticulous degree with which counsel presently go through an Act? I wonder if they would? I think that what these sorts of documents would certainly be wishing to achieve is to avoid much of the speculation that is presently engaged in by counsel when looking at a particular Act."

4.20 Professor Pearce referred to two further points. One was the question of accessibility. First, explanatory memorandum of the kind proposed would have to be available with the Act as a published document, in contrast to Parliamentary debates of Bills which are not so available. Secondly, it was not fair or proper to ask the courts to interpret Acts setting out general principles without guidance as to what those general principles were intended to cover or without bounds on the direction in which they could point the legislation.²³

Chapter V: Wider Use of Other Aids?

Evaluation of extrinsic aids

5.1 An American commentator has proposed four factors to evaluate extrinsic aids¹:

- (a) Credibility (reliability): This includes an inquiry into whether a given source is a reliable indication of legislative action or understanding. Also, is the material analytical and explanatory, as opposed to being politically or otherwise potentially biased? The character of the source is an important consideration.
- (b) Contemporaneity: The Bill and the extrinsic material should be so close that the extrinsic aid actually plays a part in the thinking process of the legislators during the enactment process.
- (c) Proximity: This has been defined as the closeness of the aid to the 'essence of the legislative action'. Thus, a legislative committee that considers the Bill would be closer to the legislative process than an outside organisation.
- (d) Context: This is less clearly defined but seems to refer to whether the extrinsic material contributed to the historical context in which the statute was made.

Not all factors need be present. Also, there is overlapping between some of them.

5.2 These factors have been developed with reference to the United States situation, where free use is made of legislative history in interpreting statutes, but they are a helpful guide in evaluating the materiality and usefulness of extrinsic aids in the Australian context, provided one further factor is added:

- (e) Accessibility: This means that the material is not only publicly available but also readily available to the users of the Act, their advisers and all courts.

Parliamentary debates

5.3 Considered in the light of some of these factors, Parliamentary debates obviously merit consideration. It has been said²:

"If we are to take into account evidence of Parliament's intention, the first thing we must do is to reverse our present practice with regard to [not] consulting Hansard."

If reports tabled in Parliament have value as evidence bearing on legislative intent, Parliamentary debates have at least equal value. Also, if reference to Parliamentary debates is excluded, how the courts ascertain whether a report or other contextual

material formed the basis of the legislation becomes something of a mystery. Some reference to Parliamentary proceedings may be necessary. This seems a more satisfactory course than relying on a presumption as to what occurred.³

5.4 A question has been raised, however, about the reliability of resort to Parliamentary debates in Australia compared to the quite different legislative environment in the United States where legislation emerges in committee reports for which it is said there is no local equivalent.⁴ This perhaps overrates the guidance provided by the American materials and underrates the assistance that can be derived in Australia from, for example the Minister's second reading speech and, where it exists, a report of a select committee on the legislation. Few in Australia would disagree, however, with the view that at the most they should be used only where clear and convincing guidance can be derived from them. Also, unless special compilations of the Parliamentary history were available as in the United States, the objective of accessibility, as explained above, would not begin to be met.

5.5 Reference should also be made to a more intangible consideration referred to in the memorandum to the Ghana Interpretation Act, 1960, which expressly prohibited reference to debates in the Legislature.⁵ It based this exclusion on two reasons, the first of which was that it would not be conducive to the respect which one organ of State owes to another that its deliberations should be open to discussion in court. In a debate in the House of Lords in 1980, the Lord Chancellor said it is a matter of 'comity' between the courts and the Houses of Parliament not to refer to Hansard.⁶

Amendments to Bills

5.6 Reference to amendments to Bills would satisfy most of the factors referred to, including reliability, since they represent a formal decision of the whole House concerned. However, though publicly available⁷, they would not be 'accessible' unless a special compilation of the legislative history that included them was freely available. The guidance provided would be limited to the scope of the amendment or amendments, and where there were no amendments no guidance would be provided.

Reports and other contextual material of a non-Parliamentary nature

5.7 The relative remoteness of this material from the law-making processes has already been noted in this paper, as have the refinements and differences of views as to the manner of its use. Wider reliance on this source, where it was available, would make it necessary to resolve these difficulties and differences. 'Accessibility' will often be a real problem. It is possible, and proper, for appellate courts to consider and evaluate the relevance of such material, but it offers little or no guidance to the ordinary users of an Act. It is of the nature of this material, and indeed also of legislative history considered in the earlier part of this chapter, that they are not self-explanatory and require an often difficult exercise of evaluation. The 'raw materials' of which they consist are by themselves deficient as a means of communication between the law makers and the citizen, and they are not even satisfactory as a general means of communication between the legislator and his or her professional adviser.

Objects clauses

5.8 The Committee on the Preparation of Legislation which reported in the United Kingdom in 1975 seems to have been persuaded by Professor Reed Dickerson away from the idea of a special explanatory statement.⁸ The Committee favoured instead⁹:

- . drafting Acts in a simpler, less detailed and less elaborate style;
- . setting out general principles in the body of a statute and detailed provisions of a permanent kind in schedules; and
- . including statements of purpose in objects clauses when they are the most convenient method of clarifying the scope and effect of legislation.

The Committee concluded that interpretation of Acts drafted in a simpler, less detailed and less elaborate style than at present, would present no great problems provided that the underlying purpose of the general principles of the legislation were adequately and concisely formulated. The real problem was one of confidence. Would Parliament be

prepared to trust the courts? The Committee itself thought that judges could be trusted to give effect to clear statements of principle. ¹⁰

5.9 The views of Professor Reed Dickerson that use of any explanatory memorandum would produce a sort of 'split level' statute have already been referred to. ¹¹ He also considered that anything that can be stated helpfully outside the statute, including the purpose of the statute and examples and needed explanations, can be stated as helpfully and with greater reliability inside the statute. ¹²

5.10 While there are examples of innovative drafting that included examples and illustrations, they have proved to be most exceptional. The most famous example is Lord Macaulay's Indian Penal Code, drafted between 1835 and 1837, and now in force in most of the Asian countries that are or were members of the Commonwealth as well as in parts of Africa. The Consumer Credit Act 1974 of the United Kingdom contains a schedule with examples, explanations and illustrations of the effect of the Act. The advantages of using such techniques in appropriate cases have perhaps been ignored or undervalued, or both. Even if, however, the sponsors and draftsmen of Acts could be persuaded to use them more, the question remains whether they would provide the flexibility afforded by the use of special explanatory material, for example to state the contextual assumptions of the Act, to set forth its object or purpose, to identify the 'mischief', or to indicate other matters that guide and assist the user of an Act in making decisions under it.

Chapter VI: Explanatory Memoranda - A Possible Procedure and Programme

A possible procedure

6.1 Drawing on the discussions to date, the following is an outline of a possible procedure that could be adopted for selected cases where it was decided to have an explanatory memorandum to be used as an aid in interpreting an Act:

- (a) Purpose: This would need to be clearly identified beforehand. It could include the following:
 - (i) to state the purpose or object of the Act -
 - where the purpose or object can be appropriately set out in the Act itself, that course may be preferable to a special explanatory memorandum
 - however, cases could arise where a memorandum would be preferable e.g.
 - where there are diverse objects in the Act
 - when the history of the topic is relevant
 - when there are other contextual assumptions that are
 - (ii) to explain the particular provisions, particularly those of a complex, novel, or specialised character, e.g. by -
 - identifying the 'mischief'
 - explaining the rationale of the provision illustrating its application
 - (iii) to give guidance for the application in particular cases of general provisions.
- (b) Standards of preparation: High standards should be set and should include accuracy, impartiality and completeness.
- (c) Preparation: While the responsibility for preparing such a memorandum should not rest with Parliamentary Counsel, they would need to be aware at the earliest possible stage of the proposed use of a special explanatory memorandum, and have an opportunity to comment on it.
- (d) Circulation: The memorandum would be circulated with the Bill, with a suitable reference being made in the Minister's second reading speech.

- (e) Approval by Parliament: Approval is important if the memorandum is to be seen as possessing Parliamentary authority. The call on Parliamentary time might be alleviated by prior scrutiny by a committee which could also be responsible for examining adjustments required by amendments.
- (f) Issue: It is basic to the proposal that the memorandum should be freely accessible. This would mean that it should be available with the Act to which it relates.
- (g) Weight to be given to the memorandum: It should be made clear that the memorandum is not part of the Act, but if Parliamentary approval is part of the scheme it would be appropriate to require that, in interpreting the Act, regard is to be had to the memorandum. The alternative is to provide that regard may be had to it.

A possible programme

6.2 Initially, at least, such a procedure should be used only for selected Bills considered by their sponsors to be appropriate for this purpose. The most likely possibilities may be Bills to give effect to a report by the Law Reform Commission or by a similar body. The time and labour involved in preparing the memorandum would be considerably lightened by the existence of the relevant report. If possible, the report should be prepared in a form suitable for ready adoption as an explanatory memorandum.

6.3 As part of such a programme, the insertion of a standing provision in the Acts Interpretation Act 1901 to provide for the use by the courts of such memoranda should be considered. Such a provision would apply only to a particular Bill where Parliament so decided but, as was pointed out by the 1969 Report on the Interpretation of Statutes, Parliament would then have the advantage of an earlier debate on the technique in principle, and be able to give more attention to its propriety in the particular instance. Also, the appropriate procedures of each House and both Houses jointly for dealing with the approval and amendments of memoranda could then be settled before a particular instance arose. The nature of those procedures is of course a matter for the Houses to consider and decide.

Concluding comments

6.4 A vital factor would be the spirit in which the courts accepted such aids to interpretation. The ultimate success of the programme would depend on the extent to which the procedures involved were seen to be, and were, means of providing more answers than the present system does to the problems of interpreting statutes.

Notes and references

Chapter I

1. Fielding v Morley Corporation [1899] 1.Ch.1, at pp.3-4. See also the paper by A.R. Neaves in Another Look at Statutory Interpretation, AGPS, Canberra, 1982, pp.10-11.
2. Neaves, ibid, at pp.11-12.
3. Acts Interpretation Act 1901, s.13(1).
4. Ibid., p.13(2)
5. See Deputy Federal Commissioner of Taxation v Carpenter [1959] VR470, at p.471.
6. Acts Interpretation Act 1901, s.13(3).
7. '....the day is long past when the courts would pay no heed to punctuation in an Act of Parliament': Marshall v Cottingham [1981] 3 All ER 8, at p.12. See also Hanlon v Law Society [1981] AC124 at pp.197-8, and Gibbs A.C.J. in Ryde Municipal Council v Macquarie University (1978) 139 CLR 633, at p.636. The better view is

that marginal notes and section headings are not to be rejected completely (R v Schildkamp [1971] AC1, at pp.10,28;cf at p.20) but the contrary view was acted upon in Bradley v Commonwealth (1973) 128 CLR 557, at p.577, relying on s.13(3) of the Acts Interpretations Act 1901 (note 6 above). See the discussion in D.C. Pearce, Statutory Interpretation in Australia, 2nd edn. Butterworths, Sydney, 1981, para.73.

8. See, for example, Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 35 ALR 151
9. Similar provisions to s.15AA have long existed in other common law jurisdictions. See the speech by R. Jacobi, M.P., in H.ofR., Weekly Hansard, 10June 1981, p.3437, referring to the provision appearing in the Canadian Revised Acts 1886 (see now Interpretation Act, 1967-68, R.S.C. 1970,c.1-23, s.11) and to the new Zealand Interpretation Act, 1888 (see now Acts Interpretation Act, 1924, s.5(j))
10. Senate, Daily Hansard, 27 May 1981, pp.2166-7.

Chapter II

1. See Holmes J, Collected Legal Papers, Harcourt, Brace & Howe, New York, 1920, p.207: "...we do not inquire what the legislature meant; we only ask what the statute means". Cf the same Judge in Johnson v United States (1908) 163 Fed R. 30, at p.32. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: "We see what you are driving at, but you have not said it, and therefore we shall go on as before."
2. See for example, Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 35 ALR 151, at pp.156-7 and 169-71.
3. Lord Blackburn in River Wear Commissioners v Adamson (1876-77) App. Cas 743, at p.763
4. Lord Reid in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg [1975] AC591, at pp.613-4.
5. Attorney-General v Prince Ernst Augustus of Hanover [1957] AC436, at p.463.
6. Merchant Service Guild of Australasia v Archibald Currie & Co. Pty Ltd (1908) 5 CLR 737, at p.745.
7. (Law Com No.21)(Scot. Law Com. No.11) para.16.

Chapter III

1. (1584) 3 Co. Rep. 7a; 76 E.R. 637.
2. See Wacal Developments Pty Ltd v Realty Developments Pty Ltd (1978)140 CLR 503, at p.509, and also the discussion in Pearce , op. cit., para.81.
3. Murphy J. in Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd (1975) 132 CLR, 323, at p.332, and see also Viscount Dilhorne and Lord Simon of Glaisdale in the Black-Clawson Case [1975] AC 591, at pp.622-3, 647,651.
4. Pearce, op. cit., para.81.
5. Ward v R (1980) 142 CLR 308, esp. at pp.322, 332; Wacando v Commonwealth (1981) 37 ALR 317, esp. at p.328.
6. Deputy Federal Commissioner of Taxation v W.R. Moran Pty Ltd (1939) 61 CLR 735.

7. Pearce, op. cit., para.103.
8. Article 32 of the Vienna Convention on the Law of Treaties, Australian Treaty Series, 1974, No.2.
9. Fothergill v Monarch Airlines [1981] AC 251.
10. South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd (1977) 139 CLR 449. The rule of exclusion has been recently reaffirmed in England by the House of Lords: Hadmor Productions Ltd v Hamilton [1982] 1 All ER 1042.
11. P. Brazil, "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1961) 4Univ QLJ, p.1.
12. See Pearce, op. cit., para.78, and now Mason J. in Wacando v Commonwealth (1981) 37 ALR 317, at pp.335-6 and in Federal Commissioner of Taxation v Whitfords Beach Pty Ltd (1982) 39 ALR 521, at pp.533-4. Not all the instances cited are recent. See, for example, Sydney Municipal Council v Commonwealth (1904) 1 CLR 208, at pp.213-14; Engineers Case (1920) 28 CLR 129, at p.147; T.M. Burke Pty Ltd v City of Horsham [1958] VR 209, at p.216.
13. See Mason J in the cases cited in note 12.
14. Sillery v R (1981) 35 ALR 277, at pp.232-3 (per Murphy J).
15. Per Barwick CJ in S.A. Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd (1977) 139 CLR, 449, at p.457: "...I would wish to say that whilst I am quite clear that no relevant assistance can be obtained from speeches in the legislature, even from the second reading speech of the Minister introducing the Bill, I can see the possibility of relevant profit in knowing the changes which take place in the Bill between its introduction and its passage. These, unlike the speeches, result from action of the legislature itself. The changes may well be classified as travaux préparatoires to which heed is paid in other systems of law. However, authorities of long standing would not allow of this possible advantage being taken."
16. Tasmania v Commonwealth (1904) 1 CLR 329, at p.333; Seamen's Union of Australia v Utah Development Co., (1978) 144 CLR 120, at pp.142-4 (per Stephen J).
17. Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583, at pp.595-600.
18. Lord Simon of Glaisdale in Ealing London Borough Council v Race Relations Board [1972] A.C. 342, at p.361.
19. Mason J in Federal Commissioner of Taxation v Whitfords Beach Pty Ltd (1982) 39 ALR, at pp.533-4.
20. See 290 HL Debates, cols 897-913.
21. Referred to in Reed Dickerson, The Interpretation and Application of Statutes, Little, Brown & Co., Toronto, 1975, pp.166-7.
22. Ibid., p.167.

Chapter IV

1. Cmd. 4060, See pp.136-7(Annexe V).
2. Sir Garfield Barwick, "Divining the Legislative Intent", (1961) 35 ALJ 197.
3. See para.3.17 ante.
4. Sir William Graham Harrison, "Criticisms of the Statute Book" [1935] Journal of the Society of Public Teachers of Law, pp. 9-45.

5. C.K. Allen, Law in the Making, 6th edn. OUP, 1958, pp.513-15.
6. Barwick, ibid.,p.204.
7. (Law Com. No.21)(Scot. Law Com. No.11), para.81(d) and Appendix A.
8. Ibid.,para.63
9. Ibid.,para.69
10. Ibid.,para.71
11. Ibid.,para.72
12. Cmnd. 6053,para. 15.2.
13. Ibid.,paras.19.18.19.24.
14. Ibid.,para.19.41.
15. [1973] Tas LR, pp.xiii-xv.
16. (1981) 55 ALJ,p.176.
17. Paper by D.C. Pearce, "The use of Explanatory Memoranda", in Another Look at Statutory Interpretation, AGPS, Canberra, 1981, p.22
18. Pearce, ibid.,pp.22.23.
19. Commissioner of Taxation v ICI Australia Ltd (1972) 127 CLR 529.
20. Pearce, ibid.,p.25.
21. Pearce, ibid.,pp.25-6.
22. (Law Com. No.21)(Scot. Law com. No.11), para.70.
23. Pearce, ibid.,p.26.

Chapter V

1. W.K. Hurst, "The Use of Extrinsic Aids in Determining Legislative Intention in California; The Need for Standardized Criteria" (1980) 12 Pacific LJ, 190.
2. Lord Reid in Black-Clawson's Case [1975] AC 591, at p.614.
3. Compare the differing approaches of Gibbs CJ and Mason J in Wacando v Commonwealth (1981) 37 ALR, 317 at pp.328, 335-6.
4. Stephen J in Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583, at pp.600-1.
5. See para. 3.17 of this paper.
6. 405 HL Debates, cols 303-4.
7. In Votes & Proceedings of the House of Representatives and the Senate Journals, see para.,3.11 of this paper.
8. See para.4.12 of this paper.
9. Cmnd.6053. paras 19.41,11.25,11.8.
10. Ibid., para 19.41.
11. See para. 4.12 of this paper.
12. Reed Dickerson, The Interpretation and Application of Statutes, Little, Brown & Co., Toronto, 1975, p.173.

AIDS TO THE INTERPRETATION OF LEGISLATION

Memorandum by
THE GOVERNMENT OF SRI LANKA

A. Explanatory Memoranda

In Sri Lanka there are two types of explanatory memoranda (a) Statements of objects and reasons appended to Bills and (b) Statements of legal effect appended to amending Bills. The former are prepared by the Ministry sponsoring the Bill and the latter, by the Legal Draftsman's Department. There is no strict practice in regard to statements of objects and reasons. Some Ministries like the Ministry of Finance always ensure that Bills sponsored by it are accompanied by statements of objects and reasons. The practice of attaching statements of legal effect to amending Bills has been strictly adhered to. The object of both statements is to give members of Parliament, in summary form, in the case of a new Bill, the policy underlying the Bill, and in the case of an amending Bill, the effect of the amendment. When a Bill is passed by Parliament and printed as an Act of Parliament, the statements do not form part of the printed Act. They are prepared essentially for the use of Parliament.

2. There is no general provision in our Interpretation Act authorising the use of statements of objects and reasons or statements of legal effect as aids to interpreting Acts of Parliament, nor has there been an instance of provision being made in an Act authorising the use of those statements as a guide to interpreting that Act.

3. However, a practice appears to have arisen in so far as statements of legal effect are concerned, of using them as aids to interpretation. Recently, the Court of Appeal had to decide whether a provision in the Inland Revenue Act, No. 4 of 1963, requiring an assessor to give reasons for rejecting a return furnished by a tax-payer, was mandatory or directory. This provision was inserted by way of an amendment in 1978. The Court referred to the statement of legal effect which was attached to the amending Bill and said that the statement confirmed its conclusion that the provision was intended to be mandatory.

B. Parliamentary Debates

Courts in Sri Lanka have on occasion referred to Parliamentary debates for the purpose of ascertaining the mischief which a statute seeks to remedy but not for the purpose of interpreting the statute.

4. There are cogent arguments against the use of Parliamentary debates for the purpose of interpretation:-

- (a) the mass of the material available: When a Bill is debated in Parliament, speeches are made for or on behalf of the Bill or sections of the Bill. There is a real difficulty therefore, in deciding whether a particular speech correctly reflects the intention of Parliament on the particular provision under review;
- (b) the unreliability of the material: Lawyers will tend to choose those speeches which support the interpretation which they are contending for. Members of Parliament will be encouraged to make speeches with a view to influencing the interpretation of the Act after it is passed. Even if resort is had only to those speeches in favour of the Bill, it is by no means certain that they represent the views of the majority voting for the Bill.

5. Most Bills in Parliament are sponsored by the Government and the speech of the Minister moving the Bill generally refers to the policy underlying the Bill. It may not be wrong therefore, to assume that the Minister's second reading speech correctly reflects the intention of Parliament. There may be a case therefore, for permitting reference to this speech for the purpose of interpreting the Bill after it has become an Act of Parliament. However, even the uses of second reading speeches has its limitations. It does not take into account, for example, amendments and alterations made to the Bill during its passage through Parliament.

THE USE OF ELECTRONIC DATA PROCESSING TO ASSIST IN THE DRAFTING OF LEGISLATION

Memorandum by
THE GOVERNMENT OF CANADA

Introduction

This paper will examine the application of data processing to the preparation of legislation from the initial draft through to the printed bill ready for introduction in Parliament.

2. When one speaks of the use of electronic data processing to assist in the drafting of legislation the range of equipment and software that may be employed is immense. It can include anything from the most simple and inexpensive word processing unit, a keyboard and some form of permanent storage media such as magnetic tapes, magnetic cards, etc., to a massive computer system, providing tremendous flexibility, requiring minimal manual intervention and naturally costing significantly more.

3. In general, it can be said that the more expensive the equipment and software involved the greater the degree of automation. In other words the more expensive the system, the less the draftsman or his/her secretary need know about it in order to make effective use of it. This is obviously a desirable goal.

4. However, in choosing a system, many factors must be taken into account in addition to the funds that are available. These include:

- (i) the future need of the office as well as the present needs so that equipment chosen for today can accommodate, or be developed to accommodate, the future needs;
- (ii) the type of equipment already in use within the government or local private sector which could provide the type of service required or could provide backup in the event of equipment failure (a not entirely impossible eventuality);
- (iii) the eventuality of local service facilities or the guarantee that a service representative can be on site within a reasonable period of time following equipment failure (e.g. 24 hours);
- (iv) the kind of environment the equipment can be operated within, e.g. is it sensitive to heat, humidity, etc. and what are the limits within which it can operate. (Current electronic data processing equipment is far less sensitive to these factors than earlier equipment but, nevertheless, problems could arise in some jurisdiction.);
- (v) can additional equipment be obtained within a reasonable time frame if expansion of the system becomes necessary, and so on.

5. Clearly it is beyond the scope of a paper of this kind to deal with all the systems and configurations that are possible. It will describe instead an operational system to illustrate the type of service that is possible and some of the difficulties encountered by draftsmen. The system described is being used by the Canadian Department of Justice. It would fall into the category of the more expensive type of system employing a large central computer shared by a number of users in addition to the Department of Justice. In addition, an Annex is attached which contains a brief description of the systems in operation in the other jurisdictions in Canada. For the most part these tend to be of the smaller and less expensive type.

Background

6. Lawyers drafting legislation for the Canadian Government have experimented with the use of computers in the drafting process for some 12 years. However it is only in the last four years that a system has been developed that meets the current needs of the drafters.

7. Drafting of federal government legislation in Canada is a centralised operation carried on in the Legislation Section of the Department of Justice. The Section consists of 16 lawyers, one-half of whom prepare the English version of bills and one-half of whom prepare the French version. While anglophone and francophone drafters are paired for this purpose, for linguistic reasons they rarely share the same secretary. At present, there is one secretary for every two drafters and the secretary is of the same language group as the drafters.

8. Each secretary has a terminal at her desk. This consists of a typewriter style keyboard and a television type screen on which appears whatever is typed on the keyboard. The terminal is connected by telephone lines to a large computer in the Government Printing Office that services both Parliament and the Government of Canada. Texts of draft bills typed at the terminals are stored on tape in the computer and the tape eventually used for the photocomposition of the bills to be introduced in Parliament.

Advantages of the computer in drafting

9. Time in which to create a legislative text and the accuracy of that text are absolute necessities to a drafter. Our experience is that the computer can offer both.

10. With respect to the accuracy of the text, once input into the computer and proofread the text need not be typed or proofread again. Prior to the introduction of the computer, our drafting process went through two phases. The first was the typing of drafts (with carbon copies) and the complete retyping of drafts, the clipping and pasting of them onto sheets of paper and then photocopying the resulting text. In each case proofreading was required and the final text set in type by the printer again had to be proofread. All of this cut into the drafter's creative time.

11. Putting the text of a Bill in the computer from its early states gives the drafter more time to work on it. Once in the computer system we use, a draft is available within minutes from either a typewriter-sized printer or on a high-speed printer. The latter, of which we have two, and which are generally used for lengthy texts, are centrally located whereas the former, of which we have four, are spread throughout the Section for easy access. The high-speed printer can also provide numerous copies of drafts for distribution to instructing officers. For shorter copies, it is more economical to photocopy the printed text for distribution.

12. The rapid return of successive drafts also saves the drafter's time. The text is printed with wide marginal areas on which the drafter can indicate his changes. The secretary, working from this draft, need only make the changes indicated and a new text is available quickly. As our computer is linked to the photocomposition unit that will print the bill for introduction in Parliament, the drafter can work to a later deadline. The Government Printing Office works around the clock and a bill, the text of which is completed by a drafter late in an evening, will be available early the next morning.

13. The computer we use also has the capacity to produce an index of every word used in the text of a bill with a reference to the provision in the bill where the word is used. In the case of larger bills, this is a great time saver to a drafter who must make changes throughout the text. As well, we have access to another computer that contains the full data base of all current statutes and regulations which can be searched for precedents or for references that will be affected by the bill being drafted.

Disadvantages of the computer drafting

14. The initial stages of introducing the computer in legislative drafting were prolonged and frustrating because of the incompatibility of suitable terminals with the printer's computer. Secondly, there was initial resistance by some secretaries to using the terminals and concern with loss of jobs. The latter was slowly overcome by the assurances that no one would lose a job because of the new technology and the former by not forcing too quickly the use of the terminals until the secretaries were comfortable with them. Courses of the use of the terminals were given half-days for one or two weeks and time allowed for the secretaries to practice on them. The value of the system is now acknowledged by the secretaries who are relieved of the tedious, repetitive work of retyping and proofreading successive drafts of the same material.

15. Secondly, from time to time, because of human error or a technical fault the text in the computer will mysteriously disappear. It is essential, therefore, to have a back-up system. It is our practice to have all current texts on the computer "captured" twice a day and stored separately on the computer. At most, only material input in one half day may need be reinputted if lost.

16. Thirdly, if the computer fails to function or if there is an interruption in the connecting telephone lines, almost all work on a bill comes to a standstill. Fortunately, this is an extremely rare occurrence.

17. Lastly, we experienced, in the initial stages of use of the systems, problems with respect to changes to the photocomposed text by the Printing Office. These were human problems, not ones caused by a computer. Our drafters are instructed to work with computer printouts until the draft legislation is satisfactory to both them and the instructing office. However, from time to time changes are required after a Bill had been printed. If the changes are not extensive, it is the practice of the printer to "strip" them in. This is done by hand by slicing out of the photocomposed print the portion to be changed and replacing it with the new text. The original data base should then be amended, but on occasion this step was overlooked and subsequent prints of the bill did not have the changes that had been made by hand. The problem arises rarely now.

Comments

18. With improved technology and lower costs of acquisition, the computer or word processor will in time be as common in drafting offices as the typewriter is now. In time, too, the photocomposition of legislative texts from computer tapes will replace typesetting and hot metal printing. However, the changeover to computer assisted drafting and printing should be undertaken with considerable caution. Particular care should be taken in the selection of machines to ensure that they are suitable to the needs and environment of the user, for the capability of the machines is often over-sold. There should be an assurance, as well, that the machines can be quickly serviced when they malfunction and there should be back-up system that ensures the drafting process is not solely dependent on the computer.

SURVEY OF THE USE OF AUTOMATION IN
RELATION TO THE PREPARATION OF
STATUTES AND REGULATIONS IN CANADA

ETUDE SUR L'AUTOMATISATION DANS
LA PREPARATION DES LOIS ET
DES REGLEMENTS AU CANADA

Alberta

Bill Processing

The first handwritten draft of a Bill is entered into the Government data centre's IBM ATAMS II system using a MAI video keyboard terminal and printouts are obtained in the drafting office using an IBM 3288 line printer located in the Legislative Counsel's Office. Further changes and additional proofs are obtained in the same manner.

Multiple copies are produced by the video terminal using IBM's time sharing option (TSO) monitor program to run the IBM 3800 laser printer which provides bold, italic and roman type faces.

In the near future the IBM 3288 line printer will be replaced by the IBM 6/670 laser printer which is a combination of an office copier, memory, data communication capabilities and laser printer.

When the Bill is ready to be typeset, the secretary/operator in the Legislative Counsel's Office issues the necessary instructions through the video terminal, and a photocomposition drive tape is produced at the Government data centre. It is picked up by a messenger from a commercial printer who carries out the phototypesetting, paste-up and offset printing. At the present time the photocomposition program does not perform page make-up which necessitates the paste-up referred to above and causes a certain amount of delay.

This problem will be resolved shortly by the use of a photocomposer capable of handling full page make-up or by a replacement to the photocomposition program.

Processing of Regulations

New and revised Regulations are processed through the system in the same way as Bills.

A study and analysis is now underway to interface all standalone word processors operating in Government departments to the Legislative Counsel Office System. This will eliminate duplicate keyboarding of Regulations.

In addition, Orders in Council will be processed on the automated system in the near future.

Computer Data Base of Statutes

A revision of the Statutes of Alberta is at present underway. As work proceeds on the revision, the revised documents are introduced into the computer system. These are, of course, supplemented by the new Bills as passed. However, at this stage a complete data base is not yet available.

Computer Data Base of Regulation

No plans are underway at present to produce a complete consolidation of the Regulations, although there are plans to revise and consolidate on a Regulation-by-Regulation basis. This would create a data base of Regulations ultimately. In addition, the Regulations being processed through the system would add to this base.

Computerized Information Retrieval of Statutes

No computer information retrieval service is used at present, but the question of an information retrieval program package is underway.

Computerized Information Retrieval of Regulations

An information retrieval service in regard to Regulations would probably be carried out in the same way as for the Statutes.

The card index for Orders in Council and Regulations is in the process of being converted to an automated system. The program is capable of extracting and sorting the data according to a choice of five topical parameters.

British Columbia

Bill Processing

All Bills are prepared using five Micom 2000 mini-computer word processors. The output from a Qume printer is then photoreduced and offset printed by Queen's Printer. The Micom floppy disc is encoded by Legislative Counsel's staff with typographic commands which can be fed directly into a photocomposition device at the Queen's Printer. This eliminates the need for operator involvement at the Queen's Printer except for actually running the photocomposition machine. Photocomposition is not used for Bills but is used for the bound and loose-leaf Statutes.

Processing of Regulations

Micom equipment is also used to prepare Regulations.

Computer Data Base of Statutes

A computer data base of Statutes is maintained in the QL Systems Limited computer at Kingston, and is updated by a member of the Legislative Counsel's staff periodically during the year using the IBM ATS service provided by QL Systems Limited. A Micom is used to communicate with and update the data base at Kingston.

Computer Data Base of Regulations

A five year program to re-enact and consolidate the Regulations is at present underway. When the number of Regulations consolidated is sufficient to justify the cost, a computer data base of Regulations will be developed.

Computerized Information Retrieval of Statutes

The Statutes are available through the QUIC/LAW service provided by QL Systems Limited, and are used extensively by the Legislative Counsel's office, the Law Reform Commission of British Columbia, and Dr. Gilbert Kennedy who is preparing the next revision of the British Columbia Statutes.

Computerized Information Retrieval of Regulations

See above.

Comment

The Legislative Counsel's office comment that by using the computerised retrieval system, they are able to prepare consequential amendments to Bills in a much more detailed form, thus making the Statutes more accurate.

Manitoba

Bill Processing

No automated procedures are used at present in relation to the preparation of Bills, but the matter is under consideration.

Processing of Regulations

There are no plans at present to automate the preparation of Regulations.

Computer Data Base of Statutes

The Manitoba Statutes were converted into machine-readable form during the course of the revision of the Statutes in 1970. The data base is updated at the end of each Session of the Legislature, and is integrated with the loose-leaf service for the Continuing Consolidation of the Statutes of Manitoba.

Computer Data Base of Regulations

A computer data base of Regulations was created in 1972 with the revision of the Regulations, but has not been kept up-to-date. It is hoped to bring this data base up to date, but funds are not available at present.

Computerized Information Retrieval of Statutes

In 1970, when the data base of Statutes was created, a batch retrieval system was developed to search for the occurrence of words, combinations of words and phrases. In addition, programs have been developed which generate word frequency lists showing the number of times a word appears in the Statute, word concordances giving the word, chapter and section it appears in, and KWIC (Key word in Context) giving an alphabetical list of all key words with the context before and after, the chapter number and section number. A KWIC of all of the Manitoba Statutes is prepared periodically using COM (Computer Output Microfilm) and is available for research purposes by people inside and outside the Government. The KWIC is used extensively by the Legislative Counsel's office. The KWIC is available in the Provincial library.

Computerized Information Retrieval of Regulations

The programs available in regard to Statutes could be used in regard to the Regulation data base once it has been updated.

New Brunswick

Bill Processing

The first handwritten draft of a Bill is inputted onto an AES PLUS diskette. Printouts are obtained by using a Qume printer which is connected to two AES

PLUS word processing machines. Amendments or corrections to the original draft can be done relatively quickly on the diskette. This process is also a time saver as far as proofreading is concerned. When a draft Bill has been proofread once, subsequent changes or corrections can be checked by the drafts person without necessitating a completely new proofreading of the Bill.

Bills stored on AES PLUS diskettes are now transmitted directly to the Compugraphic photo composition equipment at the Queen's Printer's Office by way of Datapac Limited, a telephone line adapted for computer usage. The adaption of the AES equipment in the legislative drafting office to the Compugraphic photo composition equipment at the Queen's Printers Office is made possible by a machine converter marketed by Shaffstall Limited. This process has eliminated the need for a duplicate typeset at the Queen's Printer's Office.

Computerized Data Base of Statutes

A data base of the English version of the Revised Statutes of New Brunswick is located at QL Systems Limited in Kingston, Ontario and is updated periodically by the staff of the office of the Attorney-General. The data base software does not at present support regular updates. However, upgrading of the software is underway in order to allow the regular updating of the data in the near future.

The data base of the English version of the Revised Statutes of New Brunswick is fully operational and has been updated up to 10 March 1981. A major update of this data base for the purpose of incorporating the 1981 legislation is expected to be completed by December 1981.

Work has begun on the building of a data base of the French version of the Revised Statutes of New Brunswick.

The updating of the English data base and the building of a French data base is being done by using the IBM ATS service provided by QL Systems Limited. An AES PLUS with a communication option is being used as a terminal for communication with QL Systems Limited and with the Queens Printer.

Computerized Data Base of Regulations

A consolidation and translation of all New Brunswick Regulations is under way. The AES PLUS is being used for this project and once the consolidation has been completed, the data base of the Regulations will be built.

Computerization Information Retrieval of Statutes

The English version of the Statutes of New Brunswick are available through the QUIC/LAW service provided by QL Systems Limited in Kingston, Ontario.

Newfoundland and Labrador

Bill Processing

The Office of the Legislative Counsel has an IBM Office System 6/450 information processor. The system includes a display/operator's station, and an inkjet printer. This system is being used to produce camera-ready copy for offset printing, thereby bypassing the composition stage at the printers. The system is also being used in the printing of Acts.

Processing of Regulations

No plans are at present under way to automate the preparation of Regulations. The Office is, however, the Registry of subordinate Legislation and maintains its index in the information processor.

Computer Data Base of Statutes

The Legislative Counsel's office is using the IBM System 6/450 to store Statutes for revision and consolidation. The revision and consolidation will be printed in the same manner as the Bills and Annual Statutes. The discs used in the system are readable by computer.

Computer Data Base of Regulations

There are no plans at present to develop a data base of Regulations.

Computerized Information Retrieval of Statutes

Although consideration is being given to information retrieval, no decision has as yet been taken in this regard.

Nova Scotia

Bill Processing

All Bills since the 1978-79 session were prepared using four AES 100 terminals and printed on the low-speed printer attached to the terminal. Photocopying was employed to produce the multiple copies required for the Legislature.

Chapter separates are prepared in the same way, but the annual Statutes are produced by photocomposition through an interface between the AES system and the A-M photocomposition equipment which is used. At the present time, a certain degree of manual intervention is required before the AES data can be processed by the photocomposition unit, and the photocomposition output is in gallery form. It is hoped that a page makeup procedure will be developed in the near future, and the manual intervention reduced.

Processing of Regulations

Regulations are not handled by the Legislative Counsel's Office.

Computer Data Base of Statutes

A computer data base of Statutes is being generated through the AES system and stored on floppy discs. At the present time approximately two-thirds of the data conversion has been accomplished, and this will be used in the photocomposition of a consolidation of the Statutes in loose-leaf form early in 1979.

It is planned that this data base will be updated periodically and used for the next revision of the Statutes.

Computer Data Base of Regulations

There are no plans to develop a computer data base of Regulations at this time.

Computerized Information Retrieval of Statutes

This is at present under revision but no decision has as yet been taken in regard to the development or use of any particular information retrieval system.

Computerized Information Retrieval of Regulations

No regulation data base is available.

Ontario

Bill Processing

The Legislative Counsel's Office uses ATMS text editing through a government computer in the preparation of Bills. The government printer uses photo-composition equipment which should result in machine-readable copies of new legislation becoming available. A new system for text editing, integrated with printing, is under review.

Processing of Regulations

The same situation exists in the preparation and printing of Regulations as for Bills.

Computer Data Base of Statutes

The Statutes are maintained in a consolidated (camera-ready) copy form for printing purposes, and a gradual conversion is underway to machine-readable versions. Such a data base will be completed before the 1990 revision. A program is being launched to translate selected Statutes into French using word-processing equipment in the office.

Computer Data Base of Regulations

The same situation exists for Regulations as for Statutes.

Computerized Information Retrieval of Statutes and Regulations

There is no program in the government for this purpose but the matter is under review.

Prince Edward Island

Bill Processing

The Legislative Counsel's Office uses an IBM Mag-Card System for the drafting of Bills.

Processing of Regulations

EDP is not used in the preparation of Regulations and no plans are being considered at present.

Computer Data Base of Statutes

Revisions to the loose-leaf edition of the Revised Statutes of Prince Edwards Island are produced by Alphatext in Ottawa who provide photocomposed copy to the Queen's Printer. The computer base is updated annually by Alphatext.

Computerized Information Retrieval of Statutes

At present no retrieval system is used, but consideration is being given to various options.

Quebec

Traitement des projets de loi

Le système de traitement de mots (AES C-20) sert actuellement à la préparation des projets de loi confiés à la Direction générale des Affaires législatives. On envisage toutefois de mettre au point un système plus complet de traitement des projets de loi.

Traitement des règlements

Actuellement, les règlements ne font pas l'objet d'un traitement électronique.

Base de données informatisées des lois

Une base de données informatisée des lois a servi à la photocomposition des Lois refondues du Québec de 1977, de même qu'à celle de leurs mises à jour subséquentes.

Base de données informatisées des règlements

La saisie des règlements en voie de refonte est effectuée actuellement par une firme privée qui fournira à la Commission de refonte les prêts à photocopier et un ruban magnétique qui pourra être converti dans un format similaire à celui des Lois refondues. Par la suite, la Commission pourra mettre elle-même cette banque de données à jour à même ses propres terminaux de saisie.

Repérage d'informations par ordinateur en ce qui a trait aux lois et règlements

À l'heure actuelle, la Commission de refonte des lois utilise l'ordinateur pour effectuer des recherches dans la banque des lois refondues du Québec. Ces recherches sont effectuées pour des fins internes. Cependant, un nouveau système de repérage est prévu pour l'an prochain; le ministère envisage de conclure avec la firme QL Systems Limited une entente aux fins d'en offrir le service QUIC/LAW à différents usagers relativement aux Lois refondues et, éventuellement, aux Règlements refondus.

Saskatchewan

Bill Processing

The Legislative Counsel's Office prepares Bills using Mag Card typewriters and inserts formatting codes for printing. Galleys are prepared by the Office Service Agency which are pasted up by the Saskatchewan Government Printing Company and printed in the usual manner. Late in 1981 all Bills and Regulations will be prepared on Wang word processors and typeset in the Legislative Counsel's Office. A direct link with the printing company which has the same equipment will facilitate printing of Bills, separate chapters, bound annual volumes, loose-leaf Statutes and Regulations both in the Gazette and in loose-leaf form.

Processing Regulations

Regulations are prepared in the same manner as Bills. Saskatchewan is currently involved in a Regulation re-enactment program which will result in a computer data base of Regulations.

Computer Data Base of Statutes

A project to convert the loose-leaf Statutes into a machine readable form is presently under way. The printed page will be "read" by an optical scanner and the data will be stored in the QL computer in Kingston.

Northwest Territories

Processing of Ordinances

Handwritten drafts of Ordinances are keyboarded into Micom 2000. Printouts are forwarded to the Territorial Printer for reproduction by offset printing (quick-printing: paper plates) for the Legislative Assembly. Amendments during council sessions usually travel the same route.

Processing of Regulations

Regulations are processed in a manner similar to Ordinances. Following keyboarding and signature, a hand copy is forwarded to the Territorial Printer for inclusion in the Territorial Gazette. The Gazette is produced by offset printing means (metal plate).

Computer Data Base of Ordinances and Regulations

Ordinances are collected and reproduced in yearly volumes. A computer tape is made at the time of printing but not consolidated data base is maintained. Regulations have been consolidated to 31 December 1981 and will be available in a bound volume shortly. A computer tape will be prepared but there are no plans to maintain a consolidated data base of Regulations. Maintaining an up-to-date data base on Micom diskettes of both Ordinances and Regulations is under consideration.

Computerized Information Retrieval of Ordinances and Regulations

Neither the Ordinances nor the Regulations are available at present through a computerized information retrieval service.

Comments

The Northwest Territories plans to convert to a continuing consolidated loose-leaf version of Ordinances and Regulations within the next few years. The issue of maintaining a computerized data base will have to be reviewed when this system is brought in.

Yukon

Bill Processing

A contract draftsman is currently employed in the vacant draftsman's position. He drafts and prepares Bills using an AES PLUS and incorporates any changes occurring during drafting or in the Cabinet Legislation Committee process. When the draft is ready for introduction the Bill is transferred to an IBM Mag-Card II typewriter and hard copy is prepared by offset printing for circulation. Changes occurring during debate are dealt with on the Mag-Card II.

Processing of Regulations

Regulations are prepared in-house using the Mag-Card II typewriter.

Computer Data Base of Ordinances and Regulations

A computer data base of Ordinances is maintained by Supply and Services (Canada) and is used to update the loose-leaf consolidation of the Ordinances.

Computerized Information Retrieval of Ordinances and Regulations

No information retrieval services are employed at present.

Comments

Currently, the consolidation of Yukon Statutes since 1971 has been by means of a loose-leaf system similar to that of the province of Manitoba which is annually updated. The revised Ordinances of 1971 were printed in a hard cover and no subsequent hard cover books have been produced.

The data base of Ordinances maintained by Supply and Services (Canada) has not proven to be actually capable for use for the purpose of enabling the annual revisions to be performed solely by inserting new sections, sub-sections, etc. The reprinting has produced numerous typographical errors which have required detailed proofreading subsequent to printing. An examination was conducted to ascertain where the errors had occurred. It was found that almost every new Ordinance handled since the revision of 1971 contained some errors and in some cases the errors were gross and widespread. A further examination showed that through an error in Supply and Service the final corrected version of the 1971 revision was printed without incorporating the numerous typographical errors into the parent data base. Since this was unknown in the Yukon the method for producing updates of the revision copy was to transmit for printing only the particular sections which had been changed by way of amendment or repeal. This copy was incorporated into the data base directly with the result that the reprinted newly revised Ordinance picked up all of the original errors which had never been corrected in 1971. The subsequent printing then put into force many pages of unproofread 1971 copy and eliminated the corrected 1971 copy. The error could have been foreseen earlier if the whole of each Ordinance upon its new production was proof-read. Unfortunately when one section was changed in a 200 section Ordinance only that section was proofread.

Another complete revision has been undertaken and our current loose-leaf edition is now up-to-date with effect from December 1979.

Tentative Future Plans

The Yukon Government is in the process of purchasing a new computer which will incorporate word processing capabilities. An endeavour will be made to ensure compatibility of the transmission equipment with either the QL Systems data base of the Federal Department of Justice or Supply Services (Canada) as printers. Early decisions are not expected.

Canada

Bill Processing

All Bills are prepared using the ATS system run on the Canadian Government Printing Bureau Computer which also prints them by computerized photocomposition. The Department of Justice employs 15 Vucom II terminals through which all Bills are now input, backup input being provided by the Printing Bureau. The bulk of the terminals are operated by draftspersons' secretaries with a small central data processing unit.

Processing of Regulations

All Regulations are prepared using the ATS system run on the Canadian Government Printing Bureau computer which also prints them by computerised photocomposition. It is planned that all input will soon be done on 7 Vucom II terminals located in the Department of Justice, as Regulations are approved.

Computer Data Base of Statutes

A computer data base of Federal Statutes was created as a part of the Revised Statutes in 1970. The output from the Bill processing system is used to keep the base up to date employing equipment located in the Department of Justice and the ATS system of the Canadian Government Printing Bureau.

Computer Data Base of Regulations

A data base of Regulations was created by the Department of Justice as a part of the process of consolidating the Federal Statutory Orders and Regulations. The data base is updated using the machine readable data generated through the processing of Regulations.

Computerized Information Retrieval of Statutes

The Federal Statutes are available through the QUIC/LAW system operated by QL Systems Limited.

Computerized Information Retrieval of Regulations

The Federal Regulations are available through the QUIC/LAW system operated by QL Systems Limited.

Stephen J. Skelly

November 1981

AUSTRALIAN EXPERIENCE IN THE ESTABLISHMENT OF A COMPUTERIZED LEGAL INFORMATION RETRIEVAL SERVICE

Memorandum by
THE GOVERNMENT OF AUSTRALIA

The legal profession in Australia will soon have access to computer systems for legal information retrieval to assist them in their legal research. The State Governments of Victoria and New South Wales are at an advanced stage in making arrangements with private sector organisations to establish and operate legal information retrieval systems to include at least the statutes, subordinate legislation and case law of those particular States. The plan is for each of the two systems also to include the primary legal materials of at least two other States and, in this way, the two systems will cover the six States of Australia. The Federal Government has indicated that it is prepared to make the Crown copyright material which it holds available to the operators of the Victorian and New South Wales systems so as to provide an almost complete coverage of Australian primary legal materials.

2. This stage has been reached only after discussions and pilot development projects extending over a ten year period. As might be expected, during that time a number of issues and problems were encountered, and it may be of interest to Attorneys of other countries, faced with the question whether to establish their own legal information retrieval systems to know something of the Australian experiences.

Previous Developments

3. The Attorney-General's Department of the Federal Government currently operates an in-house legal information retrieval system, known as SCALE, for use by Government lawyers in the Department. This system was developed as the result of the recommendations of a Committee which enquired into the need for computerized legal information retrieval in Australia in 1972/3. The Committee recommended that the development process should take place in two stages, firstly with the introduction of an interim in-house system in the Attorney-General's Department which could then be used as a basis for the subsequent development of a publicly accessible legal information retrieval system embracing all Australian primary legal materials. The SCALE system has been operating as envisaged within the Attorney-General's Department since 1977 and the full public system is now about to get under way.

Degree of Government Involvement

4. The extent to which Governments should be involved in the establishment of public legal information retrieval systems has been an issue of basic importance, and has been the subject of considerable discussion. In Australia, the private sector initially showed little interest in the establishment or operation of a commercial legal information retrieval system. This situation has changed in recent years, with a number of private organisations being now interested in setting up and operating such a system. This has perhaps been brought about by developments in computer technology which have substantially reduced the cost of computer systems in the last decade, and by the increasing use and acceptance of legal information retrieval systems overseas.

5. In the 1970s it was felt that the Federal Government in Australia would need to take the lead in both the establishment and the funding of the proposed publicly available legal information retrieval system in order for any development to progress. Since the private sector has indicated its desire to establish and operate such a system, the question of the extent of Government involvement has had to be reassessed.

6. The establishment and operation of a computer system for legal information retrieval is a significant commercial undertaking. Considerable financial resources and business initiatives are required, and there is a large amount of risk associated with such a venture. There is a strong case for this type of enterprise to be left in the hands of the private sector, and this has been recognised in the developments which are taking place in Australia.

7. On the other hand, there are a number of aspects in which the development of computerized legal information retrieval systems impinges upon the public interest, and for this reason Governments may wish to maintain some involvement in the operation of such systems.

8. Government will be concerned to ensure that the coverage of material in the data bases is adequate, and that the information is accurate and up to date. It will also wish to avoid the development of incompatible systems, which would result in increased costs to users and variations in the search strategies they would need to employ.

9. In Australia, the conflict between these competing sets of considerations has been resolved in the following way. Systems are to be established by private operators under the auspices of the State Governments. The States of Victoria and New South Wales have called for proposals from private sector organisations, and have indicated the terms and conditions which these proposals will have to meet. The means of Government influence over the operators of the system will be through the granting of licences to include Crown copyright material in the data bases, which is discussed separately below.

10. One of the main stipulations is that the selected operator, in conducting the operation of the system, will need to have regard to the views of the Attorney-General, and an advisory committee established by the Attorney-General, will be concerned to ensure that the system is operated with due regard to the public interest.

11. Apart from these matters of public interest, the Government has, of course, an interest in legal information retrieval as a potential major user. Governments invariably have extensive use for legal materials and are in a position to take advantage of the existence of computerized systems, particularly in relation to the consolidation and publication of statutes.

12. In providing an internal service for the requirements of Government, the SCALE system in Australia is following the example of the JURIS system operated by the Department of Justice in Washington.

Involvement of the Legal Profession

13. Members of the private legal profession will be major users of a commercial legal information retrieval system and will wish to have a say in the way the system should develop. They will have views on what material should be included in the database and will wish to be consulted on the priorities for the inclusion of both primary and secondary legal materials. Other aspects of the facilities and services provided will be of considerable concern to the system's users.

14. The success of the system will depend heavily on its acceptance and use by lawyers in private practice. Consultation in the early stages on the private lawyers' requirements, and feed-back from the users once the system is established, will play an essential part in developing a system to meet the users' needs.

15. In Australia the legal profession has been concerned that public legal information retrieval systems should be available to as wide a range of the profession as possible and not only to large or wealthy law offices. The systems should also cover as much State material as possible, in particular that of the smaller States, which might be of only marginal value for the commercial operator. The profession is also concerned that the charges and costs for the use of the system should be kept within the reach and that, where possible, existing word processing equipment in solicitors' offices could be used to access the system without the need to purchase additional computer terminal equipment.

Use of Crown Copyright

16. Crown copyright is held in both Statutory material and in court judgments and it is open to a Government to use its copyright to ensure that the development of legal information retrieval systems proceeds along lines which are acceptable both to the Government and to the needs of the private legal profession.

17. A Government by virtue of its copyright in essential material has the legal power to restrict permission to include that material in a computer data base to operators who are willing to conform to the standards and guidelines set by it in consultation with the private profession. The use of Crown copyright in this way, however, raises some important policy issues, and in Australia there has been active debate on whether it is appropriate for copyright to be so used. One view is that this is not appropriate because the law should be regarded as being in the public domain, so that it can be disseminated as widely as possible.

18. The State Governments in Australia have indicated that they favour restricting the granting of permission to a selected operator who will thereby obtain a monopoly position. This approach has not commended itself to the Federal Government which has indicated that it is disposed to make its material available to any operator who is prepared to meet terms and conditions of general application. This approach will leave more to the operation of market forces instead of to the monopoly position of the preferred operator.

Royalties

19. A major issue affecting both the cost, or even the possibility, of establishing a legal information retrieval system, is the question of royalties in respect of material where copyright is held by third parties. The SCALE system has been able to be built through the inclusion almost exclusively of Crown copyright material. The Commonwealth Law Reports have been included, for internal Departmental research only, with the agreement of the publisher, the Law Book Company, which holds copyright in the headnotes and catchwords of that publication. For other Case law material, and especially for use in a commercial system the agreement of the publishers would be required and they would presumably require royalties for the use of their material. These costs can be considerable, and would need to be passed on to the users of the information retrieval system through the scale of charges.

Problems of a Federation

20. In a country such as Australia, with a Federal system of Government, and with multiple systems of law, there are additional problems to be faced in the setting up of an appropriate system for legal information retrieval. There may be substantial disparities between the needs and the wishes of the Governments and users in different States and it may be difficult to obtain agreement in the form the system should take. The amount of material to be collected and stored and the cost of operating a legal information retrieval system, are substantially increased by the existence of separate sets of laws in each of the different States. Lawyers in the smaller States may be disadvantaged if the number of users of the system in these States is such that the providers of the legal information retrieval system consider the market to be too small to be viable.

21. The interest which a Government has in its own legal system will tend to result in each Government in a federation becoming involved in a legal retrieval system. There will be a temptation for individual Governments to do their own thing and to establish separate systems. This, however, is likely to prove uneconomic and if there is no co-ordination of the separate systems it could result in confusion for users who will be forced to purchase different equipment for different systems and to use differing search techniques.

22. Modern computer technology enables separate data bases to be linked together and operated as one "distributed" system. But if this is to be done there is a need for all the data bases in the system to be compatible with each other in certain respects. With this in mind an Advisory Committee in Australia has recommended the adoption of the following standards:

- (i) All legal information retrieval systems should be able to be accessed from any user's terminal which has a common industry standard interface.
- (ii) The enquiry dialogue and search strategy a user would need to employ to access the system should be the same for each database which is established. The Committee has recommended that the STATUS computer software developed by the Atomic Energy Research Establishment in England should be the one used for any Australian legal information retrieval system. This is already used in the SCALE system and in the publicly accessible EUROLEX system in Britain and the Kluwer Law Publishers' system in Holland.
- (iii) The database formats should be standardised so that there would be only one type of database structure for Statutes and one type for Case law. This is intended to assist the user in changing quickly from one data base to another without having to refamiliarise himself with the method of display of the material and the way the question is meant to be phrased.

Use of Word Processors for Retrieval

23. Many solicitors' offices are turning to the use of word processors and office management computers to assist in their office administration. It is desirable that specialised additional computer terminals should not be required in order to access public legal information retrieval systems. With the terminal interface recommended, many solicitors' offices should be able to use their existing word processing equipment with a simple device to attach it to a telephone line at minimal expense. This will also have the advantage that legal precedents and standard forms stored on an information provider's computer could, with appropriate commercial arrangements, be transmitted down the telephone line to the solicitor's word processor and modified or combined into documents for his own purposes.

Cost Considerations

24. The viability of commercial legal information retrieval systems depends heavily on the cost of establishing the data bases. The level of charges for the use of the system would need to be sufficient for the operator to recover this initial outlay as well as his on-going operational costs. On the other hand, the charges must be kept sufficiently low to encourage extensive use of the system. This is a delicate equation to balance and we understand that few, if any, legal information retrieval systems around the world have as yet been very profitable.

25. This situation is now changing, however. The cost of computing equipment is falling dramatically, and at the same time processing and storage capacities are increasing, so that the capital costs of equipment required to set up a legal information retrieval system are today substantially reduced. Furthermore, telecommunications systems in Australia, as in other parts of the world, are becoming more sophisticated and less costly to use.

26. In order to establish a database, the legal material must first be rendered into a machine-readable form. This has traditionally been done by manual re-keying, followed by a process of verification or proofreading in order to ensure the accuracy required. For the large volume of material required, this involves a considerable initial expense, together with an on-going cost to keep the data base up-to-date.

27. It is of great assistance if primary legal material can be produced, in the first instance, in machine-readable form. There are outstanding possibilities for this to be achieved through the use of computerized typesetting, which is discussed below.

28. One possible alternative to re-keying is the use of optical character recognition equipment. Significant advances have been made in this area in recent years and we have been following these developments with considerable interest. The difficulty presented for the scanning machine is that legal publications use several different type fonts with proportional spacing and different

sizes of characters. This type of material is much harder for machines to read than, for example, normal typing, which has fixed character dimensions. The older material is also likely to be of poor print quality, making the machine's job all the more difficult.

29. We have not, as yet, satisfied with the accuracy and cost of any of the existing optical character recognition systems, although there have been significant improvements in recent years and we anticipate that in the near future this should provide a cheaper and more effective method than the re-keying of old material.

30. Once the data base is established, the marginal cost of providing access to additional users is relatively small and hence the profitability of a legal information retrieval system depends heavily on the size of the market. In Australia the diversity of jurisdictions leads to a relatively large amount of material to be included in the data base. This, coupled with the relatively small size of the market, is seen as a major problem in establishing the commercial viability of these systems. This was one reason for the need for Government initiative in the first instance, and it is only in recent years that private enterprise organisations have recognised the possibility of a profitable commercial system.

Computerized Typesetting

31. A large part of the cost of establishing a legal data base can be eliminated if the material to be stored is already available in machine readable form. The increasing use of computerized phototypesetting in the printing industry has extended to Government Printers, who are responsible for the printing of statutory material, and also to some legal publishers. As a by-product of this process, computer tapes containing the text of the material in computer-readable form may often be available.

32. Since 1973 the Australian Government Printer has progressively introduced phototypesetting into his operations. The SCALE system in the Attorney-General's Department has largely managed to avoid the problem of expensive data capture, as nearly all of the material for its data bases has been obtained from the Government Printer's system.

33. This has tended, however, to influence the priorities for the inclusion of material into the system, and material not available in machine-readable form is less well represented. The SCALE Statutory data bases contain an extensive coverage of the Australian Commonwealth Statutes and subordinate legislation, and the statutory material of the Australian Capital Territory. In contrast, the SCALE Case Law data base is limited to the publication known as the Commonwealth Law Reports, containing the decisions of the High Court of Australia. This has been obtained by re-keying at a data preparation bureau because of its importance. Any commercial system, however, would need to have a substantially larger case law component in its data base.

Full Text or Headnotes and Catchwords

34. There has been considerable discussion over the years on whether a legal information data base should contain the full text of the Statutes and Cases or whether it should only include the appropriate catchwords and headnotes as in the subject indexes of a computerized library information system.

35. Before considering this question, however, it may be helpful to point out that the technique involved in conducting research through a computerized system necessarily differs from the traditional methods used with books. With the traditional methods, the researcher endeavours to identify principles of law that are relevant to his purpose. Having established some broad principles, he tries to refine these as much as possible to a specific principle covering the case that he has in hand.

36. With a computer, the technique is basically different. A computer does not think in terms of principles, but it enables documents to be retrieved on the basis of the words they contain. These words will be able to point the researcher in the

direction of material which covers the relevant principles. The point to be remembered, however, is that the computer system works basically through the retrieval of words and it is exceedingly capable in this task.

37. Because of the difference in searching techniques, and the greater importance attaching to words in a computer system, the general view now seems to be that it is desirable for computerized legal information retrieval systems to be full text systems.

38. The preference for full text systems is particularly evident in relation to statute law, where the actual words of the statute tend to be of critical significance and the legal researcher can be expected to want to have access to those words, rather than some general summary of the effect of the statute.

39. The need for full text may not be quite as pressing in relation to case law, but experience has shown that a full text system of case law is a much more valuable research tool than one which contains only headnotes and catchwords. It is desirable, of course, that the full text should include the headnote and catchword material, but the full text of the judgments will often deal with matters which would be missed if the researcher was entirely dependent on the headnotes and catchwords.

40. For material of minor value, it may be difficult to justify the cost of keying the full text. In the SCALE system, the approach has been taken of including both the full text and the catchwords and headnotes of the more recent material and just the catchwords and headnotes of earlier cases. This has enabled the inclusion of many years of older material at a modest cost.

41. This difficulty will be overcome in the case of future material with the use of word processors now extending into the area of courts and tribunals. This presents the opportunity for full-text material in machine-readable form from this equipment to be made available for incorporation into a computer legal data base at very little cost. The Federal Attorney-General's Department has, in fact, been using this approach for the SCALE system, on an experimental basis, with promising results. A difficulty here can be the fact that formats used by the word processing system may not be readily convertible to other computing equipment or to a format suitable for information retrieval.

Consolidation of Legislation

42. Experience to date in the Federal Attorney-General's Department has shown that the availability of the legal material in machine-readable form presents a number of opportunities for Governments for the reduction of costs and improvements in efficiency in a number of related areas. One development which is taking place in the Attorney-General's Department is the introduction of an automated system for the incorporation of amendments into existing legislation, without the need for manual text editing.

43. In Australia, amending Acts which are passed by Parliament contain textual instruction as to which words are to be added, replaced or deleted in the existing Principal Acts. When the existing Act is subsequently reprinted, these amendments must, at present, be manually incorporated into the Act by a process of cutting and pasting, and then re-keying of the material for printing.

44. The Attorney-General's Department is developing a set of computer programs which will use the wording of the amending Act to automatically incorporate the amendments into the Principal Act. This requires that the programs must be able to interpret the normal English legal wording in the amending Act, which has been written in the normal way for humans to understand rather than the computer. This development is only possible because, as the amending Bills are printed for presentation to Parliament, they are available in machine-readable form as a by-product of the phototypesetting process, as are the Principal Acts which have to be amended. The automated system should speed up the process of incorporating amendments into the existing legislation and provide an up-to-date consolidated set of Statutes in the computer data base at all times.

45. This development should also provide considerable benefits in the area of legislative publication by avoiding the "cutting and pasting" and re-keying process. Another expected benefit is that, when a Bill is ready for the second reading speech in Parliament, Senators and Members can be provided with a computer printout showing the way the Principal legislation would read if the Bill were to be passed. This would include an indication of the words which it is proposed to change. Such a service should prove to be of considerable benefit to Parliamentarians but, because of the time constraints in presenting Bills to Parliament, this is not currently possible using manual methods.

Reliance on Overseas Systems

46. A major benefit offered by computerized legal information retrieval systems is their comprehensiveness. In addition to the availability of material within a particular country, the possibility now exists for searching data bases in other countries with similar legal systems. Through an extension of the international telephone system, it is now possible, via satellite, to deal in to computer data bases on the other side of the world at relatively modest rates. The Attorney-General's Department is already making use of this facility and, as mentioned previously, some of the overseas systems in fact use similar computer programs to those in the SCALE system.

47. This facility will enable the lawyer to search quickly for precedents not only in the law of his own country but of other countries overseas. The legal draftsman will also be able to locate provisions in the Statutes of overseas countries which may assist in the drafting of laws for his own country.

48. Faced with the costs and technical difficulties of establishment a local legal information retrieval system, a Government may well consider making arrangements for their legal materials to be included in the data bases of an existing overseas system. There has been considerable discussion on the relative merits of this approach in Australia.

49. The availability of existing expertise and the relative economies of scale may be strong arguments in favour of the use of overseas systems. On the other hand, the importance of legal information systems will grow in future years and Governments may see it as undesirable to place the management of the main system providing ready access to their legal data into the hands of overseas organisations

50. A matter for consideration would be, if the system is left in the hands of a foreign corporation, whether there would be sufficient ability to exercise influence over the operation of the system in the public interest.

Conclusion

51. The future will undoubtedly reveal the increasing use of computers for legal information retrieval as in other areas of law. The volume of law is growing at an ever-increasing rate, and the problem of determining the current legal position on any particular issue using traditional manual methods is becoming increasingly unmanageable, time consuming and expensive. There is a growing recognition that manual methods by themselves are no longer adequate to the task of legal research, and the assistance of computers will be essential.

52. Legal digests which have, in the past, served the lawyer well and continue to do so, nevertheless are difficult to maintain and keep up-to-date as new cases are decided. In addition, the work of indexing case material requires a high intellectual skill if a good result is to be obtained, and more countries will soon need to face the problems and issues raised by the establishment of legal information retrieval systems and it is hoped that the Australian experience in this regard will be of value and interest.

TECHNOLOGY AND EVIDENCE LAW: AUSTRALIAN DEVELOPMENTS

Memorandum by
THE GOVERNMENT OF AUSTRALIA
(Prepared by the Law Reform Commission of Australia)

Information Technology and Society

New information technology: One of today's most dynamic technologies is the new information technology. This generic expression refers to the development of a whole range of electronic and mechanical devices which generate, process, store and communicate information. They do so in ever increasing quantities, at ever increasing speed and consistently diminishing cost. Many countries of the world, including those in the Commonwealth of Nations, are undergoing the rapid development of the so called fourth economic sector, the "information sector". The most obvious and pervasive aspect of the new information technology is the computer. For example, it has been estimated that in Australia computers are already part of an industry with an annual turnover of \$1,500 million a year. This sum comprises an estimated \$400 million a year in imports and the salaries of some 77,000 employees, now estimated as employed in the computer and associated industries in Australia. More than 11,000 computers are at present in use in Australia, most of them small and medium scale systems installed since 1970.¹ The advent of microprocessors promises the rapid proliferation of "home computers". Everywhere in Australia, one can see the rapid advance of computerization: processing reservations at the airline terminal, offering kerb-side banking transaction with an "automated teller", taking care of records in hospitals and courts, offering printouts of statutes and case law, processing correspondence and documents in offices and handling the cashflow and credit information of retail stores, to name but a few.²

2. These developments, which are international in character and rapid in development have been stimulated by two major technological advances during the 1970s:

- . The rapid extension of miniature technology by the development of integrated circuits containing ever expanding components reduced to a tiny wafer of crystal silicon by procedures of photo reduction (the so-called "microchip"); and
- . The extensive linkage of computers by telecommunications permitting vastly increased storage of information and encouraging the exponential growth of transmission of data over local and national boundaries.³

3. Legal context: The last mentioned development, so called "transnational data flows" (TBDF) presents perplexing problems that will require legal attention at national and international levels. Already in UNESCO, the Council of Europe, the Organisation for Economic Co-operation and Development (OECD), the Nordic Council and elsewhere TBDF problems have been identified. Some efforts have already been addressed to the social and legal issues that result. The areas of concern include:

- . the need for greater legal protection of privacy (data protection and data security);
- . the implication for access to government information and the international on-line operation of local freedom of information laws;
- . the impact of the new technology on vulnerability to terrorism, accident, industrial dislocation etc;
- . the need for new laws to deal with computer crime, including crime having international components;
- . the implications for conflicts of laws, state sovereignty and economic protectionism of the new technology;
- . the need to adjust intellectual property and other aspects of business law for the new technology; and

- . the implications of the technology for the legal profession, particularly in countries where that profession is highly dependant on computer-susceptible land title conveyancing.

The need for review of the laws of evidence, especially in countries following the common law tradition, is simply one aspect of the need for a major review of legal systems in the Commonwealth of Nations following the rapid introduction of new information technology. It is important to see the impact of the technology on the law of evidence in its wider context. Computers and automatically computer-generated material represent only the most obvious and well recognised aspects of the new technology. Other relevant developments include:

- . the rapid expansion and perfection of photocopiers;
- . the development of microform procedures;
- . the rapid expansion in the use of sound and video recorders;
- . the invention and widespread use of the Breathalyser and like equipment to test intoxicated drivers;
- . the development of devices for measuring the speed of vehicles e.g. radar; and
- . the significant advances in surveillance equipment, optical and audio.

4. The trial system: The tradition of the common law trial system is well known. It is a tradition of the continuous oral trial, by which relevant evidence is offered by witnesses who come before a court or tribunal and whose testimony may be challenged by testing cross-examination and answered by conflicting evidence. This trial system has many merits. They include especially:

- . the openness of curial determination of disputes based upon material, oral and written, which is openly presented, typically in a public trial;
- . the opportunity is afforded to the opposing parties to confront or challenge and test evidence which is offered against them; and
- . the procedure offers to the general community the opportunity, if it chooses to do so, to see the public resolution of disputes, according to law, upon material openly disclosed before the court or tribunal;
- . its adversary structure enables the parties to maintain a high degree of control over the presentation of their cases.

5. Evidentiary obstacles: The advent of new information technology presents a number of problems to the common law rules of evidence. Amongst the rules of evidence law which are most likely to stand in the way of evidence being admitted where modern technology has been adopted are the following three rules:

- (i) The hearsay rule: which prevents evidence being given by a witness of the out of court statements of another person. A well known example of the hearsay rule operating to render inadmissible in a criminal trial vital and apparently reliable business records was Myers v DPP⁵;
- (ii) The "best evidence" rule: which prevents the tendering of a copy document e.g. photocopies or microfilm, unless the original has been destroyed, lost or unless its absence can be accounted for; and
- (iii) Rules on evidence produced by a machine: Before evidence can be received, it must be established that the equipment was reliable and accurate at the time that the evidence was produced. Only in relation to equipment well known to work accurately will a court presume accurate operation.

The advent of the new information technology renders the continuance of some of these rules, developed in earlier times, unreasonable and indeed impossible. Clearly, it would be intolerable, as society rapidly adopts computers, photocopiers, word processors and other technologies, to require in all cases that every person who contributed to a much used and thoroughly relied upon computer record or other device, should be available to prove orally his individual contribution. Equally it would be unacceptable to require proof in every case of the operation of the equipment. Particularly would this be unreasonable in the event of computer material originating or generated in a foreign jurisdiction, transmitted, possibly across the world by TBDF. The common law rules were often unreasonable in the

case of reliable business and government records before computerization. They become even more unreasonable when computerization is employed. Yet mistakes, accidental or deliberate, do occur. It is not appropriate to accept, without any precaution or reservation the printout of every computer or the product of every photocopier as if the technology itself were always an indisputable guarantee of accuracy: providing protection against false, negligent or even malicious and misleading information. An American judge undoubtedly spoke for a large constituency when he complained in a judgment that as "one of many who had received computerized bills and letters for accounts long since paid", he was not prepared to accept the product of a computer "as the equivalent of holy writ". A compromise must be made between:

- . adherence to the common law rules of evidence devised in the days of the quill pen with their insistence upon procedural fairness and the production of the "best evidence", on the one hand; and
- . recognition of the rapid penetration of new information technology in society, its enormous efficiencies, its transborder characteristics, its overwhelming reliability, its common use by mankind and the gross inefficiencies and costs that would be inflicted if, in every case, strict adherence to traditional rules of evidence were insisted upon.

Making this compromise between the traditional laws of evidence and the new technology is easy neither in concept nor execution. The task is made no simpler by the urgency of providing solution that will ensure that courts and tribunals can receive into evidence the rapidly expanding bulk of computerized data and other technological produced evidence, because such material is, effectively, the only available information upon which the issues for trial can be accurately and justly determined. The law would be brought into even greater disrespect in the community if, in the face of the rapid deployment of computers, photocopiers and other devices, it continued to place unreasonable evidentiary obstacles in the way of the admission of such material before a legal decision-maker.

6. Guiding principles: In deciding what solution should be advanced for the evidentiary problems created by modern information technology, consideration must be given to:

- . the hurdles, if any, that should be placed in the path of the party tendering the evidence, in order to secure the public policies upheld by the law of evidence;
- . the safeguards that should be built into the trial system to ensure a fair hearing for the party against whom technological evidence is offered, and;
- . the weight to be given in the decision-making process to any technological evidence which is admitted.

In resolving these questions, and in devising legislation to overcome the evidentiary problems created by modern technology, a number of policy objectives have already emerged in Australia. Amongst the chief of these, the following can be mentioned:

- (i) **Aid to Fact-finding**: All relevant evidence should normally be admissible, unless a clear ground of policy justifies its exclusion. Barriers should not be erected to admissibility except for good cause.
- (ii) **Fairness: Testing the Evidence**: The other party should be given an adequate opportunity to test the evidence. To achieve this, the party against whom technological evidence is led might need enhanced rights of discovery e.g. to examine a computer program and advance notice that technological evidence is to be used. An alternative approach is to impose procedural restrictions in the nature of safeguards which must be complied with before technological evidence will be admitted at all.
- (iii) **Cost Saving and Efficiency**: To enable governments and business to adopt technological advances without prejudicing admissibility, and not to impose unnecessary costs or impositions, additional costs might be considered either at the point of use of the equipment (e.g. a requirement that affidavits be made) each time a set of microfilms is made or in relation to the court proceedings themselves.

- (iv) **Flexibility:** Cumbersome procedures should be capable of waiver where there is no genuine dispute. It is also important that legislation should be capable of accommodating future technical developments.
- (v) **Technological Neutrality:** The legislation should not give any preference to one type of equipment over another except for some good reason relating to its performance. For example, it has been suggested that Australia's reproduction legislation does not enable the admissibility of microfilm produced by laser and other techniques which do not produce a photographic negative. Most breadth analysis legislation is specific to particular breathalyser equipment.
- (vi) **Uniformity:** Increasingly today business must give thought to the admissibility of their records not only in the jurisdiction in which the records are kept but also anywhere else they do business or might be sued. Uniformity is an important step towards ensuring reciprocal operation.
- (vii) Other purposes to be served include:
 - . clarity and simplicity of the reform legislation; and
 - . a reasonable degree of certainty of its operation.

Australian Approaches: Legislation and Law Reform

7. **ALRC reference:** In Australia, the Australian (Federal) Law Reform Commission (ALRC) is at present in the midst of a major review of the law of evidence applicable in Federal and Territory courts. Until now, Federal courts in Australia have applied the laws of evidence of the State or Territory in which they happen to be sitting.⁶ This rule was an improvisation appropriate in the early days of Australian Federation because of the small number and docket of the Federal courts. The establishment, within the past ten years, of the Federal Court of Australia and the (Federal) Family Court of Australia, as well as the growth of the business of the Territory courts has rendered it appropriate to review the original approach and to consider whether, as in the United States, a Federal evidence law should now be developed. The laws of evidence, particularly statutory laws of evidence, vary significantly from one Australian jurisdiction to another.⁷

8. The terms of reference to the ALRC refer specifically to:

the need for modernisation of the laws of evidence used in Federal Court and; review of the laws of evidence ... with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements.⁸

The ALRC has produced a widely distributed discussion paper, Reform of Evidence Law.⁹ In it, attention is drawn to the impact on the law of evidence of technological change and to the general inadequacy of legislative attempts so far in Australia to address this issue:

Attempts have been made throughout Australia to deal with the problems created by existing rules of evidence for the tendering of computer produced evidence. Technology in this area, however, continues to develop at a rapid rate and the question arises whether current law is adequate for new information media and where the problems are in fact being experienced in tendering evidence which consists of material stored in computers, processed by computers and produced by computers. Do the laws of evidence need modification to facilitate proof of telex, satellite and other modern forms of communication? Are there problems in the use of evidence produced by modern equipment such as satellite photographs? Do the laws of evidence prevent the use of videotape evidence and should this be allowed? It might be of great convenience and less expensive to allow oral evidence to be recorded and given in this way. The disparity between the community's use and the law's use of survey evidence has already been noted.¹⁰

The ALRC is proceeding towards the production of a comprehensive report with a draft proposal for a new Federal Evidence Act. The Commission has the assistance

of a number of distinguished consultants, including Federal and State judges, law teachers, practising barristers, government officials and an expert academic psychologist. The project is being led by Commissioner T.H. Smith, a Melbourne barrister. It is hoped that a draft report with a comprehensive Bill will be produced in mid-1983. Already, the Commission has produced a series of 12 research papers dealing with particular areas of law of evidence.

9. A number of the present Australian laws of evidence and proposed changes do address the impact of technology on the laws of evidence mentioned above. The Chief relevant research papers in this connection are:

- R.P.1 Comparison of Evidence Legislation
- R.P.3 Hearsay Evidence Proposal
- R.P.4 Secondary Evidence of Documents
- R.P.8 Manner of Giving Evidence
- R.P.9 Hearsay Law Reform - Approach?

10. State reform inquiries: In addition to working closely with its expert consultants, the ALRC is co-operating actively with other law reform agencies which have delivered or are currently working upon proposals for reform of the law of evidence in Australia. The Queensland Law Reform Commission completed a major review of evidence law in that State in 1975. The New South Wales Law Reform Commission has completed two reports and many other papers on aspects of the law of evidence in that State. Its Report on the admissibility of business records¹¹ became the basis for legislation in New South Wales, Commonwealth and other Australian jurisdictions.¹² The Law Reform Commission of Western Australia has a reference before it relating to copying and micrographic technology. The South Australian Law Committee is working actively on a general project for the reform of the law of evidence. Through the Australian Law Reform Agencies' Conference and by direct communications the law reform agencies are co-operating on evidence law reform. The need for co-operation is illustrated by the disparities that have already emerged in legislation so far passed concerned with the admissibility of technologically stored, created or transmitted information.

11. Legislation: general features: It is possible to identify certain features of the Australian legislation so far enacted. The following generalisations can, it is believed, be made:

- (i) Technology Lag: The legislation tends to lag behind technological development. The non-application of microfilm legislation to laser techniques has been mentioned above. Another case arises from the use of "on-line" computers by bank customers such as now is becoming common in Australia. Even under a broadest Australian legislation, entries made by customers when affecting transactions at "automatic tellers" may not qualify for admissibility under the Federal and New South Wales legislation. These typically require that information be recorded in the computer records of a business by a "qualified person". It is doubtful whether a customer at an automatic teller can be so described. Likewise computer-generated evidence (which is produced without any imminent intervention) is not admissible under any of the technological evidence legislation in some Australian jurisdictions, although it may be admissible at common law provided the rules of evidence produced by a machine can be satisfied.¹³
- (ii) Admissibility and Reliability: The tendency in legislation to date has been to impose very strict conditions upon the admissibility of evidence. These generally relate to the reliability and accuracy of the equipment and of material produced by the equipment. It can be argued that many of these matters should be considered in deciding what weight to give to the evidence rather than controlling the admissibility of the evidence.
- (iii) Cumbersome Procedural Requirements: Some of the Australian legislation has been criticised for imposing unnecessary procedural requirements. Examples include requirements that running affidavits be made as photocopies, microfilm and other copies are made. Some of these requirements may seem cumbersome and even impracticable.

- (iv) Lack of Notice: In legislation dealing with computers and reproduction, no significant efforts have generally been made to require notice to be given to the other party so that he may be given the opportunity and assistance which would be needed to make a proper check on the reliability of the technological equipment and its product.
- (v) Complexity of Legislation: The Australian legislation varies from jurisdiction to jurisdiction. Much of it is quite complex. In addition, in relation to what might broadly be called "business records", there is a differing amalgam of laws from one Australian jurisdiction to the next. This amalgam is made up, in each jurisdiction, from treatment of some or all of the following:
 - . public documents;
 - . business and government records;
 - . photocopies produced by "approved machines" and use of legislative sanctions
 - . procedures on unapproved photocopiers;
 - . banker's books;
 - . computer records

In some jurisdictions, for example, computer records are distinguished from other business records.

- (vi) Overlap: In some cases a document is admissible under two or more pieces of legislation, and sometimes the common law as well. For example legislation of the states and Territories relating to the proof of statements in documents and records including business records could be used to tender the testimony which the reproductions legislation is designed to preserve (same applies to computer records).
- (vii) Different Common Law obstacles overcome: Admission of technological evidence might be prevented by more than one exclusionary rule. Some of the legislation overcomes the hearsay rule. Some (e.g. legislation which makes certain copies as admissible as the original) overcomes the requirements of the rule regarding secondary evidence of documents, and any "best evidence" requirements, but not the hearsay rule. The N.S.W. and Federal business records legislation, for example, overcome all these obstacles.

Australian Legislation

12. Five classes It is not possible in a paper of this length to identify all of the Australian legislation, Federal and State, by which attempts have been made to modify the common law rules of evidence to facilitate the introduction of technological evidence. A few examples will, however, demonstrate the general features listed above: the lack, so far, of a simple principled and coherent attack on the problem of technological evidence and the need for reform. These propositions will be illustrated by reference to Australian legislation on:

- . reproductions by photocopying, microfilm and otherwise;
- . copy documents legislation;
- . legislation relating to public documents;
- . legislation of business records; and
- . legislation specific to computer and computer generated records.

13. "Reproductions" legislation This legislation is designed to enable the admissibility of photocopies, microfilm or other copies produced by machines which might be regarded as accurate and reliable, for evidentiary purposes, as original documents. The principal problem raised by the common law rules of evidence was the need for the person who made the copy to give testimony as to the correctness of the copy or the accuracy of the machine when it made the copy. The other problem created by the common law is the requirement either to prove that the original has been destroyed or cannot be found, or to produce it. The "reproductions" legislation compliments pre-existing legislation and common law rules, which continue in force. If the legislation has not been complied with, it

can still be possible to fall back on those rules. The legislation is not uniform across Australia. The Victorian legislation is used for comparison. Its content may be summarised as follows:

- (i) **Official Reproductions:** A reproduction of a document in the custody of officers such as the Register of Titles or the Commissioner for Corporate Affairs may be tendered if it bears a certificate that it is a reproduction of that document.
- (ii) **Business Documents:** A reproduction of a document made or used in the course of a business can be tendered upon proof that the reproduction was made in good faith and that either the original has been destroyed or lost or that it is not reasonably practicable to produce it. The negative must still be in existence. Provision is made for proof by affidavit which must describe the machine or process by which the machine copy or negative was made and that the processing was properly carried out in the ordinary course of business by the use of apparatus and material in good working order and condition.
- (iii) **Approved Machines:** Provision is also made for machines to be approved if the Attorney-General is satisfied that the machine automatically photographs documents passing through it in normal operating conditions at a speed which will prevent interference by the operator in the course of copying a document. In the case of reproductions made by such machines, it does not matter whether the document copied is still in existence or not. Proof is required, however, that the photographing was properly carried out in the ordinary course of business by the use of apparatus and material in good working order and condition and that the 'negative' was made in good faith by means of such machine and the print reproduces the image on the negative and that the negative is still in existence. This can be done by means of an affidavit.

14. Copy Documents Legislation: There is also legislation in the Australian Capital Territory, South Australia, and the Northern Territory which relates to the tendering of copy documents. In these jurisdictions there is no "reproductions" legislation. Copy documents legislation is also found in some other States and Territories.

- (i) **Australian Capital Territory:** The Evidence Ordinance 1971, enables the tendering of a machine copy or a reproduction of official documents certified to have been made while in the control or custody of public officers and whether the original document is in existence or not. The section relates to reproductions of documents which by law must be lodged with government bodies. There is also a provision enabling facsimiles to be tendered upon proof to the satisfaction of the court that the copy was taken or made from an original document by means of a machine, that it was compared with the original, and that notice to produce the original has been given.
- (ii) **The Northern Territory:** There is legislation dealing with the photographs of old records. This relates to documents held by the Crown or "prescribed corporations".
- (iii) **South Australia:** Reproductions of business records and other documents may be admitted under two general provisions - s.45a and s.45b of the Evidence Act 1929-1979 which extend to "any reproduction of an original document (or business record) by photographic, photostatic, lithographic, or other like process." The reproduction will be admissible if it is apparently genuine. There is a discretion in the court, however, to exclude a reproduction if it is of the opinion that:
 - (a) the person by whom or by whose direction it was prepared can and should be called;
 - (b) the evidentiary weight of the document is slight and outweighed by the prejudice that might be caused to any of the parties; or
 - (c) the admission of the document is otherwise contrary to the interest of justice. Directions are also given as to the manner in which the weight to be attached to the document should be established.

State and Territory legislation which relaxed the hearsay rule to enable statements in documents and records to be tendered contain provision which enable copies to be tendered. There are two approaches:

- (i) South Australia, New South Wales and the Northern Territory. A copy may be tendered if undue expense or delay would otherwise be caused. It has to be certified as a true copy in such manner as the court may require.
- (ii) Tasmania, Victoria, Western Australia, Queensland, and the A.C.T. A general discretion to admit copies is given, and the court also decides on the appropriate way to authenticate the copy.

15. Legislation Relating to Public Documents: The legislation in the various Australian jurisdictions to facilitate the admission of 'public documents' is extensive. It contains both a general provision relating to documents of a public nature and a number of specific provisions dealing with particular descriptions of public registers and files. These include:

- (a) Registers of British vessels and ship's articles;
- (b) Registers of newspaper proprietors;
- (c) Documents filed in Corporate Affairs offices;
- (d) Registers of births, deaths, marriages and adoptions;
- (e) Documents recording convictions in Australia and outside Australia;
- (f) Judgments and other court documents both inside and outside Australia;
- (g) Crown Grants, Letters Patent, leases and other documents of title.

The general and specific provisions overlap. In addition the provision in the reproductions legislation cover much of the same ground insofar as it relates to secondary evidence of official records. The provisions vary from one jurisdiction to another. Many categories of documents are not dealt with in some jurisdictions.

16. Legislation on Business Records: As was mentioned above, the hearsay rule is one of the main obstacles to the admission of technological evidence. For example, much that is contained in business and government record consists of or includes hearsay statements. In Australia considerable inroads have been made by legislation into the rule against hearsay, in relation to financial and general business records - now increasingly and rapidly automated. The legislation generally distinguishes between civil and criminal proceedings. Generally, the legislature has seen fit to permit such second-hand written hearsay to be received, subject to specified safeguards where it is contained in some form of record and where the supplier of information or the maker is either called or is unavailable. In some instances, it is enough that the document forms part of the records of a business and was made in the case of that business. Discretions excluding evidence otherwise admissible under the legislation are included (with the exception of the A.C.T. - civil proceedings, and Tasmania - business records). There is, however, no consistency in the inclusion of or terms of such discretions.

17. The broadest civil provision is arguably that in South Australia, which allows any apparently genuine document purporting to contain statements of fact of which the person who made the statement or at whose direction it was prepared had personal knowledge, admissible in evidence. It shall not be admitted where the court is of the opinion that the person by whom or at whose direction the document was prepared should be called or the prejudicial effect outweighs the probative value, or it will be contrary to the interest of justice. In addition, in South Australia and elsewhere, there are provisions (based on or developed from the 1938 English legislation) which enable the tendering of a document made by a person with personal knowledge of the matters stated; and of "continuous records" or records of "a business" (which expression generally includes public administration) - which contain statements made by a person without personal knowledge of the matters recorded. Generally there is a requirement that the maker of the document or the supplier of the information contained in the document be called to give evidence unless unavailable.

18. Computer records and output: The hearsay rule has been modified in most jurisdictions in an attempt to cope with the new technology of computers. Two different approaches have been taken in the legislation:

- (i) One has been to enact legislation which in terms specifically deals with computers records and computer produced evidence.
- (ii) The other approach has been to include computer records and computer produced evidence within the general legislation regarding business records.

The former approach has been taken in Queensland, Victoria, South Australia, and the A.C.T. The provisions differ but generally require proof of threshold matters relating to the reliability of the computer and its operations, as to whether the information was recorded in the ordinary course of business and other similar matters. In this type of legislation, there is usually a provision enabling the formalities to be proved by certificate. There is also a discretion to exclude the evidence notwithstanding compliance with the conditions of admissibility. The other approach, followed in the New South Wales and Federal legislation, is to treat the computer records in the same way as business records generally and simply to require proof of the making of the statements in the record in the course of or for the purpose of the business, that the record forms part of the record of the business, and that the statement was made or derived from information supplied by a qualified person in the course of or for the purposes of the business. It is also permissible that the statement contain information derived from one or more devices. As to the reliability of the computer and its operations and like matters, these are treated as matters going to weight and not admissibility. Generally, the legislation has taken a far more cautious approach to the admissibility of written hearsay in criminal than in civil proceedings.

Law Reform Proposals

19. Background: In the research papers published by the ALRC dealing with Federal evidence law reform of the hearsay rule and of the secondary evidence of documents rule have been tackled directly. Attention has been paid to important reforms of the hearsay rule effected in England by the Civil Evidence Act 1968. Close attention has also been paid to the United States Federal Evidence Rules 1975 and to the recent Report of the Joint Federal/Provincial Task Force on evidence and the draft Uniform Evidence Act recently published in Canada. The universal attempt to reform the law of evidence to accommodate technologies evidence illustrates the general significance of this problem for most countries of the Commonwealth of Nations.

20. Secondary evidence: In the research paper on Secondary Evidence of Documents, the ALRC suggested a number of modifications to the common law requirements. The proposals include:

- (i) Duplicates: The accuracy of modern reproduction techniques and the convenience of tendering copies produced by them warrant their general recognition. It was suggested that the approach of the U.S. Federal Rules, as modified by the New York State Law Revision Proposal and by the Canadian Task Force proposal, should be adopted. This would mean that a duplicate would be admissible in evidence to prove the contents of the original document, whether the original document is in existence or not, unless there is a genuine question raised as to the authenticity of the original, the continuing effectiveness of the original or the accuracy of the duplicate.
- (ii) Other Secondary Evidence: In the case of other secondary evidence, it has been suggested that the approach taken in the U.S. Federal Rules the original is not required and other evidence of the contents of a writing, recording or photograph is admissible if the originals have been lost or destroyed (unless in bad faith); or the original is not obtainable or is in the possession of the opponent; and
- (iii) Reproductions other than Writings: To remove uncertainty about the scope of the common law, provision is proposed to permit the tendering of secondary evidence of the contents of modern information storing media.

21. Commercial and Government Records: In its research papers the ALRC has indicated that the above proposals will often not be satisfactory for dealing with

secondary evidence of commercial and government records, particularly where they are kept in photocopy form or on microfilm. It has proposed special provisions for such records. For example it is proposed that a distinction should be drawn, as in the present reproductions legislation, between copy documents that form part of the records of a business, (which should include commercial organisations, government departments and instrumentalities) and those that do not. It is in the business records area that the need to reform the common law is most clearly demonstrated. Normally there is a pressure for accuracy and reliability of business records, because the business itself relies upon the records. Where documents have been reproduced which are not kept as part of the general records of a business, that pressure is likely to be less. The NSW Law Reform Commission in its Report commented that the fact that the records were to be used by the business provided a strong incentive for accuracy. Where the reproductions are made and kept by businesses as part of their records, then there is a sufficient guarantee of reliability and accuracy to justify their admissibility simply on proof of the fact that they were made and kept in the ordinary course of business.

22. The ALRC proposed business record provisions are like those in New South Wales and the present Federal law with some modifications. They address the problems to both the hearsay rule and secondary evidence of documents rule. The ALRC has commented that the legislation which specifically and, in terms, deals with computer records reveals an anxiety about the accuracy of evidence produced from computers and a suspicion of computers. The legislation sets out conditions of admissibility which are concerned with the reliability and accuracy of the equipment and systems. A combination of the two approaches is to be found in the American approach to business records which treats computer based evidence as coming within the business records exceptions to the hearsay rule. Under the approach evidence is required that:

- (a) The record was made in the regular course of business, at or near the time of the act, condition or event which it evidences;
- (b) A qualified witness must testify to the identify and mode of preparation of the record;
- (c) The sources of information and method and time of preparation of the record must be such as to indicate its trustworthiness.

Satisfying these requirements, however, can involve a vast amount of extremely difficult technical evidence.

23. While it is true that errors, accidental and deliberate, occur and can occur at the very stage of the record keeping process, the fact is that they tend to be the exception rather than the rule, they tend to occur at the stage when the information is fed into the system, and normally, there are techniques available which can be, and are, employed at each stage of the record keeping process to eliminate error. The approach taken in the Australian Federal and New South Wales business records legislation, already in force, is to leave the party against whom the evidence is led to challenge the evidence. There are also provisions enabling the court to order production of related documents and further printouts. This is the only practical approach to receiving this sort of evidence. To require extensive proof, on each occasion, of the reliability of the computer records would be to place a costly burden on the party seeking to tender the evidence, to give the opposing party a substantial tactical weapon, and to add reasonably and unprofitably to the work of the courts. In many cases there will be no bona fide issue as to the accuracy of the record. It is more efficient to leave the party against whom the evidence is led to raise any queries and make any challenges it may have.

24. It is necessary, however, to ensure that the other party is protected. Two of the more important proposals for the protection of the party against whom the hearsay evidence may be led are the modernisation and extension of the procedures of discovery and a notice and counter-notice procedure.

25. As to public documents the trend in legislation specifically dealing with this category of record is to enable certified, sealed, or signed copies to be tendered in evidence and to relieve the party tendering the document of the necessity of proving the authenticity of the certificate, seal or signature or the authority of the person who purported to certify, seal or sign the documents. The ALRC has

proposed that this approach should be taken and applied generally to a broad category of public documents. There should be a residual power in the court, however, to order persons involved in the record-keeping to be called to give evidence. This safeguard becomes necessary if a more general approach to public documents is to be taken.

Alternative Approaches

26. Following the publication of the above law reform proposals and the consideration of some of the submissions received upon them and upon an earlier general suggestions for reform of the hearsay rule, the ALRC has more recently published a research paper which includes proposals suggesting much more radical reforms of the hearsay rule and the secondary evidence rule. These would have clear implications for the admission of computer evidence and, indeed, technological evidence generally. In the research paper Hearsay Reform - Which Approach?¹⁴ an attempt is made to spell out the three possible approaches to hearsay evidence law reform. They are applicable in the other relevant areas of the common law:

- (i) **Rules Approach:** The first offers fairly detailed rules, with minimum judicial discretion, in order to maximise the certainty of the admissibility of the evidence, including technological evidence, so long as procedural and other pre-conditions and other requirements are met. This, basically is the approach taken by current Australian evidence law. It is the approach reflected in the specific ALRC reforms proposed above.
- (ii) **Judicial Discretion Approach:** The second approach, borrowing from a residual hearsay discretion contained in the United States Federal Evidence Rules¹⁵, seeks to substitute for the highly specific hearsay evidence rule and exceptions a much more general test. The "price" for a radical simplification of the numerous technical requirements to overcome the hearsay rule is a considerable increase in the judicial discretion to admit or reject hearsay evidence according to the concurrences of the particular evidence in question. Simplification of the law is proposed. But this is to be achieved by a greatly enhanced discretion. The discretion would be exercised by reference to four tests, generally stated:
 - (a) **Reliability:** That the evidence was likely to reliable.
 - (b) **Convenience:** That the evidence was more probative on the point for which it was offered than any other evidence which the proponent could procure through reasonable efforts.
 - (c) **Justice:** That, balancing the arguments for admission and rejection of the evidence, it would be fair and in the interests of justice to receive the evidence.
 - (d) **Countervailing Reasons:** That there are no countervailing reason of law or public policy that required the rejection of the evidence, such as the rules that require or permit courts to reject even reliable and probative evidence obtained: unfairly or unlawfully; as a result of threats or violence; or in circumstances that would make its admission unsafe.
- (iii) **Abolish the Exclusionary Rules:** The third proposal, also set out in the recent discussion of the hearsay rule, suggests a still more radical approach, namely abolition of the hearsay rule and substitution of a broader power in the judiciary to exclude relevant evidence by reference to such considerations as:
 - (a) whether the probative value of the material could be so slight that reception would not be justified by the time that would be wasted;
 - (b) whether it would be procedurally fair to an opponent to admit the evidence particularly without notice;

- (c) whether difficulties with the evidence could be adjusted by reference to the weight given to it, rather than by rejecting its admission entirely;
- (d) whether differing rules should apply in the criminal trial, having regard to the reasons of public policy that limit hearsay in a technological and other evidence not strictly proved, whether liberty and reputation are at stake.

The ALRC is still evaluating submissions that are being received on these research papers. To date they heavily favour the first type of approach. The rapid developments in information technology suggests the need for much simpler rules of evidence that will ensure that the law can adapt to changing technology. Such technology continues to present itself in great complexity and variety. Furthermore, it is often argued that the law of evidence has become unduly complicated and is not fully understood by witnesses and other laymen, including scientists and technologists, whom the courts also serve. On the other hand, judges and lawyers, brought up in the traditions of our trial system and aware of the public policies which the hearsay rule and other laws of evidence serve, tend to resist radical reforms. They point to the need for predictability in the trial process and procedural fairness to the parties confronted by evidence, including technological evidence, which cannot readily be tested in court and quickly met by contrary evidence in the trial setting.

Conclusions

27. This paper has not purported to present a complete review of the subject of the impact of new information technology on the Australian law of evidence. It has not dealt, for example, with the rapid development of Australian legislation designed to facilitate the admission of evidence produced by breathalysers and other like devices for breath, blood and body sample analysis.¹⁶ It has not dealt with the issues of the admission of radar and amphetamine evidence, designed to help police and the courts in the substitution of scientific evidence for impressionistic oral evidence. It has not dealt with an important recent development in Australia, namely proposed legislation on the use of sound recordings of confessions to police. The Criminal Investigation Bill 1981 presently before the Australian Parliament includes provisions based on an earlier ALRC Report¹⁷ for the acceptance into evidence of sound recordings of confessions and admissions made to members of the Australian Federal Police.¹⁸

28. However, enough has been said to illustrate the rapid penetration of Australian society by remarkable advances of new information technology, particularly computers linked by telecommunications. In a country of Australia's size, these developments are especially beneficial. They are worldwide developments. They have implications, some of which have been mentioned, for the law beyond domestic jurisdiction.

29. In Australia, legislative changes have already been enacted in order to address these problems and to modify the laws of evidence. However, the illustrations in this paper indicate the disadvantage of adjusting the laws of evidence to particular technologies and the complexity of the law that can emerge as a result.

Footnotes

1. Committee of Enquiry into Technological Change in Australia (Myers Committee) 1980, Vol.1, 25.
2. A. Moyes, "The Impact on Society of Information Technology" in Information Technology Council Technological Change - Impact of Information Technology, 1980, 83.
3. D.G. Beanland, "The New Technology" in *ibid*, 3-4. See generally M.D. Kirby, "The Computer, the Individual and the Law" (1981) 55 Australian Law Journal 443.

4. R. David and JEC Brierley, Major Legal Systems in the World Today, (2nd ed.), 1978, 328.
5. [1965] AC 1001.
6. Judiciary Act 1903 (Cwlth) ss.79, 80.
7. Australian Law Reform Commission, Evidence Research Paper No.1, Comparison of Evidence Legislation in Federal Courts and Courts of Territories, 1981 (A. Sowden). For a general review of the topic of this Paper see T.H. Smith, "Legality - Information Technology and the Laws of Evidence" (1981) 1 Journal of Law and Information Science 89.
8. Australian Law Reform Commission, Annual Report 1981 (ALRC 19), 67.
9. Australian Law Reform Commission, Discussion Paper No.16 Reform of Evidence Law 1980 (ALRC D.P. 16).
10. Ibid., 10.
11. New South Wales Law Reform Commission, Report on Evidence, Business Records LRC 17, 1973.
12. Evidence Act 1898 (N.S.W.) ss.14A-14C, 14CD-CV, 43C; Evidence Act 1958 (Vic.), ss.55-56; Evidence Act 1977-1979 (Qld), ss.92-103; Evidence Act 1929-1979 (S.A.), ss.59a-59c, 45-45b, 34c-34d; Evidence Act 1906-1979 (W.A.), ss.79B-69E; Evidence Act 1910 (Tas.), ss.40A, 81A-81Q; Evidence Act 1980 (N.T.), ss.42B; Evidence Ordinance 1971 (A.C.T.), ss.28-45; Evidence Act 1905 (Cwlth), Pt.IIIA.
13. Cf. The Queen v Weatherall (1981) 27 SASR 238.
14. Australian Law Reform Commission, Evidence Research Paper No.9, Hearsay Law Reform - Which Approach?, 1980.
15. United States Federal Rules of Evidence, Rule 803 (24).
16. Australian Law Reform Commission, Alcohol, Drugs and Driving, (ALRC 4) 1976, 27-8. Each State of Australia has statutory provisions to facilitate the admission of such evidence by certificates. The differing approaches of the legislation, and the recommendations of the ALRC in the context of the Australian Capital Territory are set out in ALRC 4.
17. Australian Law reform Commission, Criminal Investigation (ALRC 2), Interim.
18. Criminal Investigation Bill 1981 (Cwlth), ("admissibility of oral confessions"). For comment on the admissibility of tape recorded evidence see the note on Cornwell v Papfield, unreported decision of the Supreme Court of New South Wales, 24 July 1981 in D. Robinson, Case Note, (1982) 1 Journal of Law and Information Science 175.

**COMPUTERS AND THE LAW:
THE CHALLENGE TO GOVERNMENTS**

Memorandum by the Commonwealth Secretariat
and a paper by PROFESSOR COLIN CAMPBELL
of The Queen's University of Belfast,
Northern Ireland

When Law Ministers met in Barbados in 1980 they had a lively discussion about the use of computers in the legal area. Since then the cost of hardware has fallen dramatically while at the same time the capacity of the machines has soared.

2. A number of companies have begun to establish electronic legal data bases and to offer competitive, and at times overlapping, computerised services to the legal profession.

3. This development carries with it a number of complex and potentially controversial issues of policy for governments. Should a private concern enjoy control over an area of legal materials and be free to set its own charges for access to it? Does the public interest require that these systems be compatible and accessible by conventional computer terminals rather than on the personalised or "dedicated" terminals which some systems require customers to hire simply for access to the electronic library in question? To what extent should governments intervene to influence developments and protect public access? What is the status of the statute book and of court judgments, and how strong is the position of a government who wishes to require orderly and compatible development in this field? Will the benefits of the new technology which should ensure to the legal profession, to governments and to the public at large be realised, or are they endangered by fragmented and competitive activities of unco-ordinated electronic publishers, each seeking an area in which their libraries will enjoy a monopoly? These are only some of a number of issues which require resolution but in a manner which encourages rather than discourages the creation of data bases without which the new technology may be in danger of being unused, misused or underused.

4. In the accompanying paper, Professor Colin Campbell (a leading figure in the Society for Computers and Law) highlights some of the developments to date and raises questions which may have to be faced by governments, and sooner rather than later.

ANNEX TO LMM(83)7

**COMPUTERS AND THE LAW:
THE CHALLENGE TO GOVERNMENTS**

Prepared by PROFESSOR COLIN CAMPBELL of the
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Introduction

The development of computer applications to law has been underway for more than twenty years. Much of the original stimulus, and early effort, came from the United States. As commentators in different countries of the Commonwealth began to pay attention to the potential of computers in the legal process two major points recurred. The first was the acceptance that, like it or not, computers would certainly come to play an important part in manifold areas of legal practice and, yet, secondly, the technical complexities and high financial costs seemed intimidating. The confidence of

the early pioneers who predicted the entry of computers into law offices and legislative chambers seems not to have been shaken by the delays in implementation. And by the 1980s the predictions were at last justified - there is a rapid and marked spread of computer applications to law.

2. That there have been, in the last few years, and will continue to be significant increases in computer applications to law is only partly due to the claims made about the attractions or superiority of computer methods. Traditionally proponents of computerization have drawn attention to the amount and complex structures of the law and its speed of change. They have argued that any technology which can assist in the storage, retrieval and control of the large quantum of words should be exploited. As computers were transformed from complex "mathematical machines" into "bit crunchers" which can handle any information in any "language" they became prime candidates for use in law. It is true that in some jurisdictions the sheer amount of law (rapidly increasing) helped to stimulate interest in exploring technological solutions. But two other, and perhaps more important, reasons lie behind recent developments.

3. The first is the change in the economic equation - i.e. as labour costs have continued to rise the costs of technology and especially micro-processors have fallen dramatically. For managers in any organisation (including a law office, a court or a law school), financial considerations entail that technology be evaluated as a possible complement to the existing organisation. But it is not just that technology has fallen in price - it has begun to change in nature in a fundamental way. If the computers, of yesteryear, were large, expensive mainframe machines typically housed in purpose-built, air conditioned rooms and tended by a team of dedicated servants, there is now a new breed, a new generation. Mini computers and micro computers - some small enough to be carried around by hand, but fast and powerful enough to do many of the functions previously required by their large predecessors - are revolutionising modern day computing. Even the computing industry is only now getting ready to grasp the implications of this. But it is selling its robust and tiny computers to all sectors of society. The next stage of technological revolution is underway. Soon a significant proportion of all members of industrialised societies will have one or more computers - in their office, in their home or in their cars. These may be linked to other computers or "dedicated" to single tasks, but they will be cheap, reliable and able to operate in normal workaday environments. These developments have come together propitiously and we stand on the threshold of considerable change in the law.

4. The media sometimes argue the technological revolution is upon us or that we live in the "information age". In the United Kingdom 1982 is "Information Technology Year", and in many countries there is keen appreciation by governments of the need to promote public and business awareness of the changes underway. It may seem curious that some of the more significant developments find their roots in law - where the profession is renowned for its conservatism - but it seems sensible to consider computer applications to law now. The major reason is that, at last, some of the different paths that may be pursued are now clearly delineated - serious discussion and planning, and not merely academic speculation is possible; the decisions made in the next four or five years may well determine major patterns of use for the following two or three decades. There are some matters, carrying important implications for the profession and the public alike, which require discussion and, dare I say, action.

Proving the Potential

5. Since the late 1950s when computers were capable of handling text and when there were demonstrations of systems for retrieval from legal materials, it has been claimed that Computer Assisted Law Retrieval (CALR) would become commonplace and offer a boon to the legal profession. Efforts to exploit the potential have been made in numerous jurisdictions but practical or commercial success has been reserved for only a few of the initiatives. In continental Europe the history is of governmental or professional backing being given to systems for lawyers.¹ In the United States it has been commercial enterprise which has launched the major systems. In the Commonwealth nothing of the size achieved in the United States has been realised - although the "state of the art" knowledge is equivalent.

6. In the United States two systems predominate - LEXIS and WESTLAW. The former, owned by Mead Data Central, comprises 40,000 million characters of the full text (i.e.

authentic copy) of both Federal law and the law of all the States. Based on dedicated terminals, relatively expensive subscription and connect time charges, LEXIS is an exceedingly large, impressive and costly online information retrieval service. WESTLAW, owned by the West Publishing Company, appears to have decided that its initial policy of publishing headnotes of cases only and inviting customers to use conventional published materials for reading full judgments or browsing was erroneous. They now publish their system using abstracts (including the West Key Concept system) and the full text. Unlike LEXIS they do not require dedicated technology and their system may be accessed on a variety of terminals or word processors. Competition between the two companies (and their different philosophies) is keen and likely to continue for some years in the United States. Both of them exhibit the enormous power of modern day computing and the sophistication of current day telecommunications-communications. They are, from a technical and organisational point of view, achievements to be admired. Clearly, the level of investment required to establish the services was very high and efforts to secure and adequate return are, accordingly, strenuous.

7. In Canada there are information retrieval systems (The Q/L system has a significant and large database) and, through the work of the Canadian Law Information Council,² efforts are made to extend access to these systems as widely as possible. The co-ordinating Council seems to follow a policy of avoiding unnecessary restrictions on access to the law via novel technologies. The aim seems to be to try to secure access to all lawyers and law students, and not just those who can afford high charges. In Europe there are a large number of retrieval services for lawyers - some use full text, some contain abstracts of materials and others hold bibliographic references. Recently the United Kingdom has become an arena for intense commercial competition. It was announced in 1980 that LEXIS was to be extended to the United Kingdom and that an English General Library of significant proportions was being established by the major legal publishers Butterworths. At about the same time, the Thompson organisation announced that, through a subsidiary (The European Law Centre) it was to use the British STATUS software in a new service to be named EUROLEX. (And clustered round PRESTEL there are different sorts of more limited services). Since 1980 a focus has thus been provided for discussions about the future of CALR - the themes often echo those developed in Canada in the 1970s and may be a harbinger for discussions underway in Australia.

8. If Canada has shown caution towards CALR systems (being properly attentive to the serious implications that follow) it has been unusually progressive in adapting and canalising the power of technology as an aid in legislative drafting. At an early stage it was realised, in Canada, that text captured in magnetic form once, could aid the legislative drafting process by expediting the production of successive drafts as they were required. Further, the entire system could, as a by-product, render available a final copy of text which was suitable for subsequent information retrieval from a computerized law database. The pristine economy of this approach is admirable. It appears, to an outsider, both surprising and anomalous that draftsmen in other jurisdictions in the Commonwealth have not followed the Canadian example. Certainly appropriate technology is available, and one would expect such a system to be exceedingly cost effective. If, as appears to be the case, there is a government interest in making the law readily available then capturing primary material at source in machine readable form should be ensured. There may be difficulties relating to staffing and traditional publishing methods, but the potential cost savings are significant, the notorious pressure on draftsman's time could be alleviated and a wasteful duplication of effort in having to transform printed legislation into machine-readable form as a separate exercise, would be avoided. Experience in Canada has proved the potential of computers in contributing to the legislative process.

9. The other major success story concerns the introduction of simple computing into law offices. For the enthusiasts of CALR and proponents of drafting systems, it was ironic to find that the major inroad into legal practice had little to do with legal research but a great deal to do with the economics of office management. With rising financial overheads lawyers in many jurisdictions turned to computer based time recording, accounting, and word processing systems to increase productivity, save costs, and improve office efficiency. Such seemingly mundane "office automation" applications have proven of relevance to the wider picture however. First they have brought to lawyers' attention, in practical ways, the benefits and advantages of a successful computer installation - such that many are now prepared to consider, on

their merits, proposals to extend to other areas. Yet, second, experience so far has made lawyers aware of the need to ensure compatibility between different types of application. Lawyers are increasingly ready to turn to technology but, naturally, they want to run an integrated and compatible office and not pay additional costs for extra equipment and the confusion that usually entails.

10. Nowadays computer assisted law retrieval can be seen to work effectively and to be, in many demonstrable ways, superior to traditional publishing and research methods. Drafting applications are not so widespread but it is unarguable that a well-implemented system can improve significantly the efficiency of the legislative process and contribute, more widely, to retrieval of law. The "legal sector" has shown itself receptive to office automation. However some areas of anxiety have been identified by those observing current development.

11. Some of the more frequently expressed worries may be listed. First, the cost of CALR systems has invited controversy. In the United States and in the United Kingdom the full text services offered by LEXIS, WESTLAW and EUROLEX are expensive. The expense comes from maintaining the huge databases they seek to provide on large expensive computers - this means that the charge to users is high.³ Commentators have become concerned that the expense may mean that only the large law firms will be able to afford use of the systems. Since such law firms already enjoy greater resources, and since it is the small firms who have the most glaring need for help in coping with the increasing complexity in law and legal practice, fear has been expressed that new distinctions will emerge in the legal profession. There will be greater differences between the large rich firms (and their clientele) and the rest. This is an important point since the legal professions in most Commonwealth countries are comprised of small firms; partnerships are, on the whole, limited to approximately 2-5 lawyers. Thus in England and Wales over 5,600 firms comprise "small units" of 4 partners or less.

12. Another major worry was expressed when the extension of LEXIS to the United Kingdom was announced. Here the issue of "national sovereignty" and copyright of legal materials was identified as a matter for concern. Lawyers in the UK who use LEXIS in fact connect with computers in Ohio in the United States, and the British materials that they read are held in the United States. Worries about the implications of this were first appreciated in Canada where it was understood that the transborder flow of law data raised numerous complex policy questions.⁴

13. These are two of the popular concerns, but there are others. The history of the computing industry is one of rapid growth ... and of confusion, incompatibility, and a high rate of wastage. Many commentators, while wishing to encourage innovation, feel that the profound incompatibilities between systems and services is no longer tolerable - certainly a lawyer would wish any applications to his work to be compatible one with the other. The question of maintaining standards is also relevant but governments everywhere have recognised the difficulties in imposing standards on a fast moving industry. The question of access to the law has been raised - a "whole can of worms" as the phrase has it. Will those with access to huge databases almost instantaneously accessible have a profound advantage over other members of the profession? Should all members of the profession be guaranteed access (they are not at the moment) to some legal materials? Should advice agencies or "para-legal" associations receive special consideration? What are the obligations on government in publishing the law of the land - to whom, how, and to what cost?

14. Interest in such questions has been shown by commentators throughout the Commonwealth⁵ and the salient issues appear to have been accurately identified. Few people have been bold enough, as yet, to offer answers, although, perhaps anomalously, in the United States has come the call from one commentator⁶ that major on-line text databases require to be taken into public ownership if profound distortions to the legal system and the legal process are not to ensue. Before returning to such questions some remarks on the next stages in computer applications to law are necessary.

The Next Steps

15. In the next five years or so there are likely to be two "groups" of further development in applying technology to law. The first group will see the realisation of

preparatory work that has already been done in some areas. As practitioners and administrators assimilate the impact of this, the seeds are being laid, in the second group, for a novel set of applications. If I am allowed the obvious disclaimer that I am only projecting from current knowledge, some remarks on probable developments in the first group may be offered, and then more tentative remarks on the possibilities in the second group.

16. In a number of countries there has been the appreciation that the range and power of technology available is such that the vital considerations now relate to the design and the planning of systems rather than their technical realisation. Within law the early foundation work that will see new systems introduced has taken place in a number of important areas. First what may be termed property registers have been computerized and while, initially, the justification was plainly administrative (to improve efficiency and save on overheads) the work done will allow for dissemination of information through the provision of "networks" for the legal profession and others. Thus, it should become possible, if it is desired, for the Land Register system in Plymouth in England to be linked to law firms directly.

17. Other systems for transmitting information materials or information or "knowledge" which is particularly important to lawyers in practice, could equally well be developed. In the United States, for example, sensible use of computers to aid in court administration procedures have been developed, and it is easy to understand that, with the investment of relatively limited resources and planning, court administration systems could be introduced in any jurisdiction where pressure on the courts or pressure on selected crucial manpower (judges or barristers for example) is experienced. Similarly the maintenance of court transcripts and the production of judgments could be improved and expedited by adapting available technology. It is here that the advent of the new generation of small, powerful and cheap microprocessors will open up a whole host of new possibilities. The flexibility and reliability of the product is accompanied by dramatic falling costs - improved efficiency can be achieved by using the new technology.

18. In the past few years publishers in many countries have come to use computers as an integral part of the printing and publishing process. The books and law reports now available have frequently been produced by computer based photo-typesetting methods. Publishers have realised the sense of maintaining the "magnetic copy" of these books and law reports and as their "stocks" of material have grown, have begun to consider how to make the magnetic copy available to the consumers who will have the equipment and means to use and read the copy. Thus, in the United Kingdom, Butterworths have suggested they might make libraries of forms and precedent available on disc for those with appropriate word processors. Sweet & Maxwell have entered into an arrangement with the European Law Centre under which Current Law and other Secondary Materials (legal textbooks etc.) are to be available for searching on EUROLEX - this may be accessed by various terminals or word processors in solicitors' offices. Within the next five years other novel methods of publishing material will become established. It seems certain that lawyers will be offered the option of holding an "electronic library" in their own office. The savings in space and overheads can be significant in urban areas; access to materials in this form can be vital in rural areas; in developing countries, in particular, the possible cost savings if such a system were planned properly could be enormous.

19. A second group of developments, however, is not so likely to be completed within the next five years but will be well into the planning stages. Earlier it was hinted that not even the computing industry has come to terms with the revolution that has been precipitated by the unlimited, cheap availability of micro-processors. This is plausible enough. Most computer applications to law, so far, were designed many years ago when the technological capabilities were limited and the costs high. Now that the capabilities have been multiplied and the costs have fallen urgent minds are being applied to the new possibilities. Some examples of what will be done can be hazarded even if the time involved in planning, administering and overcoming inertia - and securing adequate commercial investment to bring the products on to the market - may be not inconsiderable.

20. First, lawyers who are intimidated by the increasing complexity of their professional lives will call for and will receive "diagnostic" kits which will provide them with intellectual knowhow. These "Expert Systems" will give them "intelligent"

technological aids to help them in the diagnosis and analysis of the different courses of action which might be pursued to tackle a given problem. Second, it seems likely that some policy makers (and this may include government departments) will turn to technology for their modelling and planning capabilities. Just as governments need access to systematic demographic data so that they may plan for the future (budgets for health, social services etc.) so they may soon come to use computers for assistance in projecting or identifying the consequences of different administrative or legislative measures under consideration. Already, in Europe, modelling systems to predict the effects of amendments to existing legislation have been designed and used. Third, communications between different offices, courts, and departments almost all of which will have computing capabilities will become a matter of course at least during this decade. The so-called "office of the future" with "electronic mail" is, from a technical point of view, already entirely feasible - for widespread implementation it awaits the readiness of the user and the commercial investment of the supplier. Communications within a domestic jurisdiction will speed and improve the effective uses of many aspects of the legal process (no doubt bringing problems as well as benefits in tail) and international exchange between jurisdictions will become feasible.

The Prospectus

21. The proven capability of computers in enhancing legal research methods, promoting drafting and improving office automation efficiency is clear. The developments underway in allowing new forms of court administration, new methods of legal publishing and new administrative practices within the legal profession are entirely comprehensible. Where ingenious minds will identify and exploit the more novel aspects of computers is not so clear. But that technology and its imperialistic impact on law will grow is inevitable. In developed countries technological growth is unlikely to be denied; in developing countries the new low-cost technology could provide enormous advantages conceivably allowing a certain amount of leap-frogging from current practices into more desirable forms without the costs and investment experienced and incurred in Western industrialised countries. There are enthusiasts for all this as well as prophets of doom. Like most other changes in law and its administration there will be costs as well as benefits. What the ultimate balance sheet will look like will depend on decisions now made - including decisions on some of the following issues.

22. An elementary issue is for governments to consider the nature and extent of their interest in applications of the sorts reviewed above. This will almost inevitably involve rather wide policy matters. In different jurisdictions law reporting and legal publishing is treated in different ways - in some cases private enterprise is relied on and in others governments feel they have an unavoidable responsibility to guide and maintain the availability of materials. A vital issue affects access to the law and this relates to how much and what sort of law is published, at what cost, and to whom it is made available. Reliance on free competition and the avoidance of monopoly may be seen as attractive; a counter-argument is that access to the law cannot be left to free enterprise - there are, inescapably, matters of public interest involved. Aside from access to materials by lawyers different issues emerge as the amount of law continues to grow concerning the sort and types of materials made available to laymen or to advisory agencies. Advice on "citizenship" may become necessary.

23. Within each jurisdiction matters pertaining to "sovereignty" will have to be considered. It may well be that some jurisdictions lack the resources or expertise to establish a computer assisted law retrieval system by themselves, but will rely on foreign providers. This may prove to be undesirable. The transborder flow of data is increasingly understood to have complex ramifications and many jurisdictions will, at least, wish to have in their own territory, if not under their own control, the laws of their land.⁷

24. As the availability of cheap technologies increases so too will the call for some influence to be brought to bear on the suppliers of equipment and the providers of systems, to promote compatibility and the maintenance of adequate standards in the legal profession. The new technologies promise enormous benefits and there is no doubt that technically they are superlative accomplishments. Yet current development could be self-defeating if the effects of the introduction of these technologies includes the creation of different sectors within the legal profession, unable to communicate with one another, unlike their professional brethren, capable of handling some types

of tasks but not others ... all because of their dependence on or access to some system or technology. Whether the professional bodies or the governments are best placed to guide in this area may vary from one jurisdiction to another.

25. In most countries where computer applications to law have advanced in serious ways it has become clear that commercial and industrial concerns are, or come to be, as important as legal concerns. Yet in the "information age" the status of law as information - pre-eminent in everyone's lives and regulating all aspects of society - deserves to be recognised. Canada (through the Canadian Law Information Council) provides the clearest case of a country having "grasped this nettle"; there it appears to have been understood that what was needed was a policy about legal information. In the United Kingdom the National Law Library⁸ was founded with similar aims; in Australia there is, equally, understanding of the need to harmonise matters of public interest with the skills and expertise of publishers in free competition. At the moment these are encouraging developments. The danger is that they might only be token gestures - unable by shortage of resources and manpower to guide, in the way that is needed, technological and commercial development so that the health of legal practice and the legal system is not impaired.

¹ See Bing, J.: "Legal Information Services: Some Trends and Characteristics". Paper presented to UKNCCL Colloquium on Data Processing and the Law, Leicester, England 1982.

² See Annual Report of Canadian Law Information Council 1981-82.

³ As computer typesetting becomes increasingly popular the cost of mounting databases will fall (in real terms) but law retrieval via remote time-sharing computers (increasingly "old technology") will remain expensive.

⁴ See Skelly, S.J.: "The Impact of Technology on Legal Information Processing and Some of the Ramifications". Paper presented by UNKCCL Colloquium on Data Processing and the Law, Leicester, England 1982. The worries have subsequently been rehearsed in Australia as well.

⁵ And, in parallel, within the Council of Europe.

⁶ Gelfand, G.: "Public Control of Computer Assisted Legal Research: A Commentary," (1978) 55 University of Detroit Journal of Urban Law p.783.

⁷ Skelly, ibid.

⁸ See The National Law Library - The Way Ahead. Report published by the Society for Computers and Law 1979.

THE ENFORCEMENT OF CIVIL LIABILITY IN REGARD TO COMMERCIAL CRIME AND CORPORATE ABUSE

Memorandum by the Commonwealth Secretariat
and a paper by Dr. L.S. SEALY, Fellow and
University Lecturer, Gonville and Caius
College, Cambridge, Barrister and Solicitor,
New Zealand

The annexed Paper by Dr. L.S. Sealy addressed problems of concern to Commonwealth Law Ministers both at Winnipeg in 1977 and at Barbados in 1980.

2. The Paper was commissioned with a broad mandate to examine strategies to combat the growing menace of commercial and economic crime from a variety of viewpoints.

3. Included among Dr. Sealy's conclusions are a number which address themselves to difficulties within the trial process and which may offer some degree of palliative to congested court calendars. In this regard, Ministers may be interested in his suggestions that:

- (i) resources spent on efficient administration and timely law reform may, in terms of fraud prevention, be money well spent;
- (ii) unnecessary evidentiary and procedural hurdles which are commonly imposed by courts in civil cases involving corporate and commercial wrongdoing should be eliminated, following e.g. the model of the Canadian legislation aimed at simplifying and improving minority shareholders' access to the courts in order to redress corporate fraud. The tendency of judges to make rules fettering their own jurisdiction may require correction by legislation;
- (iii) traditional definitions of "fraudulent trading", "fraudulent preference", etc., may impose a burden of proof which is too high; and civil liability in the case of fraudulent trading is unnecessarily restricted to claims in a liquidation. The sanction of disqualifying directors of insolvent companies from managing other companies could, with advantage, be more frequently invoked;
- (iv) legislation providing for contribution claims between persons civilly liable should, where necessary be modernised, so that persons held indirectly liable for losses should have remedies over or against those primarily to blame;
- (v) the power to order investigations in the affairs of companies, where fraud on the part of its controllers or managers is suspected, should be available - or more readily available - to shareholders with a serious complaint.

THE ENFORCEMENT OF CIVIL LIABILITY IN REGARD TO
COMMERCIAL CRIME AND CORPORATE ABUSE

By Dr. L.S. SEALY, Fellow and University
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Cambridge; Barrister and Solicitor,
New Zealand

Commonwealth Law Ministers have at their last two meetings expressed concern at the general prevalence of economic and commercial crime, and have sought as a matter of urgency to find ways of developing and strengthening law-enforcement procedures and of fostering international co-operation in this sphere. In the paper which Dr. Barry Rider prepared for the 1980 Ministers' meeting he drew attention to the growth of "white-collar" crime and to its insidious side-effects as regards national economies, political stability, market and investor confidence and the social structure generally. He explained the serious difficulties standing in the way of detection and enforcement in this area of criminal activity, especially in cases where the wrongdoing has an international dimension; and he made a number of practical proposals - some of which have been carried into effect - to try to meet the many problems arising.

2. Attention has so far been focused, naturally enough, specifically on the criminal aspect of these activities. The purpose of this paper is, however, to examine commercial and corporate crime from other viewpoints, such as the enforcement of civil liability against the perpetrators of fraud by those who have been its victims, and the regulation and control of commercial activity by the administrative organs of State and by such self-regulatory agencies as the stock exchanges. Obviously, it must be the primary concern of the law (and the foremost claim on the resources of any State) to endeavour to put down criminal activity, and to expose and deal with those concerned, by the direct application of the rules of criminal law; and a substantial proportion of public funds is rightly devoted to developing and maintaining the strength and expertise of police and other forces dedicated to this end. Of course it must be acknowledged, in a discussion paper such as this, that there is no way in which anything done on the civil or administrative side of the law can match in weight and effectiveness what the professional police and detective and prosecuting officers are able to achieve; but there is no reason to write off civil remedies and administrative controls as unimportant. A leading American scholar, Professor G.D. Hornstein, writing about the actions brought in the U.S. by minority stockholders in cases of managerial misfeasance, has observed:

"the record of litigated cases serves as a prophylactic - a deterrent to future wrongdoing. Every successful suit duly rewarded encourages other suits to redress misconduct, and by the same token discourages conduct which would occasion suit. There is no doubt that these derivative suits have materially raised the standards of fiduciary relationships and of other economic behaviour."
((1967) Journal of Business Law, 282, 288.)

It is my purpose to ask what can be done, however modestly, to make more effective the civil remedies available to the victims of commercial crime, and to strengthen the administrative and regulatory controls over commercial and corporate activities. Even though this may do little to deter organised crime on a large scale, at least it will do nothing to encourage or attract it; and further, if the less nefarious types of activity are discouraged in the way which Professor Hornstein describes, resources will be freed to pursue more important targets. A summary of the suggestions and recommendations made in this paper appears in para. 28.

3. I write as one interested in commercial law generally and in particular as a company lawyer, and both because of this special interest and also because of the

greater complexity of the subject my main emphasis will be on corporate and securities frauds. But all economic crime, whether it takes the form of market and trading frauds, expropriation, credit frauds, corruption, false accounting or anything else of a similar kind, involves essentially the same exploitation and the same breaches of trust and confidence, whether or not committed in the corporate sector or through the medium of an incorporated company; and therefore much of what is here discussed will be of general relevance. In many cases, white-collar crime is nothing more than "old-fashioned" fraud, or conspiracy to defraud, though committed perhaps on a more massive scale, and by more ingenious and sophisticated methods. This type of wrongdoing, although obviously a common-law crime, may well also involve more technical offences under company, securities, fiscal or currency-control legislation and, on the civil side, the torts of deceit, conspiracy, conversion, breaches of trust and contract, as well as liability under the laws of restitution or account. The victims of such crimes will therefore rarely have difficulty in finding an appropriate head of claim under which to seek to bring this type of malefactor to book.

4. Some forms of white-collar crime, such as fraudulent trading and long-firm frauds, necessarily occur in a corporate context; others, such as insurance, banking and shipping frauds, will almost invariably be committed by or through companies because of the sheer scale of the operation. In other cases, companies may be used in order to give an appearance of respectability to the enterprise and, at the same time, to allow its controllers to hide behind the anonymity of the "corporate veil" and indeed, by the use of nominee shareholdings and "puppet" directors, to render their true identities wholly untraceable. Networks of companies may be used to "launder" funds, to evade tax liabilities and to move currency across frontiers and through exchange control barriers. For all these reasons, even if there is no direct infringement of company or securities law, it may well be that company law questions will arise incidentally or that the special machinery of company law (e.g. disclosure rules, powers of investigation, insolvency procedures) will have some part to play in ascertaining the true facts or unravelling the web of obscurity behind which criminal activities have been conducted. Again, the investigatory and disciplinary powers of the appropriate securities market and regulatory agencies may well overlap in function with the detection and elimination of corporate fraud on the criminal side. Company law in its civil and administrative aspects has therefore a vital role to discharge in matter of economic fraud.

5. The comments made in the foregoing paragraphs apply a fortiori when commercial crime has an international dimension. On this scale, the use of interlocking companies, nominee holdings, anonymous banking facilities and so on provides formidable additional weapons for the rogues' armoury. The problems of detection and investigation, the procurement of evidence and the enforcement of court orders are quite as daunting on the civil scene as they are in criminal matters. Indeed they may (especially on the grounds of expense) be almost insurmountable; but in some respects - e.g. the "Mareva" injunction (22) or the "freezing" of the power to deal with shares (26) - the civil law is not without ingenious remedies of its own.

6. White-collar crime, in its differing manifestations, in many ways hits Member-States whether large or small, indiscriminately. But there are some problems which more particularly affect jurisdictions and economies at one end or the other of the spectrum. Those countries which include the largest and most active commercial centres will have the established markets and the banking and other facilities which enable funds to be shifted on the massive scale necessary to perpetrate massive frauds. Their larger business population will also aid anonymity, and the sophistication of their legal and commercial institutions will allow scope for subtler kinds of deviousness and concealment. Obviously the law of such countries must have the refinement and flexibility needed to match such activities. This does not mean, however, that less developed economies have reason to be less vigilant: in fact, the absence of close regulatory scrutiny, the possible obsolescence of companies legislation (and similar "technical" laws), the dearth of professional expertise and of police resources, etc., have obvious attractions for the crooked operator. Again, those countries, and especially the smaller ones, which have endeavoured to set up "offshore" commercial facilities such as advantageous tax and licensing laws, confidential banking, and so on, may find that their efforts to attract enterprise have led suspect as well as respectable dealers to take advantage of the benefits available. In addition, where the victim or target of fraudulent

activity, whether primarily or incidentally, is the State itself, it is the economy of smaller nations which is bound to be hit hardest when large-scale international crime is successful. There are therefore lessons to be learned, albeit perhaps different lessons, from the experience and from the experiments of States large and small in dealing with these problems.

7. Looking now more specifically at company law and the regulation of the securities market, it should be emphasised right at the outset that it is not the primary concern or aim of the rules of law in either of these areas to keep down commercial crime; nor should it be. The main emphasis of good commercial legislation ought always to be on the needs of commerce and of honest business men. An eminent Californian lawyer, Professor Ballantine, wrote of company law many years ago:

"The primary purpose of corporation laws is not regulatory. They are enabling Acts, to authorise businessmen to organise and to operate their business, large or small, with the advantages of the corporate mechanism. They are drawn with a view to facilitate efficient management of business and adjustment to the needs of change."

This sector of the law must ensure that enterprises are able to attract investment as it is needed and that investors can find ventures (or havens) for the funds at their disposal; it must provide and maintain a fair and effective market for dealing in securities; and it must allow managers scope to manage whilst at the same time giving adequate protection for the members, and especially the minority members, of the corporate body. The aim is (in the words of Professor Gower (1980) 13 The Law Teacher 111, 114), "to make Capitalism work better." Such codes, to operate at all smoothly, must assume a degree of integrity typical of the business community in general; for the law cannot be backed by any very large state-enforcement apparatus - in part, no doubt, because resources are more naturally assigned elsewhere; but in part also because excessive regulation and policing of the business world is rightly regarded as counter-productive. Commerce flows the better with bureaucratic and judicial supervision kept to a minimum.

8. However, corporate abuse does occur, to a greater or less extent, wherever there are companies; and accordingly it should be the concern in every responsible jurisdiction to have and to maintain as modern a code of company and securities laws as is possible, and to administer it with all the efficiency that the available resources allow. I am not advocating that it is necessary that such laws should be "tough" - quite the reverse, because the foremost aim should be to ensure that the business and investment sectors flourish, as has just been emphasised. But it has been demonstrated both by the research work done and by the legislative innovations made in such jurisdictions as federal Canada and its Provinces that a reasonable balance can be struck between the claims of liberality and of firmness without sacrificing either; and these examples deserve to be more widely known and, indeed, emulated. Even if little is achieved directly as regards detecting and eradicating crime, by having an up-to-date and well-run companies code, it can at least be said that an administration which regulates affairs efficiently and keeps on top of the more routine types of corporate misfeasance (such as the non-filing of returns) is bound also to be more likely to discourage the crooked operator. And in the case of some well-known types of white-collar crime, such as long-firm frauds, exchange-control fiddling and sanctions; busting enterprises, offending companies will be pretty certain not to have filed returns and compiled with the other niceties of good corporate behaviour, and this may be an early and timely sign that something is amiss. In contrast, if the administration of a Companies Registry or a securities market is slovenly or disorderly, or if the laws of a country have not moved with the times, it can only make it more likely that serious crime will flourish undetected amid the general disarray.

9. It follows in my view that there is everything to be gained by ensuring that these areas of law are as up-to-date as possible, as well as being tailor-made to suit local conditions and to cope with local problems. And parallel efforts should be made to see that the law works efficiently. There are, I know, problems here - not least the shortage of professional expertise, both in regard to general administration and in such special matters as legislative drafting. But this is a

matter over which it is easy to be penny-wise but pound foolish. Prevention is generally better than cure: a few hundreds spent in redrafting the law to block a potential loophole may be a faster and better investment than many thousands spent in pursuing the rogues who may exploit that loophole so long as it remains unblocked; and in any case, it is not really a "cure" even to bring to conviction a racketeer who has got away with spoils running into millions.

10. It is, of course, normally easier to persuade treasuries to commit funds for "law and order" than to administration and law reform. But for the reasons given above, it may be far cheaper all round to discourage abuse from the outset than to cope with its aftermath - cheaper not only in terms of the allocation of State resources, but also when account is taken of the potential damage to the economy and to society at large. Even an innovation which may be difficult to justify in terms of immediate results - such as the outlawing of insider trading, or the establishment of an investigation officer or a new regulatory authority - may prove more than worth while if it leads to a raising of investor or business confidence. Conversely, there has been some criticism of the step taken recently in the U.K. of abolishing the Business Names Register, through which the true proprietors of business firms, both incorporated and unincorporated, could be traced. There was, admittedly, some saving in the cost of a few civil service salaries; but on the other hand those in the business community claimed that the Register had proved useful in practice and that they were ready to pay such extra costs as might be needed to make it work more efficiently. An expert has now expressed the opinion that the commission of "long-firm" frauds will undoubtedly have been facilitated by the abolition of the Register: see M. Levi, (1980) 1 Company Lawyer 219, 220. If this is so, the resulting damage to business confidence and to the economy may make the cost-cutting exercise appear, in retrospect, to have been very short-sighted.

11. Once again, however, comes the difficult question of striking a balance. The "prophylactic argument" is, indeed, a strong one, but it must be weighed against costs. All too often, an innovation of considerable attractiveness in theory proves subsequently to break down at the enforcement level. And it is a disservice to business to step up the compliance and reporting requirements unnecessarily increasing the burden on the great majority of well-run companies in the vain hope of catching or deterring the occasional rogue.

12. It is a fact that in many Commonwealth countries the laws governing companies and securities regulation are not well designed to cope with today's problems, or with local conditions. There are many hangovers from Victoria England, which have little relevance in modern Britain, and less still in Uganda or the Yukon. While the need for reform may be widely recognised, finding the appropriate solution may be a difficult and expensive matter. Things may not always be helped - indeed, they may be made worse - by the slavish and uncritical adoption of more recent models from, say, the United Kingdom or the United States, where commercial conditions and the prevailing business philosophy and attitudes may be very different from those in the adopting State. (This problem, so far as the model of U.K. legislation is concerned, will from now onwards become progressively more acute as, under pressure from seemingly endless EEC "directives", European "reforms" are uncomfortably grafted on to the indigenous U.K. company and commercial legislation, while the overhaul of more important issues remains sadly neglected. Commonwealth countries will be well advised in future to follow the more recent English legislative precedents with caution.)

13. Where, then, can those who are anxious to make progress in the reform of company and securities law turn for help or advice or inspiration? These are fairly technical subjects; and, while on the one hand home-grown expertise may not be available, there is also a risk that a specialist adviser imported from outside may not have sufficient familiarity with local conditions to make the most appropriate recommendations. It seems to me that one way in which something practical could be done would be to make arrangements for the sharing by Member States of their experience, and of the fruits of such consultation, research and experimentation as may already have been carried out. Many of the reforms in company and securities law, recent and not so recent, have followed inquiries and reports by special commissions, committees or task forces, studies (extensive and intensive), ad hoc consultations, and so on; evidence has been collected, and papers commissioned. Some of this material exists in published form; some is out of print; probably the bulk of it has been made generally available. By reason of their ephemeral nature,

it is generally difficult after a year or two to find copies even of the better-known reports (such as the Gower Report on Company Law Reform in Ghana) in libraries, or to obtain them in bookshops. With a little effort and co-operation, however, all this material could be collected centrally and made available for consultation. The work already done over the past few decades and that being currently undertaken, the particular issues under review, the different solutions considered or adopted in different jurisdictions, and so on, could be made the subject of continuous monitoring and review - ideally under the aegis and direction of the Legal Division of the Secretariat.

14. A second way in which there might be co-operation - or, rather, more co-operation, for a good deal does of course occur all the time - is in regard to training schemes and secondment arrangements, especially for administrative personnel in the areas of companies registration and securities regulation. One problem here is that in so many countries the civil service promotion structure operates in such a way as to prevent key personnel from acquiring the specialist knowledge and expertise which these technical subjects demand - I would myself argue that one could concentrate a whole working lifetime in this area of law and practice, and still be learning something new at the end of it. Yet there are too few jurisdictions in which administrators have a real chance of becoming truly expert in company or securities law. In the U.K., for instance, the Department of Trade is concerned with matters as disparate as marine salvage and consumer protection, as well as with companies; and an official who has the qualities likely to take him to the top of the administrative hierarchy will be moved about from one section to another so that his opportunities to grapple with the complexities of company law occur only at intervals. Again, in smaller jurisdictions, the office of the registrar of companies is commonly combined with that of patents and trademarks, births, marriages and deaths, and so on. Personnel who are well-qualified in all these areas will be hard to find - and to keep. A promising young trainee who has begun to master only some of these fields may be tempted away by the lure of private practice or the status of a minor judicial appointment; and a valuable investment is lost. It is vital, however, to try to avoid this: to see to it that administrators are recruited, trained, and retained, within the specialisms of company and securities law and that, by secondment and otherwise, they are kept abreast of developments; for a system which is inefficiently run too easily becomes fair game for racketeers.

15. Another possibility (which I know is being actively explored in many fields already) is for the administrative and registration services and facilities of several countries to be pooled, or centralised, where there are related jurisdictions in fairly close geographical proximity - e.g. in the Caribbean, or in parts of the South Pacific. With the aid of modern technology, which enables information to be retrieved at many outlets whilst being centrally stored, there is no doubt considerable potential here. As a result, expertise could be concentrated rather than scattered. Ideally, any such move should be linked with a common or harmonised legislative programme.

16. Another question, and a major one, which may be asked is whether there are not ways in which the law itself, both substantive and procedural, might with advantage be made to work better, so that any proceedings against commercial and corporate fraudsters should have the best possible chances of success. Most of the forms of wrongdoing which we are discussing, such as expropriation, conspiracy and fraud, involve well-established heads of civil liability whose definitions are straightforward enough and which have been well tested over the years. But what very often is notoriously difficult is the matter of proof - the more so if the court insists on a standard comparable with that required in a criminal charge, which there appears to be a growing tendency for courts to do even at times when the parallel is not appropriate. The burden and expense of pursuing claims (which are bound in many cases to involve very complex issues and much financial and documentary evidence) may be quite as daunting as that facing a criminal prosecutor; but the private litigant has not the resources of the State behind him, and so it is not surprising that victims of commercial crime very often consider it worth while to "throw good money after bad". In jurisdictions where it is normal to have jury trial in civil fraud claims, virtually all the problems of the criminal prosecution are duplicated. If the swindle has an international dimension or if the defendant has absconded, the problems of detection and of adducing evidence are all the more formidable, as are those of service of the proceedings and enforcement

of the judgment. The civil litigant does not have the benefit of the services of international agencies and agreements such as ICPO-Interpol, or of extradition treaties. But, assuming that he is prepared to face these difficulties and, indeed, that he is able to overcome them, it does seem that the law and the judges should be astute to see that unnecessary hurdles are not placed in the way of a litigant who has a good case. The courts have, for instance, shown a marked reluctance over the years to review commercial decisions made by men of business, and to allow their jurisdiction to be invoked to resolve internal irregularities in corporate procedures. These self-denying attitudes are, in their proper context, understandable and, indeed, praiseworthy. But in my view the law must not be such as to allow allegations of fraud to go unprobed, and allegations of substantive wrongdoing to be defeated, by rules which are merely procedural in essence. If the object of the proceedings is to seek redress for misappropriation or fraud, it is surely the court's function and its duty to look into the matter; and if the courts allow their self-made rules of procedure to stand in the way, a legislative solution should be imposed. In this connection, the attitude of the U.K. Court of Appeal in the recent case of Prudential Assurance Co. Ltd. v Newman Industries Ltd. (No.2) (1982) 2 W.L.R. 31 is much to be regretted. Here, a leading institutional shareholder sought to bring to account two corporate officers on a large number of charges of alleged fraud, for which there must surely have appeared to be a prime facie case, for the trial judge did, after a long hearing, uphold the plaintiff's case. (It is not relevant to the present point that the greater part of his findings were reversed on appeal.) The Court of Appeal invoked the ancient rule in Foss v Harbottle (1843) 2 Hare 461, and declared that it would have been better all round if the case had not been heard, in view of the apparent opposition of those who controlled the company. This attitude of judicial non-interference was justified in these words:

"We were invited to give judicial approval to the public spirit of the plaintiffs who, it was said, are pioneering a method of controlling companies in the public interest without involving regulation by a statutory body. In our view the voluntary regulation of companies is a matter for the City. The compulsory regulation of the companies is a matter for Parliament."

The implication which it appears we are meant to draw - that the regulation of corporate fraud is not a matter for the courts - must surely be wrong. We may contrast the position in the United States, where the therapeutic effect of giving minority shareholders ready access to the courts is widely recognised. As Dr. Rider has observed, writing in an academic context and citing the authority of a distinguished Malaysian judge: "It would be misguided to consider that judicial non-interference will in all cases be in the best interest of the company as a whole, or of the community" (see [1978] Cambridge Law Journal 270, 271). A more encouraging sign, however, has been the emergence of the "Wallersteiner order" (see [1975] 1 Q.B. 373), by which a minority shareholder whose claim is adjudged ex parte to be meritorious may be awarded an indemnity against costs out of corporate funds. And very recently an English Court of Appeal has upheld the use of section 75 of the Companies Act 1980 (see para. 20 below) to order an action to be brought for the recovery of misappropriated assets, at the instance of a shareholder: see Re Cyplon Development Ltd. 3 March 1982.

17. It is doubtful, however, whether the courts, left to themselves, are likely ever to do sufficient to make the shareholder-suit or "derivative" action a really effective factor in the overall war against fraud and crime. The very reaction of the English court in the Prudential case (para. 16) is reminder enough of this; and that case is bound to have repercussions for years to come which will deter other plaintiffs who might have attempted to take similar action. The considered view of virtually all recent reports on the reform of company law is that procedural restraints such as that imposed by Foss v Harbottle, mainly restraints of the courts' own creation, must be legislated away or at least radically simplified. If shareholders' access to the courts cannot be made a matter of right (as is more or less universally the case in the U.S.), then reform on the lines introduced in many Canadian jurisdictions (and more recently under consideration in South Australia: see [1981] 7 Commonwealth Law Bulletin 138) is surely the next best thing. These provisions, which typically allow a member standing to sue with the leave of the

Court ex parte, do not go so far as those with American experience would recommend, but could be regarded as a "first step" in the right direction.

18. Other civil remedies which may help to eradicate or uncover corporate abuse include orders for the compulsory winding up of companies. Suits for this purpose may be instituted on the initiative of members, creditors and, in most jurisdictions, some agency of government (e.g. in the U.K. the Department of Trade). The notorious IOS organisation was dismembered in a number of Commonwealth jurisdictions by this procedure: both because of the evidence of systematic asset-stripping and the "state of complete and irrevocable disarray and impotency" into which the affairs of the group had fallen, it was ruled "just and equitable" to make compulsory winding-up orders (see, e.g. Re I.O.S. Ltd. (1973) 7 N.B.R. (2d) 311; Re Investment Properties International Ltd. (1974) 43 D.L.R. (3d) 684). Again, however, as with the corporate suit (para. 16) and the "oppression" remedy (para. 20), the courts have been prone to erect unnecessary procedural barriers of their own devising which debar or discourage those who might wish to seek this remedy. For instance, it is a rule of ancient standing (though more than once reaffirmed in modern times) that a shareholder has no standing to present a petition to have a company put into liquidation where that company is insolvent. This should not be the rule at least in cases of alleged fraud, in view of the element of public interest involved. It is urged that thought should be given to the question of abrogating this rule, as a part of any comprehensive company law reform programme.

19. It is of course true that the discovery of frauds during a liquidation may not be of great use to anyone, and that the chances of recovering misappropriated funds may be remote. However, even private liquidators have a duty to report suspected frauds to the Director of Public Prosecutions (or the equivalent authority), so that in the wider context of putting down commercial crime this procedure may have beneficial results, through liaison between the civil and criminal arms of law enforcement. Prosecutions for "fraudulent trading" may follow (a fortiori, for "reckless" or "wrongful" trading, if the law has been reformed to create this wider jurisdiction, as in some progressive States). Money may also be recovered under the heading of "fraudulent preference" (or the broader category of "undue preference", as in Australian jurisdictions). As the passages in brackets in the preceeding sentences indicate, however, there is in the more traditional codes of company and insolvency law a burden of proof which is widely criticised as being too high; and reforms along the lines suggested should be more generally introduced in order to strengthen the remedies against honest and delinquent commercial operators. There is a strong case, too, for removing the link between fraudulent trading and liquidation, not only for criminal purposes (see Companies Act 1981 (U.K.), s.96) but also to extend the corresponding civil liability (Companies Act 1948 (U.K.), s.332(1)). The jurisdiction of the courts to order that persons who have been concerned in the management of insolvent companies should be disqualified from acting as directors of companies ought to be far more frequently invoked, as well as being more liberally defined in legislative terms. All too often those who have irresponsibly or even fraudulently allowed one corporate organisation to collapse in insolvency, perhaps bringing ruin to many innocent creditors as a consequence, are allowed by virtue of the principle of limited liability to emerge virtually unscathed and to begin trading again through a newly-incorporated company. The power should exist to stop this and, where it does exist, it should be used with greater vigour.

20. Earlier disquiet over the restrictions of the Foss v Harbottle rule (para. 16, above) led to recommendations for the introduction of a new remedy for shareholder "oppression". Such an innovation has been made in very many Companies Acts in the Commonwealth. It is difficult to say whether this experiment has been a success or not, for the answer to this question depends entirely on the response of the judges, and this has varied from country to country. We may, for instance, contrast the imaginative solution devised by the Malaysian court in the Kong Thai Sawmill case (1976) 1 M.L.J. 59 (Fed. Ct.) with the defeatist and negative approach in such cases as Re Bellador Silk Ltd. [1965] 1 All E.R. 667 in the United Kingdom. It is, regrettably, almost certainly the case that the overall experience of the "oppression" remedy in practice has been a disappointing one, because of the proneness of the judiciary to construe these sections restrictively and it may well be that the more modern variants of the legislation, which use the test of "unfair prejudice" rather than "oppression", will be all too likely to meet a

similar reception. The Cyplon decision (para. 16) is, however, an encouraging indication to the contrary. But here again we see that, when the legislature invites the courts to involve themselves in the policing of corporate mismanagement, it is easier to lead the judicial horse to water than it is to make it drink. The lesson is perhaps that it is a mistake to assume that courts in the common-law tradition will readily undertake an inquisitorial and interventionist role. The alternative is for administrative counterparts of this kind of procedure to be developed (see para 25); but here, too, the oppressed minority shareholder has had a discouraging reception in practice. An intermediate way might be for jurisdiction to dispense this highly discretionary form of justice to be conferred in the case of the smaller private company (where "oppression" is most often met) upon District or Country Courts, or the equivalent, where adherence to precedent is commonly less strict, and in addition costs are lower.

21. There is another area where recent developments are certain to have a salutary impact on the conduct of company and commercial affairs, although there is an arguable view that these changes cannot be welcomed universally. I am referring to the increasingly heavy responsibility which the law is placing on persons in professional and advisory positions, making them answerable for what are primarily the misdeeds of others. These include accountants, auditors, liquidators, receivers, solicitors, valuers, etc.; banks which allow misappropriated funds to pass through their hands without due inquiry; passive and inactive directors; and so on. There are various factors at work here. Developments since Hedley Byrne v Heller [1964] A.C. 465 have led to the imposition of extensive liability in negligence for economic loss; companies legislation more and more calls for valuations, certificates of solvency, etc., as a precondition to various corporate activities; and (in the case of Canada) specifically makes directors collectively responsible except for those individuals who expressly dissociate themselves from the act or decision in question; in addition, professional standards (especially in auditing and accounting) have noticeably risen during the present century. There can be little doubt that, as a result, commercial affairs generally are now carried on under a fairly intense pattern of vigilance from these "watchdog" figures, with a general enhancement of responsibility all round. My reservations about these trends are that the compliance costs of the very many well-run companies are pushed up in the hope of restraining an undisciplined few; and that the victims of fraud are presented with a readily available and solvent "soft" target, while the real malefactors may well escape. Even if these defendants have in law a remedy over against the main culprits (which will by no means be certain, in the absence of an enactment such as the U.K. Civil Liability (Contribution) Act 1978, the evidentiary problems will be formidable for a plaintiff who seeks contribution in respect of a wrong to which he was not a primary party. In order to help such claims, all jurisdictions should aim to have, at the very least, legislation on the lines of the U.K. Act mentioned above. In many places, the existing statutes govern only the case of tortfeasors, and this may be inadequate to meet more complex forms of liability.

22. There are developments in the general field of procedural law which are to be welcomed, as additional aids in the fight against commercial crime. Mention may be made of the "Mareva" injunction (which prevents the removal of assets out of the jurisdiction of the court pending the disposal of litigation) and the "Anton Piller" order, allowing entry upon premises and the inspection of their contents, in cases of infringement of copyright and other forms of piracy of intellectual property. Subject to the necessary safeguards, there is everything to be said for the encouragement of such novel remedies, which may in some cases be quite as effective as the powers of the police in the corresponding criminal situation.

23. To turn now to discuss some possible administrative controls, we may consider in turn (a) various forms of licensing, (b) systems of registration and disclosure and (c) powers of investigation and inspection by, or under the authorisation of a government officer or department. We begin with licensing. Some developing countries have business licensing laws in force which affect virtually the whole range of commercial activity. While this gives the State very direct powers of regulation and enables action to be taken against improper practices (whether known, or only suspected) almost at will, the administration of such a system soon becomes unwieldy and expensive, with the growth of business generally, and there is inevitably pressure to discontinue it if investment from abroad is to be attached. It is also bound to be, or at least to seem to be, arbitrary and at times oppressive in its operation. Although in some countries this method of control may appear to

be a good form of protection for the people and the economy, this is surely an inward-looking and paternalistic view. More restricted licensing systems may be the appropriate form of regulation for such activities as banking and money lending, dealing in securities, insurance, unit trusts and so on. Examples are numerous in all jurisdictions. The primary issue of policy here is to balance the need for control against the cost of administration; but there is no doubt that this is among the most effective methods of regulation. The grant of incorporation itself may in theory (e.g. in letters-patent jurisdictions), and in some cases even in practice, depend on a degree of executive discretion. In some countries, the Registrar of Companies has quite extensive supervisory powers. In my view it is difficult to defend this form of control, in view of the now accepted tradition of freely available incorporation, and even more difficult to enforce it in practice, given the need to allow shares to be transferable without restriction subsequently to the incorporation. Attention is sometimes drawn to the widespread use in civil claims for damages in the USA of remedies based on the concept of "breach of statutory duty", having as their legislative source the regulations of the Securities and Exchange Commission. Although there is no doubt that in such matters as insider dealing a most useful jurisdiction has developed in that country, my own view is that the better way is for civil remedies, where thought necessary, to be provided for expressly by the legislation in question rather than for them to depend upon the altogether unpredictable interferences as to the "intention" of penal legislation which the courts in common-law countries have to make in this context.

24. Disclosure is, of course, the keyword and the principle which underlines the whole of the philosophy of company law and the regulation of listed securities. As well as ensuring that investors and creditors are adequately informed about the affairs of the companies with which they are concerned, the disclosure system has the beneficial effect of making journalists, market analysts and, in a sense, the whole of the public participate in the supervisory process. But, vital though it is, it is no panacea - especially against devious and crooked operators, who can all too easily defeat the system by using nominees, giving inaccurate or misleading information, or allowing returns to fall into arrear. For these and other reasons, the efficient and effective administration of the registration and disclosure system is vital; and this applies equally to the official and governmental agencies and to self-regulatory bodies. It is all too easy, also, for legislators to assume that disclosure in corporate affairs is self-evidently a good thing, and so to require more and more information to be filed or publicised, without paying sufficient attention to the added burdens thereby being placed upon commerce and upon government administrators. At best, disclosure can only be seen as an aid in the enforcement of the law against fraud and crime; it is an illusion to believe that it will stamp out such misconduct.

25. Investigations into allegations of mismanagement and fraud have been a feature of company law since the earliest times; but whereas there was originally a quite widespread use of this device as a way of meeting shareholders' complaints and grievances, in more recent times there has been a swing away from this notion to the idea that inspections and investigations should be part of the government's armoury, and used either to allay public disquiet following some investment or trading scandal, or as part of the general law-enforcement process. Valuable as these considerations may be, it does seem important in my view that shareholders, who under our traditional laws (in contrast with those of the USA) have no right of access to corporate records, should have some means of securing that suspected managerial malpractice should be officially investigated. Unfortunately, there are on record instances where a shareholder with a complaint of fraud, which is eventually shown to have been well-founded has been repeatedly turned away (as in the Wallersteiner case (1975)); and the change made in the U.K. by the Companies Act 1981, which has taken away from members the right to have their company's affairs investigated when this has been requested by a special resolution, is much to be deplored. Dr. Rider, in his Paper to the 1980 Law Minister's Meeting, has discussed the inspection system fully and examined the part which it can play in the detection of commercial fraud and crime, and I shall not try to cover this ground again. In regard to the civil law an inspection can, of course, have a valuable role in the unearthing of evidence to which a plaintiff would otherwise not have access; and judicial decisions which allow either the evidence given to an inspector or the findings embodied in his report to be used as at least prima facie evidence in compulsory liquidation proceedings or in damages claims show the potential usefulness of the inspection procedure in civil enforcement aspects of

corporate fraud. But the system has also the defects, adverted to by Dr. Rider in his paper, of cost, delays and the risks of injustice inherent in all arbitrary and inquisitorial powers.

26. The self-regulatory bodies, such as The Stock Exchange (and the Take-over Panel and similar agencies, most typical of the London scene but occasionally "exported", with mixed success, to other parts of the globe) also have an important part to play in keeping commercial crime at bay. The purpose of these agencies is, of course first and foremost the maintenance of a fair and effective market; but of course in such functions as market surveillance, the enforcement of codes of conduct, reporting requirements and the maintenance of standards of integrity and responsibility among their professional members, they plainly supplement the law and, indeed, discharge a function which in the majority of countries, is left to the law. In some respects the business scene can be policed more effectively by a voluntary code - for instance, the emphasis can be on the spirit rather than the strict letter of the rules, and fact-finding is made easier by the co-operation and goodwill characteristics of self-governing associations of professionals. Decisions are normally taken with less formality and a good deal more speed, and administration is less costly. Nevertheless, organisations which lack full legal backing are bound to meet problems when dealing with outsiders, and especially with persons based overseas. It is not as easy for them to establish liaison with the police and other governmental law-enforcement agencies, both internally and on the international scene; while in their relations with individuals and the public at large they may be inhibited by considerations of confidentiality and by their vulnerability to legal action, e.g. in regard to defamation. Some of these difficulties may be overcome by bringing such self-regulatory bodies as the stock exchanges within the statutory framework - as Professor Gower has suggested in his recent Discussion Paper, Review of Investor Protection (HMSO January 1982); but the agencies themselves may resist such a move out of fears for the loss of independence which might appear to be involved. Another solution is for such a body to be given ad hoc legal authority, e.g. by conferring on it the powers of investigation described in para. 25 - a move for which there is always a precedent within the Commonwealth. Another possibility is for the law to step in and take the primary responsibility for a particular kind of abuse (e.g. insider trading), whilst leaving undisturbed the greater part of the self-regulatory activities, or to authorise particular forms of extra-legal sanctions by conferring additional powers expressly for this purpose. For an example of the latter, we may look at the Companies Act 1981 (U.K.) Part IV, and especially sections 74-77, which give extensive powers to "freeze" the rights attached to equity shares where the registered holders refuse to give satisfactory information about the beneficial ownership of shares held by nominees, or about the existence of suspected "concert parties". There is a case for reviewing the law, at least in all jurisdictions where shares are widely held and extensively traded, in order to ensure that possible loopholes allowing fraud and concealment to flourish are closed by reforms along the lines discussed.

27. The last and, in many ways, the most intractable of the problems in this area is the question of the enforcement of civil remedies and sanctions, and related issues of procedure and evidence. These matters pose difficulties enough when dealing with the criminal aspects of commercial fraud and corporate abuse; but in a civil context, where claims must be prosecuted without the backing of public funds and without the aid of extradition treaties and other forms of international co-operation, they may be insuperable. For this reason, the development of sanctions which directly affect the property concerned (such as the "freezing" of rights attached to shares (para. 26)) and of procedural aids such as the Mareva injunction, though somewhat Draconian, may be the most efficacious solution.

28. It may help to summarise some of the recommendations and suggestions made in this paper.

(1). (paras. 8-9). Company and securities laws should be as up-to-date as possible, and adapted to meet local conditions and the special problems of particular jurisdictions. Parallel efforts should be made to ensure that the law works effectively at an administrative level.

(2). (para. 10). Money spent on efficient administration and timely law reform may prevent frauds which, in terms both of the damage they do and of the

expense of pursuing the wrongdoers, may turn out to be infinitely more costly.

(3). (para. 13). Consideration should be given to collecting and pooling of existing and new information regarding company and commercial law and law reform and the sharing of reports, studies, surveys etc. already carried out or currently being undertaken by Member countries.

(4). (para. 14). Co-operation in such matters as training schemes, the secondment of personnel, etc. should be encouraged. The need for administrators to develop specialist expertise in technical areas of commercial law should be acknowledged, and not thwarted by internal civil service promotion structures, etc.

(5). (para. 15). Smaller countries may be able to concentrate expertise by instituting co-ordinated or centralised registration and administration services.

(6). (paras. 16-17). Unnecessary evidentiary and procedural hurdles which are commonly imposed by courts in civil cases involving corporate and commercial wrongdoing should be eliminated, following e.g. the model of the Canadian legislation aimed at simplifying and improving minority shareholders' access to the courts in order to redress corporate fraud. The tendency of judges to make rules fettering their own jurisdiction (paras. 16-20) may require correction by legislation.

(7). (para. 19). Traditional definitions of "fraudulent trading", "fraudulent preference", etc., may impose a burden of proof which is too high; and civil liability in the case of fraudulent trading is unnecessarily restricted to claims in a liquidation. The sanction of disqualifying directors of insolvent companies from managing other companies could, with advantage, be more frequently invoked.

(8). (para. 21). Legislation providing for contribution claims between persons civilly liable should, where necessary, be modernised, so that persons held indirectly liable for losses should have remedies over or against those primarily to blame.

(9). (para. 25). The power to order investigations into the affairs of companies, where fraud on the part of its controllers or managers is suspected, should be available - or more readily available - to shareholders with a serious complaint.

(10). (para. 27). The problem of nominee shareholdings may best be dealt with by direct sanctions such as "freezing" rights attached to shares. Where legislative backing is needed for this, reforms should be introduced.

THE SEIZURE AND FORFEITURE OF PROPERTY ASSOCIATED WITH CRIMINAL ACTIVITY

Memorandum by the Commonwealth Secretariat
and a paper by Dr. NICHOLAS LIVERPOOL of the
Faculty of Law, University of the West Indies,
Barbados

Commonwealth Law Ministers at the last three meetings have expressed concern about the growth of serious organised crime and its increasing sophistication. The particular harm that can be caused to developing economies through serious international commercial crime has been highlighted.

2. Law enforcement agencies are increasingly coming to recognise the practical utility of attacking serious organised crime through its assets. The growth and power of organised crime groups depends in large measure on how effective they are in earning, securing and deploying the financial proceeds of their illegal activities. The mere imprisonment of members of the group without restrictive measures being employed against their property, which in many cases is the source of their power and influence, simply allows the enterprise to be run more or less effectively by surrogates or from prison. The sort of operation we are here considering is relatively sophisticated and is the kind of structure one might expect to encounter in illicit narcotics trafficking.

3. The authorities in the United States of America have given a good deal of attention to the forfeiture and confiscation of property associated with criminal activity as an enforcement technique. It has been restored to with some degree of effect in the case of organised crime penetration of legitimate business and international trafficking operations. There is a practical advantage that monies and other property seized can contribute directly or indirectly to the actual costs of law enforcement.

4. Having regard to the increasing level of interest in the Commonwealth as to the utility of these devices and the interest displayed by ICPO-Interpol and such organisations as the United Nations Commission on Narcotic Drugs, the Commonwealth Secretariat thought it appropriate to commission a general study on forfeiture and confiscation of property associated with criminal activity. Another study has been commissioned focussing specifically on the problems of combatting international trafficking operations in regard to illicit narcotic substances.

5. Dr. Nicholas Liverpool, of the Faculty of Law of the University of the West Indies, who has considerable knowledge of the various legal disciplines involved in any discussion of this complex subject, was commissioned in June 1981 to undertake this study. Given the appointment of a Commonwealth Fraud Officer in November 1981, his terms of reference were slightly amended in the Spring of 1982 to focus attention more on international commercial crime and organised crime aspects.

6. Dr. Liverpool recommends the enactment of legislation which would allow effective confiscatory action to be taken against property associated with criminal activity. He also recommends the enactment of legislation which would facilitate the seizure of property prior to a criminal trial and the forfeiture of property directly related or involved in the crime. He feels that none of the present legislative models are wholly adequate and in the circumstances recommends that the Commonwealth Secretariat should further consider the matter and prepare draft models.

7. The careful criminal may well attempt to put his illicit profit beyond the reach of the courts of the jurisdiction where he commits his crime. In such cases the existence of provisions allowing the seizure, forfeiture and confiscation of his property would not be effective unless they could be enforced against equivalent property within the jurisdiction, or some sort of arrangement could be made with that other State whereby recognition was accorded to these orders. Alternatively,

in certain areas of criminal activity countries may be prepared to take action against property and monies within their own jurisdiction which are the product of or related to the commission of these crimes albeit in another jurisdiction. These questions are raised by Dr. Liverpool, but are more specifically considered in the wider context in the paper prepared by Dr. David Chaikin and the Commonwealth Secretariat on Mutual Judicial Assistance in Criminal Matters within the Commonwealth.

ANNEX TO LMM(83)22

THE SEIZURE AND FORFEITURE OF PROPERTY
ASSOCIATED WITH CRIMINAL ACTIVITY

Paper prepared by
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Introduction

In June 1981 I was commissioned by the Commonwealth Secretariat to prepare a small study which would canvass in general terms the problems of ensuring that crime does not pay by attaching the indirect proceeds of crime. This study was to be regarded as a discussion paper, designed for submission to the 1983 Meeting of Commonwealth Law Ministers to be held in Sri Lanka, and was not intended to go into the details of any particular branch of law, but was to be regarded as the forerunner of a more detailed analysis of precise strategies which were worth considering in this area.

Given the constraints of time I have not been able to examine every aspect of crime and I have chosen for special consideration the two main areas in which urgent attention would seem to be desired viz: white collar crime and drug related offences. Both these areas of economic crimes are a source of concern to most if not all Commonwealth countries, and efforts to eradicate them are most likely to meet with the greatest co-operation.

The constraints of time and the resources available to me have further meant that although the proposals contained in this paper have received considerable thought, there has neither been the time nor the material to provide either as much detailed analysis, or references to the laws of many other Commonwealth jurisdictions, as I would have hoped. Most of the references are to English law.

In preparing this paper I have proceeded on the assumption that there has been an increase in the number of crimes which would necessitate the use of forfeiture proceedings, that there is some difficulty in tracing the proceeds of many serious crimes, and that there is support for the view that the indirect proceeds of certain crimes should be confiscated, at least where they are substantial.

It is recommended that the proceeds of certain types of crime be confiscated on the grounds that the activities of those who penetrate these crimes are very injurious to the moral fabric of society. These crimes are usually highly sophisticated, diversified and increasingly widespread. They tend to drain millions of dollars from the economies of the various territories by unlawful and immoral conduct, corruption, fraud and the illegal use of force. It is unthinkable, therefore that those who engage in such conduct should be permitted to retain any part of their ill-gotten gains. A major portion of the income of such criminals is eventually siphoned off into regular commercial activity thus upsetting the economic prospects of persons who are engaged in normal and legal commercial undertakings.

Forfeiture is an ancient doctrine that has been in existence for hundreds of years yet it plays a surprisingly insignificant role in the struggle against crime.

However, the enormous increase in theft-related (white-collar) and drug-related crimes in recent years has focussed attention on this branch of the law as a means of depriving criminals of the proceeds of their crime by confiscation, and thus discouraging others who may be inclined to participate in such illegal activity by making it clear that crime will not be allowed to pay.

As the law stands at present in most of the countries of the Commonwealth it is not yet equipped to strike at the profits of crime. It is restricted to arresting criminals and seizing the objects of their crime, but even here, as will be seen later, doubt has been expressed as to whether the law permits seizure for the sole purpose of providing evidence at the trial, or whether seizure also exist for the purpose of restoring the goods to their rightful owner, on conviction of the accused. In addition, a recent attempt to enlist the aid of the civil law to assist in the freezing of the assets of the accused until the trial has taken place, has been objected to on the ground that the applicant had no "interest" in the subject matter, thus raising in a different but related manner, the distinction between the direct and indirect proceeds of crime.

It is the purpose of this paper to suggest that the means should exist to seize not only the direct proceeds of criminal activity, but also the indirect proceeds whether it consists of money in hand or in a bank account or other accumulated assets of real and personal property. This may entail a slight alteration to the rules governing the burden of proof in these matters, but the result to the State in revenue and social justice certainly justifies this further step in the drive against crime.

It will also be argued that seizure should extend to a larger number of offences than exist at present, and that confiscation of the proceeds of crime should take place automatically on the conviction of an offender for drug-related offences, and for some of the more serious and profitable crimes.

Reference in this paper to "the Report" are to "The Business of Crime": An evaluation of the American Racketeer Influenced and Corrupt Organisations Statute from a Canadian perspective published in October 1980, by the Criminal Justice Division in the Ministry of the Attorney General of the Province of British Columbia, Canada.

Reference to "the Guide" are to the Drug Agents' Guide to Forfeiture of Assets, First Edition by Harry L. Myers and Joseph P. Brzostowski of the Financial Investigative Section of the Drug Enforcement Administration in the Ministry of Justice, Washington D.C. 1981.

For purpose of clarification I have chosen the following terminology: "Seizure" is used to mean the power to take before conviction or condemnation, property which is reasonably believed to have been stolen or otherwise fraudulently obtained, or which is the subject of crime or other prohibition. "Forfeiture" denotes the power of a court before which an accused has been convicted to order that property which is immediately connected with an offence be retained by the Crown or State. Although this usually takes place as a result of a hearing, property may also be forfeited by default when the claimant has not responded to a notice to justify his claim. "Confiscation" will be used to indicate the power which the court exercises to deprive a convicted person of the proceeds of an offence or its monetary equivalent.

Most jurisdictions do not draw a clear distinction between the concepts of forfeiture and confiscation, and so long as the desired ends are achieved it need not be necessary to do so. But if the indirect proceeds of crime are to be successfully attached long hours and careful investigation will be required before satisfactory evidence can be gathered, and consequently there is a case for initiating separate proceedings for this purpose. One other important factor ought to be borne in mind viz: that Courts constantly refuse to enforce the penal provisions of the laws of other States. If the power to confiscate proceeds along the avenues of the civil jurisdiction of the courts, judgments which have been obtained by this process may prove much easier to enforce under the provisions of legislation which provides for the reciprocal enforcement of judgments.

The need for developing and facilitating co-operation within the Commonwealth and even internationally in regard to serious commercial (white-collar) crime and

drug related offences is urgent. I have therefore attempted to present proposals which would not require lengthy debate or expense. Luckily the Government of Australia has available in its Customs Act, recently strengthened by amendments in 1979, 1980, and 1981, very wide and far reaching powers to detect offences relating to narcotics; and to seize, forfeit and confiscate both the direct and indirect proceeds of narcotic offences. In addition, there is already in place a Commonwealth Fraud Liaison Officer, and a projected Commonwealth Panel of Experts on whose expertise the Liaison Officer may draw as the need arises. Model legislation could therefore be prepared, using the Australian provision as a working model, for circulation to Member States. It is suggested that such legislation should initially be confined to "white-collar" crime and drug related offences, because of the expense which is likely to be involved in the investigatory process of such offences, prior to confiscation.

CHAPTER ONE: SEIZURE

(a) Tangible Assets

Several statutes now provide for the forfeiture of the proceeds of crime after the accused has been convicted, but the power to seize and detain property which has been stolen or is suspected of having been stolen is severely circumscribed, and before the English case of West Mercia Constabulary v Wagner¹ it was doubted whether the courts had the power to seize or detain money in a bank account. In fact Forbes J. opened his judgment with the stunning remark that what was before him was an originating summons of a somewhat novel character, and that at one state he was "extremely troubled about it".

It is very clear, however, that it is exactly in those circumstances, i.e. where the accused still has the proceeds of the crime in his possession, and before he is able to dispose of them that the power to seize and preserve is most needed; since a bare conviction obtained after the assets have been dissipated will certainly not meet the main object in view, which is to deprive him of assets to which he is not justly entitled and to prevent him from putting them beyond the reach of the law, and also of those who are legally entitled to them.

At common law the police are undoubtedly entitled on a lawful arrest (at least on a charge of treason or felony) to take and detain property which has been found in possession of the suspect, if it will form material evidence in his prosecution for that crime. The reason for this additional power was clearly and succinctly stated by Pallas C.B. in Dillon v O'Brien and Davis² in the following oft-quoted words:

"... the interest of the State in the person charged being brought to trial in due course necessarily extends, as well as to the preservation of material evidence of his guilt or innocence, as to his custody for the purpose of trial. His custody is of no value if the law is powerless to prevent the abstraction or destruction of this evidence, without which a trial would be no more than an empty form".

In that case Pallas C.B. was also called upon to decide whether this right extended to cases of misdemeanour. He held that it did; and in arriving at this conclusion, the learned Chief Baron traced the history of the matter thus:-

"The characteristics (by which felony is distinguished from misdemeanour) is that at Common Law the goods of the felon were forfeited upon conviction. The only right, however, to these goods which the books mention as being in the Crown before conviction, by reason of the possible future conviction, is that of taking (and detaining them for a reasonable time) for the purpose of making an inventory. Such a right has nothing in common with that of taking for the purpose of evidence. Forfeiture in felony cannot therefore be the origin of that right. To what then is it to be referred? Its purpose and object viz, to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law".

This vital power of the police to seize or detain goods was considered and extended by the Court of Appeal in Chic Fashions (West Wales) Ltd. v Jones³; where it was held that on entering a house with a search warrant or by the occupier's consent, the police had power to seize goods which they reasonably believed to have been stolen or obtained fraudulently by deception. They were empowered to detain the goods for such time as was reasonably necessary to complete their investigations, and if their investigations revealed that the goods had either been stolen or fraudulently obtained, they could detain them further so that they could in due course be produced at the trial as material evidence, if necessary, or be restored to their rightful owner. But once it appeared that the goods were not stolen or fraudulently obtained and not needed as evidence, the police had to restore them to the person from whom they had been taken, even if it was clear to everyone concerned that he was not entitled to them.

At this stage it should be noted that the decision in Chic Fashions extended the purpose - as stated in Dillon's case - for which goods could be detained by the police, because whereas Palles C.B. gave as the ground for seizure and detention, the preservation of material evidence, Diplock L.J. in the Chic Fashions included the additional ground of restoration to the rightful owner. But whatever the grounds which were stated, it is clear that in neither case is the accused legally entitled to the goods in question; and therefore an order to deprive him of them could by no stretch of the imagination be considered as inequitable if they do not belong to him in the first place.

(b) Intangible Assets

So far, it is clear that the law empowers the seizure of goods or tangible assets. Until recently, however, it was thought that the courts had no power to seize assets of an intangible nature, such as money in a bank account. However, the enormous profits now made by the perpetrators of fraudulent transactions and those involved in drug-related offences demand that a solution be found, first in seizing the property until trial; and then in confiscating it after trial and conviction. It can also be strenuously argued that a prior conviction should not be a mandatory prerequisite to either forfeiture or confiscation. The fact that the property is intangible means that it is more easily disposable, and grave injustice could follow unless an attempt is made to stop this lacuna in the law.

Since tangible property could not have been seized on the authority of Dillon and Chic, it was but a short step to extend seizure to all types of property, tangible or intangible; and this it seems, is the approach which was adopted by Forbes J. in the West Mercia case. In order to do this His Lordship merely adopted the submission of counsel for the plaintiff, that " ... the police have a common law right to seize or preserve property which is the subject of crime", and that the court should lend them support in doing so. Two important points however stem from this decision, viz:- (a) do the police have an interest in seeking civil remedies to restore stolen or fraudulently obtained property, and (b) what is the proper procedure to be adopted to achieve this result? Both these points will be dealt with later.

It was conceded in the West Mercia case that justices of the peace had no power to issue a search warrant to seize and preserve moneys in a bank account, but that seemed to Forbes J. " ... to be a strange lacuna in the armoury of the courts in their endeavour to assist in the prevention of crime that there may be no remedy available to the police in such a circumstance". Strange, it might be, but true it was. The common law did not permit it and equity had never been called in aid of the criminal law in those circumstances. The civil remedy of tracing was obtainable to the owner, but apart from being tedious and time consuming, it too was limited in effect, in that it does not extend to land: a vital omission which must be remedied if it is proposed to devise and maintain an efficient armoury against the perpetrators of organised crime. The West Mercia case is therefore authority for the principle that when it is alleged that a person has obtained money dishonestly and that he has paid such funds into his bank account, the courts are empowered to place an embargo on withdrawals from this account pending the outcome of the trial of the accused.

The decision was upheld by a majority of the Court of Appeal in Chief Constable of Kent v V and Another⁴ where the questions of standing and procedure were fully ventilated.

(c) Standing and Procedure

Once it is conceded that there is no power in the criminal process to issue a warrant of search and seizure in respect of intangibles resort must be had to civil procedure. In the West Mercia case the court froze the account by virtue of the powers which it claimed had been conferred upon it by Order 29 Rule 2(1) of the Rules of the Supreme Court, which reads as follows:-

"On the application of any party to a cause or matter the court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter".

This provision clearly contemplates the existence of a "cause" or "matter" between the parties before the court, as a prerequisite to the exercise of its power thereunder. There was obviously no cause or matter in dispute between the parties, and it is this, more than anything else which made Forbes J. extremely troubled about the application, and in particular whether the plaintiffs could arguably be said to have any locus standi to move the Court for the relief which was sought. It was at least doubtful if such locus standi could be said to exist, but the learned Judge founded his decision on the narrower ground that since the police have a common law right to seize or preserve property which is the subject of crime, the court ought to lend its support to them in doing that.

In the case of the Chief Constable of Kent the court had been approached by way of a different procedure probably because of the doubts expressed by Forbes J. in the earlier decision. Here the Chief Constable issued a writ and then applied for an injunction to restrain the accused from withdrawing any moneys from the bank accounts. Even then could it have been said that the Chief Constable had any interest to protect? In agreeing with Lord Denning M.R., Donaldson L.J. reasoned that in:-

"Chic Fashions Ltd. the common law came to the support of the common weal and invested the police with a right to seize goods which the courts could, if necessary, have enforced by mandatory injunction. In the instant appeal the common law could and should invest the police with a right to 'detain' moneys standing to the credit of a bank account if and to the extent that they could be shown to have been obtained from another in breach of the criminal law".

The matter is not free from doubt, and in a powerful dissenting judgment Slade L.J. concluded that whether or not it might be desirable, he was not convinced that the Chief Constable had any present or contingent legal or equitable right to intervene in such a matter.

Ministers may feel that both the importance and the complexity of the matter are such that clear legislation should be introduced to empower certain police officers, as of right, where they believe on reasonable grounds that moneys standing to the credit of a bank are traceable to property which had been obtained from another in breach of the criminal law, to apply to the court for an order either to prevent withdrawals from that account, or that the moneys should be paid into court.

Such an application could be made in the forum most convenient whether it be a civil or a criminal court. If this recommendation is adopted, it could serve to solve both questions of standing and procedure which raised their heads in the cases discussed above. It is assumed that it is generally conceded throughout the Commonwealth that the principle of Dillon's case as extended by Chic Fashions Ltd. would be accepted as good law.

(d) The Effect of Seizure⁵

The right to seize property whether tangible or intangible before the guilt of the accused has been established in a court of law will clearly need to be circumscribed for various reasons. First, it may affect adversely the ability of the accused to carry on his legitimate business either alone or in association with

others; secondly, the money in the account or the tangible assets seized may legally belong to both the accused and some other person who has neither been suspected nor accused of crime, or it may belong exclusively to third parties although it is ostensibly under the ownership control or protection of the accused; and thirdly, such seizure may be in breach of one or other of the rights of the accused which have been guaranteed under a written constitution.

(i) Effect on Accused

The inherent dangers to a bona fide trader from an application to freeze his account must constantly be borne in mind since they are potentially very harmful. The otherwise innocent shopkeeper who is persuaded to permit his place of business to be used as a collection point for the exchange of cash in return for prohibited drugs, may for example have deposited some of these moneys into his account with the intention of paying them over to sellers of those drugs. These funds should clearly be seized and as will be argued later, should also be confiscated. But at least until conviction it would be inequitable to freeze the whole of the trader's bank account since his normal means of livelihood may well be jeopardised.

It would be wrong to ignore the fact that the stopping of a business account, even for only a few days, may well result in commercial disaster for the business concerned. It is imperative therefore, that the proprietor of a business whose account has been frozen pursuant to an ex parte application should be afforded the earliest opportunity to address the court. And even where an order has been made after hearing all the parties concerned, it should be flexible enough to permit the court to vary or discharge it, if new evidence is brought to light which justifies such variation or discharge; because it is only in this way that a fair balance can be maintained between the interest of the community as represented by the prosecutor, on the one hand; and on the other, the right of a trader to operate his business unhindered so long as he does so within the law.

Both these points were accepted in West Mercia and also in Chief Constable of Kent. In the first case the injunction was granted until further order with a clear indication by the learned judge that the words "further order" were not a mere formality, because he could conceive of situations in which the accused might wish to put before the court evidential material which would indicate that some latitude ought to be allowed to the company to trade from its own bank account. In the second case the Master of the Rolls stated that if the accused had any special reason for making payments out of his accounts he had only to ask and proper payments would be permitted. In fact the accused was given leave to apply for the release of such sums as he might need for his defence or otherwise.

(ii) Effect on Third Parties

An order for freezing assets may also affect third parties adversely and for that reason needs to be carefully studied before implementation. It has already been seen that dicta in both West Mercia and Chief Constable of Kent contemplate that in certain circumstances the accused may apply to the court for sums to be drawn out of his account. This power should, for obvious reasons, apply to a third party who had a proprietary interest in the property seized; since it would be unjustifiable and certainly inequitable to seize property which did not belong to an accused where the third party has no knowledge that (in the case of tangible assets) his property has been directly used to perpetrate crime; or, (in the case of intangible assets) that his funds are being seized because they merely happen to be in a joint account with moneys which belong to the accused.

It would seem that in such cases, knowledge by the third party should be a vital factor. If the third party has no knowledge of the criminal nature of the accused, then he should be able to recover his property without question. Where, however, it can be shown that the third party knew or ought to have known of the conduct of the accused, he should be required to go further and show that he was in no way involved in that conduct, nor did he facilitate it. The principles governing the rights of third parties to have their property exempt from seizure apply equally to forfeiture and confiscation, and consequently any discussion of these matters here will take that into account.

Where the accused and the third party bought real property in equal shares and the court is minded to make an order to freeze the property of the accused, the question naturally arises as to the nature of the order which should be made in those circumstances. It is clear that a provision which empowers the court to freeze the entire asset would be so draconian as to border on the unconstitutional. Yet it is important that the accused's share of the asset should be attached lest he disposes of it before the trial. In such a case it is recommended that a charging order would be the appropriate remedy; but it should be borne in mind that even with such an order, difficulties could arise as to the share of the accused in the property, and complicated accounts may have to be taken in order to arrive at a fair solution.

Where the third party himself has a mortgage or charge on the property the problem may be more easily solved, since at any given period of time, a mortgagee or chargee will almost always be in a position to prove what is the accused's indebtedness to him. Any legislation which is contemplated should however, specifically confer on third parties the right to approach the court in a summary way in order to have their rights vindicated; and no unreasonable time limit should be placed on the third party's application, especially where he may not be aware of the fact of seizure. Where the third party's interest is registered e.g. in a case of joint ownership, or a mortgage or charge or a bill of sale, the applicant for seizure will be fixed with notice by the mere fact of registration, but provisions could be made for publicising an application for seizure, and no amount of publicity should be regarded as being too extravagant.

Another question which is likely to arise is whether the accused should be allowed to withdraw funds to meet his unsecured debts, for example, to maintain his family or to pay his utility bills. This does not afford of an easy answer. Since in pre-trial procedure the accused is presumed innocent until he has been found guilty and convicted, in theory at least it could be argued that since, if his guilt is not subsequently proved, the assets will have to be returned to him, he should be able to utilise some of them for essential purposes. On the other hand the applicant for seizure may be able to show that the accused had no funds in that particular account before he embarked on his criminal activities, and that even if he is not convicted he should not be entitled to the proceeds or profits of his crime. It is undesirable to lay down any hard and fast rules, each case should be decided on its merits.

In the first instance it is recommended that the application should be made to the court which ordered the seizure, with a right of appeal by the party who is dissatisfied with the decision. This would include the Crown/State and, of course, any third party whose property has been affected by the decision.

(iii) The Constitutional Question

Most countries of the Commonwealth are governed by written constitutions with enshrined fundamental rights and freedoms, among which are for example, protection for the privacy of the home and other property, and from deprivation of property without compensation; and provisions to secure protection of the law. Where the law in question imposes upon a person charged with a criminal offence the burden of proving particular facts, this is not held to be inconsistent with or in contravention of the rights to protection of the law, but care must be taken in passing legislation such as that which has been recommended, to ensure that the clause protecting the deprivation of property without compensation is not breached.

Typical of these provisions is that to be found in the Barbados Constitution.⁶ This section states that no property or interest or right over property, shall be compulsorily acquired except by or under the authority of a written law which prescribes the principles on which and the manner in which compensation is to be determined; and which gives a person claiming compensation a right of access to the High Court. However, nothing contained in or done under the authority of any such law is to be held to be inconsistent with or in contravention of the section, to the extent that it makes provision for the acquisition of property by way of penalty for forfeiture in consequence of a breach of the law.

Where, therefore, the person has been convicted, properly drafted provisions could pave the way for forfeiture. But such provisions need to be carefully worded

and distinctly set out in order that the courts which are required to administer them may be able to do this with the minimum of room for error. With this in mind, therefore, it is suggested that the provisions of a recent Bill which is intended to amend the Narcotic Drugs Act of Barbados would seem to be too wide, and consequently open to serious objections.

The Bill is an attempt to provide for the revision of penalties under the Act, and for the forfeiture of all articles used in the commission of an offence as well as any profits arising therefrom; but no guidance is given as to either the procedure to be used in case of forfeiture; or the method to be used in investigating the nature and extent of profits which have been made as a result of the commission of the offence. Consequently, it is likely to face the same restrictive interpretation which has been applied to similar U.K. legislation. In addition, if it is intended to include the provisions for confiscation which have been recommended elsewhere in this paper, then it would also be open to serious constitutional objections.

CHAPTER TWO: FORFEITURE

(a) Introduction

The concept of forfeiture was based, in feudal England, on the intimate bonds of loyalty and allegiance which existed between the subject and his Lord. Until 1870 all the property whether real or personal, of a person who was convicted of treason or felony was forfeited to the Crown. However, in the case of felonies other than treason, if there was an intermediate Lord, forfeited land escheated to him after a year and a day. Where the accused fled the jurisdiction in order to evade trial, his property was forfeited following his outlawry. As it was a fruitful source of revenue for the Crown, there were strong reasons for retaining it, but the severity of the punishment caused juries to return perverse verdicts, and more knowledgeable offenders to convey their property to trustees in order to evade its effect. Forfeiture on conviction was abolished by the Forfeiture Act, 1870, and forfeiture for outlawry was abolished in 1938.

A similar concept known as "deodand", but which was also loosely referred to as "forfeiture" can be traced as far back as the Old Testament and both the Romans and the ancient Greeks also forfeited things which were involved in certain wrongs. Early Britons also recognised the concept, which in its early stages arose out of a need for revenge against the offending thing, if not against its owner. Over the years the concept of revenge has gradually faded, but the doctrine has remained, and is used principally to protect the public from harmful objects and also to deter crime. Deodand has been abolished since 1846.

The need for forfeiture in relation to certain crimes can easily be justified. In the case of theft or fraud-related offences, it is often quite clear that the victim has been deprived of some tangible objects or valuable consideration to which the accused is not legally entitled, and it is suggested that whatever the outcome of the trial, the accused should not be permitted to retain or claim any part of this property to which he clearly cannot stake a legal claim. As has been stated earlier drug-related offences seriously undermine the moral fabric of society. It has adverse effects on the health of countless persons who make use of those drugs, particularly the young and unsuspecting, and yields huge undeserved monetary rewards to those who make it their business to deal in them. The forfeiture of the proceeds of such crimes can only be of immense benefit to society generally, if successfully and fairly pursued.

Yet the law seems to be strangely and inexplicably unable to attain what are plainly the desired ends; because in some instances it would seem that even legislative provisions does not permit the court to make an order for forfeiture. Three recent examples which are discussed later illustrate the dilemma which the courts have to face.

(b) Legislation on forfeiture

Many statutes confer power on the courts to order forfeiture of articles whose possession is prohibited e.g. acts which govern the publication of obscene

materials. The gist of the offence in this type of case is the possession of the offending article, hence the requirement that it be removed from the possession of the offender by forfeiture, on conviction. But an examination of a random list of statutes reveals that although in some cases the wording may seem to be insignificant; in others the differences may be vital. In some cases for example, a conviction is not required before forfeiture; notable among these is the power of forfeiture conferred for breach of the provisions of various "Customs" legislation, and in others, the court is "permitted" rather than "required" to forfeit, although in such cases the power conferred may in fact be much wider, in that forfeiture is made to apply to anything which relates to the offence. In the U.K. a time limit for making an order of forfeiture has now been imposed.

Section 43 of the Powers of the Criminal Courts Act, 1973, (U.K.) for example, has conferred on the courts a general power of forfeiture, but Section II of the Courts Act, 1971 effectively imposes a time limit within which this power can be exercised. In R v Menocal an order for forfeiture had been made in respect of a sum of money which was found on the person of the accused, and which was admittedly in her possession for the purpose of being handed over for the payment of illegally imported drugs. The Courts Act imposes a time limit of twenty-eight days on a Court's power to vary a sentence after it has been pronounced, but the order in Menocal's case was made more than twenty-eight days after conviction. The House of Lords had no hesitation in holding that there was no justification to make the order. The decision in this case clearly strengthens the submission that confiscation orders could be used to supplement forfeiture orders where the Court is unable to make up its mind at the time of conviction, whether or not to order forfeiture.

Section 27 of the Misuse of Drugs Act, 1971 reads as follows:

- "27(1) Subject to subsection (2) below, the court by or before which a person is convicted of an offence under this Act may order anything shown to the satisfaction of the Court to relate to the offence, to be forfeited and either destroyed or dealt with in such other manner as the Court may order;
- (2) 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 provision applies to property which is in the possession or control of the accused at the time of his apprehension, and is limited to cases where the offender has been convicted of a certain type of offence viz: one which is punishable on indictment with imprisonment for a term of two years or more. But even where it is shown that the property was in his possession and control, the prosecution is required to go further and satisfy the court that the property has been used, or was intended to be used, for the purpose of committing or facilitating the commission of an offence.

Certain specific powers of forfeiture such as that contained in the Firearms Act, 1968 (U.K.), do not require the property to be linked to the offence at all, so that after the conviction of a person for this offence, the court may order the forfeiture of any guns or ammunition which are in his possession. This power may seem reasonable in respect of gun-related crimes, since an offender may have a large selection of firearms, only one of which was used in an attack, but it is certainly unreasonable to conceive of this power being applied to "any offensive weapon" for example, since the variety of things which are capable of falling within this genus are infinitely variable and manifold.

Ministers may wish to consider whether forfeiture should be confined to relate to the specific offence of which the offender has been charged or whether there should be a general power of forfeiture circumscribed by a time limit within which it may be imposed. Where it is not necessary to charge or convict a person before forfeiture, the types of offences are clearly defined and follow a well recognised pattern. It may be felt therefore that all legislation which embody forfeiture provisions should follow these well worn paths, leaving it to new provisions on

confiscation to seize and/or trace any other property which cannot be securely linked to the commission of any specific offence, but which is nonetheless clouded with suspicion. Finally Ministers may also wish to consider whether all powers of forfeiture should not also contain a provision relating to seizure and disposition; or whether a general power as to seizure and disposition should be provided in new legislation, which would include some machinery whereby this power may be effectively utilised.

(c) Analysis of three recent cases

In Regina v Ribeyre,⁸ Taylor J, sitting with O'Connor L.J. and Neil J. in the Court of Appeal (Criminal Division) held that an order which had been made under section 27(1) of the Misuse of Drugs Act, 1971 forfeiting the cash proceeds of the sale of drugs was made without jurisdiction where a person had been convicted of having drugs in his possession with intent to supply. Like the House of Lords in R v Cuthbertson,⁹ the Court interpreted the words of section 27(1) as relating strictly to the offence of which the person was convicted, and therefore found that since the appellant would not have required his "working capital" for the act of selling drugs, the money was accordingly not "anything shown ... to relate to the offence".

As will be pointed out later one of the aims of national and international policy is to strip the offender of his profits, but most legislation so far passed does not seem to have addressed this specific point with sufficient accuracy. It is in cases of this nature that the tracing provisions contained in legislation which has been enacted in the United States and Australia could be most usefully employed. Under these provisions the assets and bank account of the appellant could have been investigated, the difference in amount over a period noted, this would presumably have raised a presumption on the balance of probabilities that the money was acquired as a result of the sale of drugs, thus throwing the onus on the appellant to prove beyond reasonable doubt that it was not so obtained.

In R v Uxbridge Justices,¹⁰ the accused was found with foreign currency notes on him, and he was charged and convicted on six counts of dishonestly handling, and one count of corruption. The police had seized not only the coins found on the accused but also a considerable quantity of Bank of England, Bank of Clydesdale and Fijian notes which had been found at his home. However, because the owners of the currency found at his home were not known he successfully applied to have those returned to him.

The facts showed clearly that the accused was in the habit of frequenting Heathrow Airport where he unlawfully obtained foreign currency. While the notes found at his home could not have been the subject of seizure on the technical ground that they could not be proved to relate to the offence of which he was convicted, it was, it is suggested, nevertheless as clear a case as any for confiscation. Legislation should provide that in cases of this nature, notice of confiscation should be served on the accused, and the Crown/state should prove on a balance of probabilities that the money had been obtained as a result of criminal activity. The conviction of the accused should be sufficient to raise that presumption. The onus would then shift on the accused to show beyond a reasonable doubt that the currency was not obtained as a result of criminal activity.

The third case which has revealed the weakness of current English legislation is R v Cuthbertson. In that case, the House of Lords, in interpreting s.27 of the Misuse of Drugs Act, 1971 felt that the question of forfeiture should not be approached with any preconception that Parliament must have intended the section to be used as a means of stripping professional drug traffickers of the whole of their ill-gotten gains, however laudable that conclusion might appear to be. Their Lordships accepted the submission that forfeiture under the provisions of the statute was limited to the accoutrements of the crime i.e., the tools, instruments or other physical means used to commit crime.

In the case it was also clear that the accused persons had accumulated considerable sums of money by illegally manufacturing dangerous drugs, yet the proceeds of their crime were kept out of the reach of the forfeiture provisions of

the statute because they had been charged with and convicted of the offence of conspiracy, which was not an offence created by the Act. Their Lordships held that in order to justify forfeiture the accused had to be convicted of an offence under the Act, and that the power of forfeiture would be applied only to tangible things capable of being physically destroyed and not choses in action or other intangibles, even then only to those tangibles which are shown to the satisfaction of the court, to relate to the offence.

There is another instance where the procedure for confiscation could augment that of forfeiture. The court was satisfied that the accused were professional drug traffickers, and consequently, if the legislation which is recommended were in force a notice of confiscation served on them would have placed the onus on them of proving beyond reasonable doubt that those funds were not obtained as a result of trafficking in drugs. If the proceedings in Cuthbertson and Ribeyre had been taken against the appellants under the provisions of the Customs Act of Australia there seems to be no doubt that the provisions of this Act are wide enough to have ensured a forfeiture of the moneys involved.

CHAPTER THREE: CONFISCATION

Once it is accepted as a matter of policy that the criminal should not be allowed to profit from his crime especially where the health of innocent citizens are jeopardized in order to reap these profits, it is but a short step to agree that there is nothing inherently wrong in depriving him of the proceeds (whether direct or indirect) of that crime.

Confiscation, though eminently desirable, is however most likely to be more particularly relevant in two distinct types of situations. The first is where the transaction which yields the profit is itself illegal; and the second situation arises where the transaction itself is lawful, but the profit is boosted by illicit means; the sale of prohibited drugs, the sale of pornographic material and the transportation of illegal immigrants. Attempts to confiscate profits are likely to meet with the approval of a large section of a country's population, especially where the transaction which yields the profit is illegal.

Legislation to deal with the second type of case may not, however, evoke the same level of support. For example the manufacturer who ignores pollution controls, or illegally discharges waste may increase his profits tremendously, so also may the owner of a "listed" building who demolishes it in order to obtain an increased purchase price of the vacant site. But in this type of case the conscience of the community is not similarly aroused to the same degree of reprehension. Nevertheless, it is suggested that these types of cases could at some later stage, also be considered suitable for the application of confiscatory legislation.

Confiscation may in theory be achieved by the simple process of imposing an appropriate fine. But as the Canadian experience has revealed, the expectation of the law maker and the public, may not always be satisfied by the level of fines which have been imposed. In addition a number of problems have been identified which could severely curtail the effectiveness of using fines for this purpose. These can be classified under two headings: ineffective information gathering procedures and means of enforcement.

It need hardly be emphasised that before a suitable fine can be imposed, the procedure for gathering information in most Commonwealth countries would have to be strengthened and improved. The essence of confiscation is that the accused is thought to have acquired assets to which he is not justly entitled; it is of great importance therefore that accurate facts concerning the size of the profits are placed before the Court and this can only be done effectively and satisfactorily by painstaking investigation which is likely to prove costly both in terms of time and money. Since the resources of most Commonwealth countries may be unable to withstand the cost both in terms of finance and in manpower, the result of a poorly undertaken investigation may be to supply the court with inaccurate and/or insufficient facts.

As far as the means of enforcement are concerned, many of these offences are triable summarily and it frequently happens that the profits of the crime far exceed

the maximum fine which the court is empowered to impose. The answer here is surely either to increase the fine which may be imposed or to state a minimum but no maximum leaving it to the discretion of the magistrate, in the light of evidence disclosed at the hearing, to use his discretion in the matter.

One further problem is also very real, as local experience shows. The fine is expressed in terms of a sum of money. The offender may choose not to pay it, preferring instead to serve a term of imprisonment and hope that he will be able to enjoy the fruits of his crime in addition to accrued interest on his release from prison. In order to avoid this, the procedure for confiscation should be set in motion in order that a full-scale investigation may be undertaken.

One of the most crucial aspects of any attempt to confiscate property is to be found in the procedure to be followed by the court which is required to order confiscation. In examining the procedure adopted both in the United States of America and also in Australia, it will be seen that great care has to be taken to evolve a set of rules which will deal with the multifarious problems which can arise in interpreting legislation which confers general powers of confiscation. The Australian legislature has adopted a fairly detailed code which is specifically geared to the confiscation of drug related offences; and it would seem that a procedure which is aimed at a specific type of offence is easier to administer.

The power of confiscation would be restricted to the more serious offences since elaborate and expensive procedures are generally required for purposes of computing the illegal gains to be confiscated. But where it can be shown that substantial profits are being made from what are still regarded as relatively minor offences, the power of confiscation could be extended to them.

Ministers may wish to consider generally whether legislation providing for the confiscating of the proceeds of certain crimes ought to be introduced, and for what types of crimes. The Commonwealth Fraud Officer could be requested to consult and to prepare a draft to be circulated among Members. It is suggested that confiscation should aim initially at the illicit profits of transactions where the transaction is illegal per se. Where the immediate proceeds are sold, exchanged or transferred that other property should also be subject to confiscation, with adequate safeguard to protect the interest of innocent third parties and creditors of the accused.

It ought to be borne in mind that confiscation could be opposed as a matter of principle. There will be many persons who, though not applauding the activities of those whose property is to be confiscated, nevertheless feel that it is wrong in principle to confiscate property after the offender has been suitably punished for his crime. And this line of attack is likely to be even more vocal when attempts are made to confiscate the proceeds of crime even where, as is recommended, the accused is not found guilty of any recognised crime.

There is a school of thought which subscribes to the view that the criminal law should proceed on the assumption that persons should be found guilty of offences in open court, and the sentence determined there and then in order that the criminal may know what price he has to pay to expunge his debt to society; and that at completion of the sentence that should be the end of the matter. It is also felt that in many instances an attempt to attach the indirect proceeds of crime may prove unworkable in practice; an obvious example being where the criminal who has served his sentence subsequently decides to describe his criminal activities in print or write his memoirs. In addition, it has been urged that confiscation aimed at the indirect proceeds of crime in certain cases such as the publication of past criminal activities could lead to a great number of undesirable effects if, in order to circumvent confiscation provisions, details of a crime could be passed to and published by the criminal's children or other relations.

These points of view, justifiable though they may be, should not be permitted to detract from the great social ills which are inflicted on society generally by the perpetrators of drug-related and white-collar crimes; and although it may not prove possible to bring every conceivable serious crime within the pale, these criticisms should not deter Governments from passing legislation, with adequate safeguards, to combat the spread of these dangerous activities.

CHAPTER FOUR: UNITED STATES EXPERIENCE

The two main legislative provisions which provide for forfeiture, as a result of criminal offences, in the United States are contained in the Racketeer Influenced and Corrupt Organisations Act (18 U.S.C. 1962, 1963), and the Controlled Substances Act, Continuing Criminal Enterprise Offense (21 U.S.C. 848). They are provisions which were inserted in two Federal statutes, and are absolutely dependent upon a conviction of the accused of the substantive offences created by the particular piece of legislation.

(a) The Racketeer Influenced and Corrupt Organisations Act, (RICO)

This Act was enacted by the Congress of the United State on October 19, 1970. Its aim was to seek the eradication of organised crime in that country by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organised crime.

Although the Act has been drafted very broadly, both writers and courts in the United States have, on the basis of its legislative history, attempted to limit its application to situations where a legitimate business (as opposed to an unlawful or illegal business) is used or acquired in violation of the statute, and its forfeiture provisions have been confined to the holdings of the accused in legitimate business enterprises. This interpretation is sought to be justified on the additional ground that when the Bill was being debated, the Congress of the United States expressed deep concern about the effect which organised criminal activities were having on the country's economy.

The statute provides that any person who commits certain crimes as part of a pattern of racketeering activity from which he acquires, with dirty money, or by illegal acts, or illegally uses, an interest in an enterprise affecting commerce, shall, upon conviction, forfeit that interest in the enterprise and everything which affords a source of influence over the enterprise. It creates several new offences, and provides substantial criminal penalties, including mandatory forfeiture of interest acquired in violation of the Act.

Each criminal provision of RICO expressly applies to "any person", defined as: "any individual or entity capable of holding a legal or beneficial interest in property". Based on this language, the courts have held that RICO is not limited in its application to members of traditional organised crime families. The conduct of the accused is punished irrespective of his status.

RICO lists twenty-four Federal and eight State felonies which are considered to be "racketeering activities" within its provisions. These were chosen because they were thought to be typical of organised crime. They are:

State Felonies

1. Murder
2. Kidnapping
3. Gambling
4. Arson
5. Robbery
6. Bribery
7. Extortion
8. Dealing in Narcotics or Dangerous Drugs

Federal Felonies

9. Bribery
10. Sports Bribery
11. Counterfeiting
12. Theft of Interstate Shipment
13. Embezzlement of Pension and Welfare Funds
14. Extorting Credit

15. Transmitting Gambling Information
16. Mail Fraud
17. Wire Fraud
18. Obstructing Justice
19. Obstructing Criminal Investigation
20. Obstruction of State or Local Law Enforcement
21. Interference with Commerce through Robbery or Extortion
22. Racketeering
23. Transporting Wagering Paraphernalia
24. Unlawful Welfare Fund Payments
25. Conducting Illegal Gambling Business
26. Interstate Transportation of Stolen Property
27. White Slave Traffic
28. Illegal Payments to Labour Organisations
29. Embezzlement from Union Funds
30. Bankruptcy Fraud
31. Fraud in Sale of Securities
32. Felonious Manufacturer or Other Dealing in Narcotic or Dangerous Drugs

Any combination of these crimes can form a "pattern of racketeering" activity, which is defined as:

" ... at least two acts of racketeering activity, one of which occurred after the (Act was passed) and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior set of racketeering activity".

The definition does not discuss the need for some connection between the crimes used to form a pattern, but it is submitted that simply proving that two of the thirty-two crimes listed were committed with a ten-year period should not be enough to establish "a pattern" of racketeering. There should have been some continuing activity. It is also suggested that the separate acts of racketeering must have had a similar method of commission, or must otherwise be related and not isolated events in order to form a pattern.

One line of authority in the United States holds that something more than accidental or related instances of prescribed behaviour is required, whereas another view is that any two acts of racketeering activity are sufficient for a conviction if they fall within the time limits set out in the Act. It would seem that by failing to define the word "pattern" the draftsmen left the matter to be decided by the trial Court as a question of fact, but this lack of definition has itself created problems.

The word "enterprise" which is very significantly one for the purpose of the Act, is not exhaustively defined, but it includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity. Business and labour unions, Government units, and even foreign enterprises are considered to fall within the definition.

Courts disagree over whether the term "enterprise" includes illegal combinations of individuals associated solely to engage in racketeering activity. But although the expression has received a very liberal interpretation, it is doubtful if it could be held to extend to strictly criminal organisations, on the ground that in passing the legislation, Congress would obviously have had in mind the infiltration by racketeers of legitimate business activities.

The Statute in effect creates three new main offences. They are:

- (i) Using or investing, directly or indirectly, any income or proceeds of income, derived directly or indirectly from a pattern of racketeering activity; or collection of an unlawful debt or to acquire an interest in or to establish or operate, an enterprise

This provision which is loosely referred to as the "dirty money" section makes it an offence to invest the proceeds of racketeering activity in an enterprise, and it was designed to penalise the "laundering" of money. The invested funds must be derived from a pattern of racketeering activity or collection of an unlawful

debt, and the investing party must have participated in the predicate crime as a principal. Canadian researchers found that only a proportion of those who knowingly invest "dirty money" are subject to prosecution, and state that the section has been largely unsuccessful in dealing with the problem at which it was aimed, principally because of the difficulty of proving the offence. It contains no investigative aids or legal presumptions to assist in proving the offences.

Proving this offence requires tracing, and the method of tracing is to show a direct connection between the dirty money and the acquisition of the interest in the legitimate business enterprise. But since RICO is a criminal statute, and since every element of a crime must be proved beyond reasonable doubt, the tracing requirements of this provision have proved to be very demanding, and at times, well nigh impossible.

(ii) Acquiring an interest in, or control of, any enterprise through a pattern of racketeering activity or collection of an unlawful debt

This provision covers the illegal acquisition or maintenance of an interest in an enterprise. Examples in which has variously been used to prosecute offenders who have been caught in illegal acts include: the taking over of a business by a loan shark; a massive mortgage fraud scheme; extortionate "muscling in" on legitimate companies; and a system of "kickbacks" involving medical laboratories.

Basically, this provision makes it a crime to acquire an interest in, or control of, an enterprise by illegal acts of racketeering. "Elbowing" into an enterprise by extortion, bribery, or by any combination of the thirty-two crimes listed above is the gist of this offence.

(iii) Being employed by, or associated with, an enterprise and participating in the conduct of its affairs through a pattern of racketeering activity, or collection of an unlawful debt.

This sub-section is widely drawn, and it has been interpreted equally widely. It covers situations where a person is operating inside a legitimate enterprise on behalf of a syndicate, and is also used successfully to prosecute criminal gangs, or strictly illegal enterprises. Actual prosecutions under this provision have been concerned with corruption of public officials, labour racketeering groups of persons who are regarded to be "associated in fact" with such illegal activities.

The criminal forfeiture provision under RICO is mandatory, but narrow. Unlike section 848 the convicted person does not forfeit his profits, but only his interest in the enterprise and everything affording a source of influence over the enterprise.

(b) The Controlled Substances Act, Continuing Criminal Enterprise Offence, (Section 848)

This piece of legislation was passed on 27 October 1970, eight days after RICO was enacted. Its main aim was strengthen law enforcement authority in the field of drug abuse, and in particular to severely punish the professional drug trafficker, hence the mandatory criminal forfeiture provision which it contains. It provides that a "lender", who in concert with five or more followers commits a Federal drug felony as part of a continuing series of Federal drug crimes from which he obtains substantial income or resources, shall forfeit upon conviction, his profits, any interest in, and everything affording a source of influence over, the enterprise.

Unlike RICO, which can apply to any person in a criminal enterprise, section 848 is strictly limited to organisers, supervisors or managers. An organiser is a person who puts together people engaged in separate activities and arranges them in one operation or enterprise, whereas a supervisor is regarded as one who manages, directs, or oversees the activities of others. An accused need occupy only one of these three positions, but a criminal organisation can have more than one organiser, supervisor or manager, so that it is possible to find more than one leader in an organisation, who may be liable to prosecution.

Before he can be found guilty of a violation of section 848, the "Leader" must commit certain crimes "in concert" with five or more of his followers, and the words "in concert" have been interpreted by the Supreme Court of the United States to require an agreement between the "Leader" and five or more of his followers to commit drug crimes. The lack of personal contact between them is no defence if they agree to act in concert, and the "Leader" and his followers need never be present in the same location, nor need the crimes which they are accused of having committed in concert, occur at the same place. Similarly, they need not be acting together at any precise moment in time, it is sufficient if they work in concert during the life of the enterprise.

Unlike RICO which relies on a wide variety of Statute and Federal crimes in order to establish a pattern of racketeering activity, section 848 depends entirely upon the repeated commission of Federal drug felonies to establish a continuing criminal enterprise. The drug felony relied on by the prosecution must be part of a continuing series (i.e. three or more) of Federal drug violations which must endure or span a definite period of time, with a single or substantially similar purpose.

The final criminal element of a section 848 offence requires proof that the accused obtained substantial income or resources from the continuing criminal enterprise. The word "substantial" means of real worth and importance, and "income" includes money or other property. Gross income is sufficient proof that the accused obtained substantial income, it is not necessary to identify any accumulated gain or net profit made by him. The jury is invited to conclude that the accused obtained substantial income from the drug enterprise simply by considering his position in the organisation, the volume and value of drugs transferred, and the sums of money which have changed hands.

Mandatory forfeiture of all profits is one of the penalties imposed by section 848, and the burden is on the Government to prove what property, interests or contractual rights of the accused are forfeitable. Since the provision is directed too high for him to continue in operation, he is required to forfeit all illegal profits no matter how disguised or where invested. The section does not define "profits", but the likely interpretation should include all financial gain of any kind realised by the accused from the illegal drug enterprise. The method of proof most likely to be acceptable in forfeiture proceedings under the section would be one which would measure the net worth of the accused over a given period of time. Unless this gain can be proved to be attributable to legitimate sources of income, it is presumed to represent profits from illegal drug trafficking.

The forfeiture provisions of section 848 also extend to any interest which the accused has in, or claim against, the enterprise; and also to any property or contractual rights of any kind which afford him a source of influence over the enterprise. This provision has proved to be extremely useful in obtaining convictions against the "Leaders" of crime who amass fortunes, rather than the street pedlars who are constantly being caught and prosecuted, but easily replaced by virtue of the vast resources available to the "Leaders".

(c) Comparison of the two Statutes

A comparison of the effect of the two statutes is shown here at a glance.

RICO	848
ANY PERSON who commits	A LEADER who IN CONCERT WITH 5 OR MORE FOLLOWERS commits
CERTAIN CRIMES As part of a	A FEDERAL DRUG FELONY As part of a
PATTERN (2 or more) of RACKETEERING from which he	CONTINUING SERIES (3 or more) of FEDERAL CRIMES from which he
ACQUIRES WITH DIRTY MONEY	

confiscation to seize and/or trace any other property which cannot be securely linked to the commission of any specific offence, but which is nonetheless clouded with suspicion. Finally Ministers may also wish to consider whether all powers of forfeiture should not also contain a provision relating to seizure and disposition; or whether a general power as to seizure and disposition should be provided in new legislation, which would include some machinery whereby this power may be effectively utilised.

(c) Analysis of three recent cases

In Regina v Ribeyre,⁸ Taylor J, sitting with O'Connor L.J. and Neil J. in the Court of Appeal (Criminal Division) held that an order which had been made under section 27(1) of the Misuse of Drugs Act, 1971 forfeiting the cash proceeds of the sale of drugs was made without jurisdiction where a person had been convicted of having drugs in his possession with intent to supply. Like the House of Lords in R v Cuthbertson,⁹ the Court interpreted the words of section 27(1) as relating strictly to the offence of which the person was convicted, and therefore found that since the appellant would not have required his "working capital" for the act of selling drugs, the money was accordingly not "anything shown ... to relate to the offence".

As will be pointed out later one of the aims of national and international policy is to strip the offender of his profits, but most legislation so far passed does not seem to have addressed this specific point with sufficient accuracy. It is in cases of this nature that the tracing provisions contained in legislation which has been enacted in the United States and Australia could be most usefully employed. Under these provisions the assets and bank account of the appellant could have been investigated, the difference in amount over a period noted, this would presumably have raised a presumption on the balance of probabilities that the money was acquired as a result of the sale of drugs, thus throwing the onus on the appellant to prove beyond reasonable doubt that it was not so obtained.

In R v Uxbridge Justices,¹⁰ the accused was found with foreign currency notes on him, and he was charged and convicted on six counts of dishonestly handling, and one count of corruption. The police had seized not only the coins found on the accused but also a considerable quantity of Bank of England, Bank of Clydesdale and Fijian notes which had been found at his home. However, because the owners of the currency found at his home were not known he successfully applied to have those returned to him.

The facts showed clearly that the accused was in the habit of frequenting Heathrow Airport where he unlawfully obtained foreign currency. While the notes found at his home could not have been the subject of seizure on the technical ground that they could not be proved to relate to the offence of which he was convicted, it was, it is suggested, nevertheless as clear a case as any for confiscation. Legislation should provide that in cases of this nature, notice of confiscation should be served on the accused, and the Crown/state should prove on a balance of probabilities that the money had been obtained as a result of criminal activity. The conviction of the accused should be sufficient to raise that presumption. The onus would then shift on the accused to show beyond a reasonable doubt that the currency was not obtained as a result of criminal activity.

The third case which has revealed the weakness of current English legislation is R v Cuthbertson. In that case, the House of Lords, in interpreting s.27 of the Misuse of Drugs Act, 1971 felt that the question of forfeiture should not be approached with any preconception that Parliament must have intended the section to be used as a means of stripping professional drug traffickers of the whole of their ill-gotten gains, however laudable that conclusion might appear to be. Their Lordships accepted the submission that forfeiture under the provisions of the statute was limited to the accoutrements of the crime i.e., the tools, instruments or other physical means used to commit crime.

In the case it was also clear that the accused persons had accumulated considerable sums of money by illegally manufacturing dangerous drugs, yet the proceeds of their crime were kept out of the reach of the forfeiture provisions of

the maximum fine which the court is empowered to impose. The answer here is surely either to increase the fine which may be imposed or to state a minimum but no maximum leaving it to the discretion of the magistrate, in the light of evidence disclosed at the hearing, to use his discretion in the matter.

One further problem is also very real, as local experience shows. The fine is expressed in terms of a sum of money. The offender may choose not to pay it, preferring instead to serve a term of imprisonment and hope that he will be able to enjoy the fruits of his crime in addition to accrued interest on his release from prison. In order to avoid this, the procedure for confiscation should be set in motion in order that a full-scale investigation may be undertaken.

One of the most crucial aspects of any attempt to confiscate property is to be found in the procedure to be followed by the court which is required to order confiscation. In examining the procedure adopted both in the United States of America and also in Australia, it will be seen that great care has to be taken to evolve a set of rules which will deal with the multifarious problems which can arise in interpreting legislation which confers general powers of confiscation. The Australian legislature has adopted a fairly detailed code which is specifically geared to the confiscation of drug related offences; and it would seem that a procedure which is aimed at a specific type of offence is easier to administer.

The power of confiscation would be restricted to the more serious offences since elaborate and expensive procedures are generally required for purposes of computing the illegal gains to be confiscated. But where it can be shown that substantial profits are being made from what are still regarded as relatively minor offences, the power of confiscation could be extended to them.

Ministers may wish to consider generally whether legislation providing for the confiscating of the proceeds of certain crimes ought to be introduced, and for what types of crimes. The Commonwealth Fraud Officer could be requested to consult and to prepare a draft to be circulated among Members. It is suggested that confiscation should aim initially at the illicit profits of transactions where the transaction is illegal per se. Where the immediate proceeds are sold, exchanged or transferred that other property should also be subject to confiscation, with adequate safeguard to protect the interest of innocent third parties and creditors of the accused.

It ought to be borne in mind that confiscation could be opposed as a matter of principle. There will be many persons who, though not applauding the activities of those whose property is to be confiscated, nevertheless feel that it is wrong in principle to confiscate property after the offender has been suitably punished for his crime. And this line of attack is likely to be even more vocal when attempts are made to confiscate the proceeds of crime even where, as is recommended, the accused is not found guilty of any recognised crime.

There is a school of thought which subscribes to the view that the criminal law should proceed on the assumption that persons should be found guilty of offences in open court, and the sentence determined there and then in order that the criminal may know what price he has to pay to expunge his debt to society; and that at completion of the sentence that should be the end of the matter. It is also felt that in many instances an attempt to attach the indirect proceeds of crime may prove unworkable in practice; an obvious example being where the criminal who has served his sentence subsequently decides to describe his criminal activities in print or write his memoirs. In addition, it has been urged that confiscation aimed at the indirect proceeds of crime in certain cases such as the publication of past criminal activities could lend to a great number of undesirable effects if, in order to circumvent confiscation provisions, details of a crime could be passed to and published by the criminal's children or other relations.

These points of view, justifiable though they may be, should not be permitted to detract from the great social ills which are inflicted on society generally by the perpetrators of drug-related and white-collar crimes; and although it may not prove possible to bring every conceivable serious crime within the pale, these criticisms should not deter Governments from passing legislation, with adequate safeguards, to combat the spread of these dangerous activities.

status quo, but then the other question which arises is why should the accused be permitted to retain funds if he can't make use of them for example to meet his attorney's fees? In the Chief Constable of Kent, Lord Denning, M.R., gave it as his opinion that the accused could apply for funds for reasonable expenses, including attorney's fees, and it is suggested that this interpretation of the powers of the court on an application by the accused, is to be preferred.

The provisions which the statutes contain for Civil forfeiture are worthy of adoption. In fact the Court of Appeal in the Chief Constable of Kent had no doubts that the procedure adopted in that case was proper. As has been stated the matter is not free from doubt for various reasons, and consequently clear legislation on the matter is required. Every act of seizure should be followed by formal condemnation either in forfeiture proceedings or by confiscatory action and it should clearly be stated that forfeiture or confiscation should relate back to the date of the act or event from which the forfeiture accrued.

The RICO Statute authorises the Attorney General of the United States to seize all property or interests which have been declared to be forfeited under the statute. It is recommended that such a formal step be also included in any proposed legislation relating to forfeiture or confiscation. One of the criticisms levelled at s.27(1) of the Misuse of Drugs Act, 1971 is that no machinery whatever is provided by the section for affecting the assignment of choses in action or creating and realising the charges on real and personal property which following the assets in this kind of way would entail. It is suggested that clear guidelines be laid down in any proposed legislation.

CHAPTER FIVE: CANADIAN EXPERIENCE

A Canadian evaluation of RICO was published in October 1980 under the heading "Business of Crime", by the Ministry of the Attorney-General of the Province of British Columbia. Its purpose was to examine the United States legislation and to assess the desirability of incorporating provisions similar to those contained in the RICO Statute into Canadian law. The study was undertaken in four parts: first, the extent of enterprise crime found in Canada was examined; secondly, consideration was given to existing provisions in Canadian law which could be used against that type of criminal activity in a way similar to the RICO statute; thirdly, an analysis was made of the RICO Statute in order to determine its effectiveness and also to identify problems in its operation; and fourthly, an assessment was made and recommendations formulated.

(a) The Extent of Enterprise Crime

The Report suggests that there are four essential elements included in the concept of a criminal enterprise, namely:

- (1) Planning and organisation of criminal activity;
- (2) A succession of criminal acts, and some degree of continuity of organisation;
- (3) Rational behaviour, i.e., a conscious acceptance of the risks inherent in the activity; and
- (4) the pursuit of financial gain.

It then goes on to examine seven major criminal activities for which RICO had been designed and for which it had been extensively used, viz: Narcotics; Loansharking; Gambling; Labour corruption; Criminal gangs, such as motorcycle gangs; "White-Collar" or Commercial crime; and the "Laundering" of money and infiltration of legitimate business. In the case of narcotics, for example it quoted police source as estimating that nearly \$1.5 million per day is spent in Canada to purchase narcotics, and pointed out that the criminal justice system in that country does not provide any adequate means of confiscating the immense profits made by drug importers and traffickers.

Loansharking, the lending of money at usurious rates of interest, was found to be one of enterprise crime's most lucrative activities in Canada, with estimated

profits of over \$40 million in the Montreal urban community in 1976. The researchers were of the view that although a 1980 amendment to the Canadian Criminal Code, when proclaimed could be an effective tool in dealing with loansharking activities, there was still room for improvement in that area, and gave as an example the fact that the amending Bill did not deal with the taking over by loan sharks of legitimate business.

It was found that there was a tendency for the courts to treat gamblers leniently, partly because the gambling laws permit and even encourage certain types of gambling under certain circumstances, and also because gambling cases are not presented to the courts as one part of a possible multi-faceted criminal enterprise. Labour corruption was regarded as being less common in Canada, however this type of corruption could increase beyond its current level, since historically social and criminological phenomena often appeared in the United States several years before they were visible in Canada.

In examining the activities of motorcycle gangs, the report pointed to the profitability of the legal activities undertaken by gang members, and lamented the fact that the criminal law did not focus on the activities of the gang itself, but rather on the activities of the individuals who form part of that gang. It was found that "white-collar" crimes are very lucrative, so that if the estimated losses to business which was projected by United States law enforcement authorities (valued at three per cent of the gross National Product) were applied to Canada, this would amount to \$6.3 billion annually. It was also felt that the incidence of this class of crime, namely: stock market frauds, fraudulent bankruptcies, frauds on Government and computer crimes was bound to increase, because of the increased opportunities provided by the growing complexity of the economic system and an increasing reliance on technology.

Finally under this head, the report examined various ways in which "laundering" of money obtained by crime takes place in order that it be made to appear that it was obtained legally, and its subsequent investment in legitimate business enterprises. As a secondary activity which flows from prior criminal activity, the researchers found that the criminal justice system is mainly directed towards the predicated criminal offences to the exclusion of these secondary activities, and warns that if left unchecked, these avenues could be used to monopolise complete sectors of the economy and to influence and corrupt politicians.

(b) Existing Criminal Law in Canada

The report states (not altogether surprisingly) that nothing in existing Canadian criminal law is expressly designed to provide for the types of remedies needed for the forfeiture of illicit profits on conviction. It points to a number of provisions in the Criminal Code which are designed only to remove from the hands of convicted persons, objects whose possession is unlawful, but all those mentioned are tangible objects. And even the general forfeiture provision contained in section 446 of the Criminal Code itself was seen to refer to a tangible and portable object. Intangibles, such as shares in a company, or an interest in a partnership or money in a bank account cannot be forfeited. Similarly things which are not portable, (i.e., capable of being brought before a Justice) such as real estate do not appear to fall within the terms of the section.

(1) Narcotic Control

Under the provisions of the Narcotic Control Act there is a limited power to forfeit the proceeds of illegal narcotic sales, for a police officer may seize any thing by means of or in respect of which he reasonably believes an offence under the Act has been committed, or any thing which may be evidence of the commission of such an offence. Since the primary purpose of such seizure is to gather evidence for the prosecution of the accused, it would seem that only things which are capable of being tendered in evidence may be seized. Moreover the Report points out that since the language of the Act appears to require proof that the actual bills seized were obtained from the purchaser of the narcotics; a money order, into which the cash had been converted could not be seized, with the result that large quantities of cash seized from persons who have been convicted of drug trafficking or importation, frequently had to be returned to the accused or his lawyer.

Other statutes mentioned which create criminal offences containing forfeiture provisions which are also equally limited in effect are the Food and Drugs Act, the Customs Act and the Excise Act. The Criminal Code contains a general provision which provides for the forfeiture of tangible portable objects which have been seized pursuant to the issue of a search warrant under the Code; but the object must be brought before a Justice of the Peace who, on being satisfied that it is no longer required for purposes of investigation or trial, and that it is in the unlawful possession of the person from whom it was seized and that the lawful owner is not known, may issue an order for forfeiture. Here again this general power is severely limited, as it excludes intangibles, such as shares in a corporation or an interest in a partnership, and in fact anything which cannot be physically brought before a Justice of the Peace.

(ii) Laundering Money

The Report examines the difficulties which are encountered in successfully prosecuting persons who have been accused of "laundering" money. An amended provision of the Criminal Code is identified as the anticipated antidote.

The section reads as follows:-

"s.312 (I) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

(a) the commission in Canada of an offence punishable by indictment, or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment."

The purpose of the amendment was to provide an offence which would cover the laundering of funds and the importation of "dirty money" into Canada; but no evidence of its use for this purpose has been found. It is however frequently used to prosecute persons who are found in possession of stolen property, because of the difficulty of proving the origin of the funds, and the absence of a provision which places the onus on the accused to prove beyond reasonable doubt that the funds were legally acquired. It has been found that two further weaknesses limits its usefulness viz:- it depends on the concept of possession, and it does not contain any forfeiture provisions.

(iii) Sentencing forms

Despite the fact that there is no limit in Canadian criminal law to the size of fine which may be imposed for an indictable offence, the Report did not find frequent use being made of this power even when truly serious enterprise crimes had been committed. Judges were reluctant to impose fines in addition to lengthy jail sentences even where the evidence revealed that the profit from the crime must have been enormous.

The following illustrations are given:-

For example, in a case in which the convicted persons were "the wholesale supply source of capped heroin for the Vancouver market" the Trial Judge sentenced two of them to 15 years' imprisonment and a fine of \$10,000. The British Columbia Court of Appeal increased these sentences to life imprisonment but two of the three judges refused to impose any fine at all on the men. In another case, a man who was caught importing between \$1 million and \$2 million worth of marijuana was sentenced to imprisonment for eight years, but neither the trial Judge nor the Newfoundland Court of Appeal imposed a fine. A group of people found in possession of between \$3.5 million and \$4.5 million worth of heroin were each sentenced to 20 years' imprisonment, no fine was imposed although the evidence had demonstrated that at least \$261,000 had been sent by the group to Hong Kong within a five-week period.

(c) Application of RICO to Canada

The researchers identified certain advantages, disadvantages and difficulties in implementing a statute similar to RICO in Canada. It was felt that it would be an advantage to be able to focus criminal proceedings on an organisation rather than on an individual as at present, and that this could be effectively used to combat the use or acquisition of legitimate business enterprises by persons involved in criminal activities. They also regarded the forfeiture provisions as helpful to the State, both as a means of removing the profit incentive from criminal activity and of depriving organised crime of its ill-gotten gains, and also in permitting the State to recover from criminal organisations at least part of the cost of investigations and prosecutions. The civil forfeiture provisions of RICO were also considered to be advantageous as they allowed action to be taken in cases where the evidence was insufficient for a criminal prosecution, they compensated the victim, worked as an economic punishment to the accused and most importantly they prevented the unjust enrichment of the individual.

The disadvantages were considered to be the cost in court time and money of prosecutions, and the constitutional difficulty which could be encountered because of the absence of jurisdiction in the Federal Government either, if civil forfeiture provisions were passed on their own, or if they were engrafted on to the criminal provisions as part of the penalty. The researchers perceived one area of particular difficulty in the high burden of proof placed on the Crown to prove the origin of funds involved in racketeering activity since the "tracing" of the money back to the criminal activity is well nigh impossible. In order to obviate this difficulty the Report recommended the introduction of a reverse-onus provision, which would place on the accused the burden of proving on the balance of probabilities that the money was not derived from racketeering activity once the Crown had demonstrated that the accused had participated in racketeering, and had accumulated assets of substantial value during that period.

(d) Recommendations of Evaluators

The Report found that the RICO statute had the potential to become an effective weapon in the fight against crime, because it provided the prosecution with a novel way of illustrating to the court and the public the economic underpinnings of organised crime, and recommended that Canada adopt similar legislation. The enactment of the RICO Statute as a separate piece of legislation did not find favour, it was recommended instead that the new legislation be incorporated into the Criminal Code. The Researchers did not favour the adoption of the Civil provisions, and warned that since the possibility of inappropriate or abusive prosecutions will always exist, consideration should be given to a requirement that the Attorney-General of a Province or his deputy must consent to any such prosecution. This last recommendation is one which requires careful consideration if the lack of investigatory support is not to detract the attention of the police away from the "leaders" to the "small men".

CHAPTER SIX: AUSTRALIAN EXPERIENCE

(a) Introduction

Recent amendments to the Customs Act of Australia, and in particular those effected by the Customs Amendment Act, 1979 (No.92) have greatly strengthened the hands of the law enforcement agencies in that country, by introducing stricter methods of investigation and proof, and tougher methods of seizure and confiscation for offences relating to narcotic drugs. The use of listening devices has been authorised, subject to certain safeguards which are designed to protect the right of the citizen; the forfeiture proceedings have been strengthened by shifting the burden of proof; and stringent provisions are made for confiscating the indirect proceeds from dealings in narcotic drugs by the recovery of pecuniary penalties.

(b) Use of Listening Device

A member of the Australian Federal Police who is making narcotic enquiries is empowered to use a listening device to listen to or record words while they are being spoken if the speaker would reasonably expect the words to be heard by the Officer; or if either the speaker's consent or a warrant has been obtained.

A Judge may issue a warrant authorising the use of a listening device if he is satisfied by information on oath given orally or otherwise, that a person has committed, or is reasonably suspected of having committed, or is likely to commit a narcotics offence; and that enquiries are being made in relation to the likely commission of that crime. A warrant, which must state at what times entry is authorised, and specify the period (not exceeding 6 months) during which it is to remain in force, may authorise entry into any premises (anywhere in Australia) in which the subject is, or is likely to be, in order to install, maintain, use or recover the device. the authority of such a warrant must be exercised by the Commissioner of Police himself, or by officers approved directly or indirectly by him; and it may be discontinued before the date of expiry if the Commissioner is satisfied that the grounds on which it was issued have ceased to exist.

The secrecy of information obtained in this manner is partially preserved for it is an offence under the Act to divulge or communicate that information to any other person; or to record or use it except for the purpose of those inquiries. But the Commissioner or any other officer authorised by him may communicate the information to other police officers for the purpose of investigating any offence committed against the laws of the country, which is punishable by a term of not less than three years imprisonment; and he may also communicate it to the Director-General of Security if he thinks that activities which are prejudicial to the security of Australia are disclosed by any information so obtained. Here indeed is a very wide power of eavesdropping; albeit for a morally justifiable purpose.

The wide power given to the police is partly limited by the duty imposed on the Commissioner to account to the Minister in respect of the use made of information obtained by them. The Commissioner must furnish the Minister with a copy of all documents obtained as a result of the issue of a warrant, and also a report in writing in respect of each warrant, indicating the use made of any information obtained by the use of a listening device, and where applicable, the persons (other than members of the police) to whom information so obtained had been communicated. This provision may have the salutary effect of restraining any excesses feared by members of the public, since questions may be addressed to the Minister where it is feared that the powers of the police are being abused.

All warrants and other instruments and documents must be retained in the records of the Australian Federal Police and are to be destroyed when no longer required.

(c) Forfeiture provisions

The forfeiture provisions allow for the proceeds of narcotic goods to be seized and forfeited. The section defines a "prescribed narcotics dealing" and then goes on to provide that any money or goods (which includes cheques) in the possession or under the control of a person, and which came into his possession or control by reason of a prescribed narcotics dealing are deemed to be forfeited goods and must be seized. If the money had been exchanged for goods or vice versa it must still be regarded in its new form to have been obtained by engaging in such a dealing. But goods must not be taken to have been purchased with, or out of such moneys unless the whole, or substantially the whole of the moneys were obtained by engaging in a prescribed narcotics dealing.

To this very drastic and comprehensive provision there are two main exceptions. Where the owner of the money or goods can prove to the satisfaction of the court that when the money or goods were seized he did not know and had no reason to suspect that the moneys or goods had been obtained by engaging in a prescribed narcotics dealing, the court must direct its return to him. Similarly, if the licensee of a warehouse can satisfy the court that he did not know either that goods stored in his warehouse were narcotic goods or that they had been imported

into Australia in contravention of the Act, any moneys or goods which have been seized must be returned to him.

In both these exceptions, it is suggested that the onus of proof which must satisfy the court should be proof beyond reasonable doubt; since the scheme of the Act seems to be geared towards raising presumptions in favour of the Crown where certain primary facts are shown to exist; seizing the property which is subject of the enquiry, and placing the onus squarely on the shoulders of the suspect to satisfy the court that his hands are really clean.

(d) Recovery of pecuniary penalties

The Act has perfected a very detailed procedure for imposing on drug offenders a pecuniary penalty which is designed to confiscate the proceeds of their crimes. It is not limited to offences for which the defendant has been convicted and extends to property acquired outside Australia. The court can hear evidence of the market value of the kinds of narcotics involved or the kinds of services provided; and it can take the difference in value of all the defendant's property before and after the transaction, or period of the transaction, as the value of the benefit derived from the sales of the narcotics. The onus is placed on the defendant of proving that the gains during that period were lawfully made; and the pecuniary penalty is fixed by reference to the defendant's turnover - not his net profit.

The court is empowered to appoint the Official Receiver to take all the defendant's property, and the Official Receiver may examine him in order to discover details of his property. The evidence disclosed cannot however be used against the defendant except for fixing the pecuniary penalty or for a prosecution for perjury. Where the court makes an order directing the Official Receiver to take control of any property, there is created on that property a charge to secure the payment of any pecuniary penalty which may subsequently be imposed. This charge is subject to any prior encumbrance on the property but it takes priority over all other encumbrances whatsoever, and is not affected by any change of ownership of the property.

This pecuniary penalty appears to be in substitution for, and not in addition to seizure. So that where the court makes an order directing a person to pay a pecuniary penalty in respect of goods which have already been seized, the penalty is deemed to be reduced by an amount equal to the value of the property at the time of seizure. If the penalty is paid the Government becomes liable to pay the person an amount equal to the value of the property, but the goods themselves are not returned.

CHAPTER SEVEN: THE INTERNATIONAL DIMENSION

The poor record of many countries in successfully prosecuting crimes which span the boundaries of more than one country is very marked in relation to drug-related and white-collar crimes. A concerted effort is therefore required if successful attempts are to be made to stamp out the incidence of these and similarly serious offences. National legislation and local law enforcement efforts seem to be adequate to cope with the small offender. It is, however, true to say that such legislations as at present exists in most countries fails to catch individuals or gangs which operate across national boundaries. And even where such individuals or gangs are eventually caught and specific items are seized, it is generally conceded that their profits remain by and large beyond the reach of the law.

Resolution 1980/21 passed by the Economic and Social Council of the United Nations which deals with financial assets and transactions related to illicit drug trafficking requested the Division of Narcotic Drugs to convene a working group of International Organisations and Bodies and Member States to examine the pertinent legislation, administrative measures, and law enforcement action already taken by some Governments, and to collate these in a form which could provide; and also to serve as a basis for improved international co-operation in this connection (See Appendix III).

This resolution had in mind the provisions of the single Convention on Narcotic Drugs, 1961 which was amended by a Protocol of 1972; Article 4 of which placed on the signatory States an obligation to take such legislative and administrative measures as may be necessary, to carry out the provisions of the Convention within their territories; to co-operate with other States in the execution of the provisions of the Convention; and to limit exclusively to medical and scientific purposes, the production, manufacture, export, import, distribution of, trade in, use and possession of drugs. Article 35 sketches out the action which is recommended to be taken against the illicit drug traffic, and Article 36 contains an outline of the penal provisions which could be incorporated in any legislation passed. (See Appendix I).

The Committee on Narcotic Drugs had already invited Governments by a circular letter in 1979 to provide information on existing legislation, and other law enforcement action against direct or indirect illicit activities involving narcotic drugs (See Appendix II). The response to this invitation revealed that the general practice appeared to be that the legislation was generally contained in the Penal or Criminal Code and also in Customs legislation; and there was an almost universal provision for the seizure and forfeiture of the drugs and other articles used in the actual trading operations; but that the trend was for the sanctions to apply only to the persons who were directly involved in the illicit operations, and did not normally extend to those who indirectly supported them whether financially or otherwise.

It is proposed that the ideal solution to the form of any new legislation should be that of an enactment which would deal specifically, and only, with the multifarious problems related to the stamping out of illicit drug traffic in all its forms; and it recommended that some sort of machinery should be set up for the inter-governmental exchange of information relating to convicted criminals, and of suspects, involved directly or indirectly in illicit drug trafficking. The matters which were suggested for inclusion in the proposed legislative and administrative measures are contained in Appendix IV.

Meanwhile the International Criminal Police Organisation (INTERPOL) has been paying growing attention to this matter. At the 49th INTERPOL General Assembly Session which was held in Nairobi in 1979, a resolution was passed assigning to the General Secretariat of the Organisation, the responsibility of gathering all available information from member countries regarding existing legislation which would allow for the seizure of assets derived from drug trafficking. The response to a questionnaire sent out in June 1980 indicated to the Secretariat that many countries were interested in working through the INTERPOL system to examine the greater use of existing legislation and/or to study new investigative approaches already existing; and contained the text of forfeiture legislation in force in many countries. The 50th INTERPOL General Assembly held in Nice in 1981, adopted a resolution which called on the Secretariat to organise a working seminar to discuss financial assets derived from drug trafficking, and this was convened in Saint-Cloud, France in February 1982.

Among the problems which will have to be faced in any attempt to enlist the international community in a concerted effort to eliminate or at least to reduce considerably the profitable activities of organised crime are those of definition and drafting. It is not generally agreed what sort of crimes (with the possible exception of narcotics and white-collar crimes involving fraud of large sums of money) should fall within this sphere; and it does not seem likely that there will be agreement on the attachment or confiscation of the indirect proceeds of criminal activity, especially where third parties are involved. In fact, but for the glaring evidence that drug trafficking is severely endangering the health and safety of our young, it is doubtful if consensus would have been reached on efforts to restrict the activities of illicit drug dealers.

As far as defining the criminal activity goes, probably to a greater extent in these cases than other areas of criminal activity, the determination of what activities should or should not be brought within the criminal law calls for a series of value judgments. And specifically with regard to legislation which would confiscate the indirect proceeds of crime there are certain to be many and conflicting views, as we have already seen. But an attempt must be made and the fact that many Commonwealth countries have seen it fit to pass legislation (albeit in

varying degrees) to combat drug-trafficking for example, is a clear indication that co-operation at that level could be confidently expected.

Many criminals nowadays, particularly those who are associated with organised crime, operate at an international level. The ease of modern communication permits almost instantaneous communication with most parts of the world. International travel is, in many instances, as free from restrictions as internal travel, and many countries of the Commonwealth depend on unrestricted travel for their economic survival. Trade patterns have also changed, and the move towards the formation of regional and sub-regional trading blocks operate in favour of the international operator whether legitimate or illegitimate. It is also a fact of life that certain organised criminal groups possess an international infrastructure and capability which permits them to function with ease in more than one country at the same time.

The Canadian evaluation revealed that the economic and social systems of the United States which have provided a fertile breeding ground for organised criminal groups are closely comparable to those in that country; and feared that organised crime was poised to take root there as well. The same may be said for many other Commonwealth countries. It is very important, therefore, that nations combine both their investigative and law enforcement efforts in order to meet the challenges posed by these well-organised groups.

Some of the obstacles to closer co-operation in combating organised crime on an international or even a Commonwealth basis are provided by the cases of R v Cuthbertson and Attorney General of New Zealand v Ortiz.¹¹ As the Cuthbertson case revealed, there could be a competing claim to the proceeds of crime both by the court of the country in which the criminal is tried and by that of the country in which the assets or other property is to be found. It has been suggested that this complication may be considered to be of lesser importance since the philosophical basis of confiscation is that the accused ought not to profit from his crime; and that the State need not benefit from it.

The problem will necessarily have to be resolved at some time and it may be that diplomatic rather than legal channels could provide the best avenue for a solution.

CHAPTER EIGHT: THE ROLE OF THE COMMONWEALTH FRAUD OFFICER

At their meeting held in Barbados in 1980, Ministers resolved to create the post of Commonwealth Fraud Officer with the following terms of reference:-

- (i) to develop criminal intelligence systems between Commonwealth police forces and between Commonwealth and such other police forces 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 international organisations as may be appropriate, and work closely with the liaison officers within the organisations concerned with the same areas of crime;
- (iii) to gather and disseminate relevant information with particular regard to modus operandi and targeting exercises;
- (iv) to assist in the development of appropriate training programmes, exchanges of police personnel and the publishing of existing training opportunities both within countries and organised by other international agencies;
- (v) to assist in the facilitation of international investigations, inter alia with a view to the elimination of duplication of effort;
- (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.

The office has been approached for and has rendered assistance on several occasions in assisting to trace money in various countries. It has, for example, joined with the International Maritime Bureau in tracing the sum of U.S.\$800,000 which was obtained by fraud. The matter was discussed with the Director of the Bureau and he has given preparatory assistance as to the people with whom the Bureau might work. The office did not get directly involved with tracing the money because no Commonwealth country was involved.

The officer is currently assisting the Government of Malaysia in tracing the individuals who have been involved in a fraudulent transaction amounting to \$2.7 million (Malaysian) against the Malaysian Government. He is considering a request from the Government of Indonesia for assistance in tracing a very large sum of money which was fraudulently obtained in the context of a Development Aid Programme and which probably involves a Commonwealth country.

The office, at present, lacks the resources which are necessary to enable it to act as an effective tool in assisting the smaller Commonwealth territories in undertaking investigations, and to improve liaison with Member countries of the Commonwealth generally. By and large, therefore, the priority so far seems to have been in developing good relations with various Non-Commonwealth Governments and relevant International institutions, which in the long run will stand Member governments in good stead.

If, however, any of the recommendations made in this paper are adopted, Ministers may wish to consider what supporting staff are required and also whether the Commonwealth Panel of Experts ought to be activated. In the light of the decision of the Court of Appeal in Attorney-General of New Zealand v Ortiz, it is also suggested that the office should initiate co-operation among Member States of the Commonwealth so that legislation similar to that contained in the Fugitive Offenders Acts may be passed in order to facilitate the handing back of treasures which are illegally removed from one, and taken to another Commonwealth country.

CHAPTER NINE: SUMMARY OF RECOMMENDATIONS

Having considered the present English legislation; the Racketeer Influenced and Corrupt Organisations Act (RICO) and the Controlled Substances Act, of the United States of America; the Canadian Evaluation of RICO undertaken by the Ministry of the Attorney General of the Province of British Columbia, Canada; the Customs Act of the Commonwealth of Australia as amended; and other relevant materials, it is recommended that Law Ministers consider enacting legislation which will deal effectively with the forfeiture and confiscation of the proceeds, both direct, and indirect (where possible) of white-collar and drug related crimes. Neither the powers available under the common law, nor some recent endeavours at passing legislation have managed (with few exceptions) to provide the Crown/State with any significant weapon in its struggle against enterprise or organised crime, and in particular, in its attempt to confiscate the proceeds of criminal activity.

The legislation should make the important distinction between seizure, which is the process whereby before trial, property (both tangible and intangible) may be seized and preserved until the trial for the purpose of providing evidence of the crime, or for restoration to its legal owner or for the purposes of forfeiture or confiscation on the one hand; and forfeiture and confiscation, which should take place after trial, on the other. Forfeiture should be confined as at present to things which are used to commit crime and are before the court at the time of trial; whereas confiscation should refer to the means of tracing and attaching the indirect proceeds through changes in the character or destination of the property being followed.

Provision should be made after the property has been seized for the accused and innocent third parties whose property is affected to be permitted on application to make use of part of the property, where feasible, for limited purposes to be approved by the Court.

For the purposes of this special legislation an order of forfeiture should, as at present, be made at the trial and should be subject to such right of appeal as

may be allowed. A recommendation for confiscation could be made by the trial court and thenceforth the practice and procedure mentioned below should be followed. It should be stressed that the cornerstone of the confiscatory process will have been laid by the efficiency of the investigatory process which should begin even before seizure.

Where it is intended to confiscate property, notice to that effect should be given to the accused and to any other person who is known to have, or claim an interest in the property to be confiscated. The interests and the property should be specifically described and the party should be informed in order that he may be represented at the hearing by his legal representative if he so desires. A hearing should follow at which the Crown or State should prove on the balance of probabilities that the property or interest which has been recommended for confiscation was obtained by the defendant from the proceeds of, or in exchange for, other property or interests which have been proved to be the subject matter of a crime. It should not be mandatory for the defendant to have been convicted before the process of confiscation can be initiated.

Once the Crown/State has proved its case, the onus should then shift to the defendant to prove beyond reasonable doubt that the property or interest was not obtained as a result, direct or indirect, of criminal activity. Both parties should be given a right of appeal, and the decision of the first appellate court should be regarded as final. Provision should also be made for the third party who can prove that he was not aware of the proceedings for confiscation to apply to have the matter re-opened within a reasonable period of time.

The confiscatory process should take the form of summary civil proceedings without pleadings. Jury trial should not be available in these proceedings. Once notice of forfeiture is given in the stipulated manner, the matter should be adjourned to await the outcome of the criminal proceedings. But the acquittal of the accused on the criminal charge should have no bearing on the civil action for confiscation, since the reverse-onus clause would place the burden on the accused to prove beyond reasonable doubt that the moneys or other property were not obtained as a result of the forbidden illegal activity. Care should be taken to ensure that the judgment obtained will be enforceable in other jurisdictions on the basis of reciprocity.

The Fraud Liaison Officer with the assistance of the Panel of Experts could be asked to undertake the initial drafting for submission to Ministers. It is also recommended that the assistance of the International Police Association should be enlisted in the investigative process, since the resources of many Member States may not be able to bear the expenses involved in investigation.

Drug trafficking and white-collar crime are big business, organised to earn huge profits. The statistics relating to these crimes are staggering. The tendency of most enforcement procedures has been to seize the illegal products such as narcotics and other dangerous drugs; but the profits made have largely been ignored. The vast profits made from drug-related offences are used, for example, to buy silence from witnesses, to pay bribes, to expand into other illegal activities to move into new locations, to seduce more citizens into joining the ranks, and to pay for illegal expenses.

So long as these profits go untouched, lost workers and lost products can always be quickly replaced. Even with the leaders in jail their confederates continue the illegal practices with the profits left behind; and those who have been imprisoned quickly return to their old habits after release. They regard a period of imprisonment as an acceptable risk as long as their earnings are kept intact. Any serious attempt to stamp out these illegal practices must, therefore, have as its ultimate aim the seizure and confiscation of the profits and property which are the proceeds of these crimes.

Footnotes

1. [1981] 3 All E.R. 378
2. (1887) 16 Cox C.C. 245

3. [1968] 1 All E.R. 229
4. [1982] 3 All E.R. 26
5. See D.W. Fox, Applications to freeze Bank Accounts: Justice of the Peace (1982), p.229
6. Section 16
7. [1979] 2 All E.R. 510
8. Times Law Reports, 1 May 1982
9. [1980] 2 All E.R. 401
10. [1981] 3 All E.R. 129
11. [1982] 2 W.L.R. 10

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Mr. L.E. Sawyer, Director of Information Services, Ministry of the Attorney General of the Province of British Columbia, Canada, for providing me with a copy of the report entitled The Business of Crime - An evaluation of the American Racketeer Influenced and Corrupt Organisations Statute from a Canadian Perspective.

The Drug Agents' Guide to Forfeiture of Assets 1st edition by Harry L. Myers and Joseph P. Brzostowski Washington D.C. (1981).

Mr. Jeremy D. Pope and Dr. Barry A.K. Rider of the Legal Division of the Commonwealth Secretariat.

APPENDIX I

Single Convention on Narcotic Drugs, 1961 (as amended by the 1972 Protocol)

Article 4: General Obligations

1. The parties shall take such legislative and administrative measures as may be necessary:
 - (a) To give effect to and carry out the provisions of this Convention within their own territories;

- (b) To co-operate with other States in the execution of the provisions of this Convention; and
- (c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

Article 35: Action Against the Illicit Traffic

Having due regard to their constitutional, legal and administrative systems, the Parties shall:

- (a) Make arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination;
- (b) Assist each other in the campaign against the illicit traffic in narcotic drugs;
- (c) Co-operate closely with each other and with the competent international organisations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;
- (d) Ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner; and
- (e) Ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel;
- (f) Furnish, if they deem it appropriate, to the Board and the Commission through the Secretary-General, in addition to information required by Article 18, information relating to illicit drug activity within their borders, including information on illicit cultivation, production, manufacture and use of, and on illicit trafficking in, drugs; and
- (g) Furnish the information referred to in the preceding paragraph as far as possible in such a manner and by such dates as the Board may request; if requested by a Party, the Board may offer its advice to it in furnishing the information and in endeavouring to reduce the illicit drug activity within the borders of that Party.

Article 36: Penal Provisions

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed internationally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.
- (b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment,

education, aftercare, rehabilitation and social reintegration in conformity with paragraph 1 of Article 38.

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,
 - (a)
 - (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;
 - (ii) International participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connection with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;
 - (iii) Foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism; and
 - (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.
 - (b)
 - (i) Each of the offences enumerated in paragraphs 1 and 2 (a)(ii) of this article shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them;
 - (ii) If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences enumerated in paragraphs 1 and 2(a) (ii) of this article. Extradition shall be subject to the other conditions provided by the law of the requested Party;
 - (iii) Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences enumerated in paragraphs 1 and 2(a)(ii) of this article as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party;
 - (iv) Extradition shall be granted in conformity with the law of the Party to which application is made, and, notwithstanding subparagraphs (b)(i)(ii) and (iii) of this paragraph, the Party shall have the right to refuse to grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.
3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.
4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

COMMISSION ON NARCOTIC DRUGS
TWENTY-EIGHTH SESSION

Resolution 3 (XXVIII)

Final assets and transactions related to illicit drug traffic

The Commission on Narcotic Drugs

Recalling Resolution 2002 (LX) of 12 May 1976 of the Economic and Social Council, Article 4, 35 and 36, particularly Article 36 (2)(a)(ii), of the Single Convention on Narcotic Drugs, 1961, as well as those articles as amended by Articles 13 and 14 of the 1972 Protocol, and Articles 21 and 22 of the 1971 Convention on Psychotropic substances.

Noting that the illicit drug traffic involves large sums of money, significant financial transactions and the acquisition of assets by members and financial supporters of trafficking groups, or by other persons, although they may not be themselves engaged in the illicit movement of drugs.

Convinced that close attention to the financial transactions and acquisition of assets by persons involved in the illicit drug traffic may lead to the dismantling of major trafficking groups.

Aware that some Governments have already enacted legislation and taken other administrative measures to attack the financial resources and illegally acquired assets of illicit drug traffickers.

Believing that this policy would considerably contribute to reducing illicit drug traffic.

1. Requests the Division of Narcotic Drugs, in consultation with the International Criminal Police Organisation, the Customs Co-operation Council and other international organisations and bodies and interested Member States, to examine the pertinent legislation and administrative measures and law-enforcement action already undertaken by some Governments and to synthesize these in a form which could provide practical guidelines for other Governments concerned which are facing similar problems, and serve as a basis for improved international co-operation in this connexion.

2. Invites Governments to co-operate fully with the Division of Narcotic Drugs in this endeavour.

3. Authorises the Division of Narcotic Drugs to convene, if necessary, a small working group in pursuit of the above objective.

4. Recommends that, where necessary, any expenses which this may involve should be borne by the United Nations Fund for Drug abuse Control.

**Financial assets and transactions related to
illicit drug trafficking**

(Resolution 1980/21)

The Economic and Social Council

Recalling its Resolution 2002 (LX) of 12 May 1976, and Articles 4, 35 and 36, particularly paragraph 2 (a)(ii), Article 369 of the Single Convention on Narcotic

Drugs, 1961, as well as those articles as amended by Articles 13 and 14 of the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, and Articles 21 and 211 of the Convention on Psychotropic substances, 1971,

Mindful that illicit trafficking in drugs requires large sums of money, usually in the form of currency, and involves financial transactions of significant size,

Noting that the members and financial backers of trafficking organisations are involved in the acquisition of assets by means of profits generated from such illicit activities, although they may not be directly involved in the actual movement of illicit drugs,

Convinced that close attention to financial transactions and the acquisition of assets involving persons who may be members or financial backers of trafficking organisations is valuable in identifying and prosecuting international drug traffickers and in dismantling major trafficking organisations,

Aware that some Governments have already enacted legislation and have undertaken enforcement activities to attack the financial resources and assets acquired by means of the illegal profits of major drug traffickers,

Believing that co-operation between Governments focusing on such financial activities can lead to the destruction of international criminal enterprises engaged in illicit drug trafficking,

Endorsing Commission on Narcotic Drugs Resolution 3 (XXVIII) of 21 February 1979, in which the Commission requested the Division of Narcotic Drugs of the Secretariat, in consultation with the International Criminal Police Organisation, the Customs Co-operation Council and other international organisations and bodies and interested Member States, to examine and synthesize pertinent legislation, administrative measures and law-enforcement action already undertaken by some Governments as a means of providing guide-lines and furthering co-operation among governments facing these problems,

1. Requests the Division of Narcotic Drugs to endeavour urgently to complete the action requested by the Commission on Narcotic Drugs in its Resolution 3 (XXVIII);
2. Invites the Secretary-General to convene, as soon as feasible thereafter, a meeting of international financial and legal experts, police experts in illegal financial activities and criminal conspiracies and officials familiar with the prosecution of those involved in international criminal conspiracies for the purpose of preparing guide-lines for the negotiation of treaties that would facilitate and promote the co-operative investigation of financial activities involving illicit drug trafficking and that would lead to the prosecution of major traffickers;
3. Recommends that if necessary, the expenses incurred in holding the meeting envisaged in paragraph 2 above should be borne by the United Nations Fund for Drug Abuse Control;
4. Invites the Secretary-General to report to the Commission on Narcotic Drugs at its twenty-ninth session on the action taken pursuant to the present resolution, including in his report any draft model agreement that is elaborated for the consideration of the Commission and to consider possible transmission of any such draft agreement to Governments.

MATTERS TO BE INCLUDED IN LEGISLATION AND ADMINISTRATIVE
MEASURES TO ATTACK FINANCIAL RESOURCES AND ILLEGAL GAINS
OF DRUG TRAFFICKERS AND THEIR SUPPORTERS AND BACKERS

1. Scope of measures:

To extend to include persons directly and indirectly engaged in illicit narcotics dealings, including (but not exclusively) -

- (i) importation, including precursors;
- (ii) manufacture, including processing;
- (iii) distribution;
- (iv) sales;
- (v) exportation;
- (vi) possessing;
- (vii) financing any of the above, or related, functions;
- (viii) procuring, or conspiring with, any other person or persons to engage in any of the above functions;
- (ix) aiding and abetting, advising, procuring or being in any other way concerned in the illicit dealing in narcotic drugs, whether imported or produced in-country.

2. Type of sanction

- (i) Imprisonment; AND
- (ii) Fine and/or pecuniary penalty related directly to the quantum of illicit gains; AND
- (iii) Forfeiture of all goods and property involved in the illicit traffic, including drugs, constituents thereof which after processing would become dangerous drugs, all equipment, vehicles, marine craft, aircraft, furniture, plant, buildings, and any other property fixed or movable of any nature whatsoever, used in the trade. Such forfeiture must be done in proper manner so as to ensure the immediate and permanent removal of the items seized from the control of the person or persons from whom seized. (In this context, it appears that the Code of Criminal Procedure of the Federal Republic of Germany (s.111), requires "seizure and attachment" to achieve this object); AND
- (iv) Forfeiture of all monies used directly in and for the importation, manufacture, sale, distribution, and any other form of illicit dealing in the drugs concerned; together with all monetary and other profits acquired, not only during the dealings which are the subject of the legal processes in hand but also accruing from previous dealings of a similar or related nature. Power should be taken to "follow through" gains accrued from dealings in drugs which have been converted into assets other than cash, e.g. otherwise legal enterprises, holdings of stocks, shares, bonds and other securities; holding of immovable property; and deposits in banks and similar institutions: this power should extend to cash and other assets removed from the country in which they were acquired or from which they accrued. Similarly, power should be taken to seize and forfeit illicit gains accruing not only, within the country concerned but also in foreign countries.

3. Administration

As the detection, investigation and arraignment of persons engaged in criminal activities related to the illicit drug traffic on an indirect basis, i.e. in the financing, planning, procuring or in any other way indirectly aiding and abetting the direct participation in the trade will present many difficulties, it will be necessary to take powers in any proposed legislation to ensure that the widest possible coverage of law enforcement agencies and officers are empowered to initiate action leading to the indictment of suspects; these should include not only Police and Customs officers but also Income Taxation and Exchange Control officers (where applicable). The method of dealing with unexplained accretions of wealth discovered by investigations conducted into a suspect's financial position will, naturally, depend to a large extent on the political philosophy of the Government concerned, but it is thought that, where evidence attaching to unexplained surpluses points to their having accrued directly or indirectly from illicit drug dealings, there should be a presumption of guilt and the surplus should be forfeited to the State unless the suspect can prove an alternative source. Such forfeiture should not, of course, preclude prosecution for any criminal action arising from the same set of circumstances.

4. Specimen legislation

The Government of Australia, in its Customs Amendment Act 1979, has gone into very great detail on the comprehensive penal law and administrative measures required to deal with direct and indirect illicit trafficking in drugs and related substances. This enactment could well serve as an extremely useful guide to other Governments preparing new legislation in this sphere.

ACCESS TO ASSETS DERIVED FROM CRIMINAL OFFENDING

Memorandum by
THE GOVERNMENT OF NEW ZEALAND

Although New Zealand had long had on its books a provision (now s.403 of the Crimes Act 1961) giving the Courts the power to award compensation to any person who suffers loss by reason of any criminal offence, this relatively narrow provision could not readily be adopted to stripping offenders of their ill-gotten gains.

2. The pressure to implement such a regime arose with the increasing incidence of serious drug offending. In 1978 the Misuse of Drugs Act 1975 was amended to allow, among other things, a Court to impose a fine on a person convicted of a drug dealing offence which not only reflected the seriousness of the offence (a factor which also determines the sentence of imprisonment to be imposed), but which also has regard to assets or money owned by the offender which on the balance of probabilities are proved to have been acquired as a result of the offence. This provision, s.38 of the Amendment, has been used to some effect.

3. Section 39 of the Amendment was designed to take matters much further into the field of "asset stripping". It provides that where a person has been convicted of a drug dealing offence he may be fined an amount that reflects not only the assets derived from the particular offence but also reflects assets gained from other drug dealing offences. These, however, must be proved beyond reasonable doubt although not as the subject of fresh indictments.

4. This approach was taken after anxious consideration of the questions of justice raised by a scheme which in effect tried and sentenced a suspected drug dealer without a proper trial before a jury. At the end of the day it was decided that the dangers presented by the traffic in "hard drugs" justified an exception to the ordinary rules of criminal procedure. This was acceptable, however, only if the other drug dealing offences were proved to the criminal standard.

5. Unfortunately this latter requirement highlights the difficulty with the whole concept. If the previous other drug dealing offences can be proved to the criminal standard there is no good reason why this cannot be done before a jury under the ordinary rules of a criminal trial. Also, in practice, the Police have not yet generally considered themselves to be in a position in a major drug-dealing trial to prove other offences to the required standard. The power has been used only once.

6. Although various alternative schemes to get around the difficulties in s.39 have been considered from time to time there was no further development in the field of assets derived from criminal offending until the publication of the Report of the Penal Policy Review Committee later in 1981.

7. That Committee on the strong representations of the then Secretary for Justice recommended in essence that the assets of "major" drug and property offenders should be capable of being frozen after their arrest, on application made to the High Court. If a conviction followed the assets, including those acquired or discovered after conviction, should be disposed of by a statutory trustee.

8. These recommendations, which owe something to the "criminal bankruptcy scheme" that operates in England, are currently under study. As attractive as these proposals may seem they are not without their difficulties. Setting aside questions of principle (which must nevertheless be weighed along with other considerations), a number of practical considerations arise. These are particularly evident in the proposed asset "freeze" to apply after an arrest has been made.

9. Once an answer has been obtained to the question of what type of offending will allow an application to be made (drug dealing offences are an obvious candidate but the nature of any property offending is a much more difficult area), the nature of a freeze order must be delineated.

10. In tackling this question the Justice Department must find answers to the following questions:-

- (a) Should the proceedings be ex parte or on notice?
- (b) As a freeze order may have profound consequences for an accused and others and applies before conviction should the Crown be required to establish a prima facie case before an order may be made?
- (c) What provision is required to allow an order to be varied to avoid hardship to the accused or others?
- (d) How will the interests of innocent third parties be taken into account?
- (e) Will special provision be required for continuing periodic payments made by the accused?
- (f) What access and under what conditions will there be to solicitor's trust accounts?
- (g) What allowance will there be for the accused's legal costs?
- (h) Will there be a moratorium on the accused's debts?

11. The nature of the liability of those who breach the terms of any order will also have to be considered, in particular whether there will be specific criminal sanctions or a reliance on the law of contempt.

12. There is also the question of the appropriate person to administer such a regime, and the asset stripping order. Any trustee will require considerable resources in terms of staff and other facilities.

13. The proposed asset stripping order throws up fewer problems but control among them is the question that has caused the difficulties with s.39 of the Misuse of Drugs Amendment Act, namely whether there should be proof of other offending before assets beyond those acquired through the particular offence may be seized and, if so, to what standard. Indeed, if such an order was to be effective the question of a presumption that all of a convicted person's assets were derived from drug or property offending would have to be carefully considered.

14. The other major question in such a regime for a small country such as New Zealand concerns the costs of administration. The suggested trigger point for the application of the scheme is a sentence of imprisonment of or exceeding five years. Such a sentence may be imposed in respect of relatively small amounts of drugs and in respect of those whose asset backing is not larger. In such cases it is quite possible that the costs of trustee and his staff would not be met once all the assets had been liquidated and distributed among innocent third parties and in payment of any fine that might have been imposed.

15. Accordingly, the cost effectiveness of such a proposal must be carefully evaluated before it can be implemented.

16. The Report of the Penal Policy Review Committee also tentatively supported the introduction of a "criminal bankruptcy scheme", not so much as an asset stripping device but as an additional procedure to aid in the enforcement of a fine.

17. As indicated earlier, the Misuse of Drugs Amendment Act 1978 introduced with the concept of a fine the notion that the profits or assets from the particular offence could be taken into account in setting the level of the fine. This has been used to good effect as the ordinary mechanism for enforcing a fine, notably the warrant of distress has been supplemented by powers which make it clear that money held in a bank may be attacked, and which allow for the seizure and sale of real property.

18. Accordingly, any need for a criminal bankruptcy regime as an aid in fines enforcement, or for use on the wider field of asset stripping, must be assessed against total crime, and not merely against drug offending.

19. Taking the wider view, there must be some doubts about the efficiency of a criminal bankruptcy scheme as envisaged by the Penal Policy Review Committee simply because outside of the field of drug offending few criminals in New Zealand would have substantial assets.

20. It is this point which also assumes considerable importance in considering a criminal bankruptcy scheme along the lines of that in the Powers of Criminal Courts Act 1973 (UK). Ordinary bankruptcy proceedings require relatively significant co-operation from the bankrupt for their success. Without this the task of the official assignees would become well nigh impossible. Similar co-operation from an offender, especially one who had been sentenced to a long term of imprisonment, could not be assured. The additional costs of enforcement would thus be significant.

21. As an additional factor for consideration there is some evidence to suggest that even in the field of reparation a criminal bankruptcy scheme would not be the most effective option, again because of the costs and because any person who suffered loss through the offence would rank only as an unsecured creditor.

22. In essence, then, the New Zealand Government is faced with a number of difficult decisions in the field of denying the criminal the fruits of his endeavours. Although the scheme outlined in the Report of the Penal Policy Review Committee for the freezing and realisation of an offenders assets has considerable attraction, the practical and financial difficulties are significant.

23. The enforcement of penalties in the field of drug offending is in the New Zealand experience, much more satisfactory than the general law relating to fines enforcement and compensation. It may well be that any further moves into the field of asset stripping will be based on that experience and legal structure.

PROTECTION OF CULTURAL PROPERTY

A Paper prepared by the
HON. J.K. McLAY, MP
Attorney-General and Minister of
Justice of New Zealand

In recent years the concern of governments to protect their national heritage has produced legislation designed to restrict or forbid the export of objects of national cultural significance. A 1980 survey by Lyndel V. Prott and Patrick J. O'Keefe of 124 jurisdictions showed that 106 had some legislative control over export. The penalties for illegal export, they found, ranged from fines to forfeiture of the objects concerned. Some jurisdictions also provided for other penalties such as imprisonment.

2. This legislation has been prompted not only by considerations of national pride but also by the belief that the cultural property of a nation is a part of the heritage of mankind and therefore to be protected at all times. In particular, cultural property is seen to have an important contribution to make in achieving a better understanding between peoples in the cause of peace.

3. In accordance with these developments various initiatives have been taken in the international community, particularly through UNESCO, in establishing measures for the preservation of cultural property and the prevention of illicit dealing in cultural property. In 1964, in recognition of the fact that many emerging nations had been subjected to a systematic denudation of their cultural heritage by agents operating on the increasingly lucrative world art market, UNESCO passed a recommendation on the illicit import and export of cultural property. This recommendation received widespread support from the international community and was later strengthened by the adoption in 1970 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Convention requires all participating countries to collaborate with one another in securing the return of illicitly exported cultural property. Unfortunately, however, while most countries agree with the principles and objectives of that Convention it has not been widely accepted because of administrative and legal problems foreseen by some States in its implementation in their domestic law.

4. In the absence of international co-operation backed up by agreed legal measures, purely domestic legislation may be of limited efficacy in curbing the illicit transfer of cultural property or securing its return. The problems are well illustrated in recent litigation involving the Government of New Zealand (Attorney-General for New Zealand v. Ortiz [1982] 3 All.E.R. 432, 451).

5. The Ortiz case is a particularly significant one and it has undoubtedly aroused interest in the international community. It is certain to be a major precedent in the English speaking world concerning the enforcement of foreign restrictions on the export of cultural property. The case concerns the attempted recovery by the New Zealand Government of certain Maori carvings removed illegally from New Zealand. The brief facts of the case are:

In 1973 a dealer in primitive works of art purchased from the person who had found them a set of five Maori carvings. These were then illegally exported from New Zealand and were subsequently sold to Mr. Ortiz, a collector of African and Oceanic works of art. In 1978 Mr. Ortiz sent the carvings to Sothebys for auction. This came to the notice of the New Zealand Government. Three days before the sale a writ was issued claiming a declaration that the carvings belonged to the New Zealand Government and seeking an injunction to prevent the sale or disposal of them. In the face of the writ, it was agreed that Sothebys would not include the carvings in the sale but would hold them pending trial or further order. Two points have been tried in the English Courts as preliminary issues:

- (a) whether, on the facts as alleged, the New Zealand Crown has become the owner and is entitled to possession of the carvings pursuant to the relevant New Zealand legislation, and

- (b) whether in any event the provisions of such legislation are unenforceable in England as being foreign penal, revenue, and/or public laws.

6. The High Court in England found in favour of the New Zealand Government on these two issues but the English Court of Appeal subsequently reversed that decision. An appeal is now pending to the House of Lords on these two points and therefore, as the matter is sub judice, it is not possible to discuss the case in any detail.¹ However, the general principles upon which New Zealand is trying to protect its cultural property and some of the matters canvassed in the decisions will be of interest.

7. Both courts spent considerable time upon the construction of the New Zealand legislation (the Historic Articles Act 1962 and the Customs Acts of 1913 and 1966). In respect of the first issue the essential question for the Courts was whether the forfeiture provisions in s.12 of the 1962 Act provided for automatic vesting of title in the Crown or whether seizure or perhaps condemnation of the goods was a condition precedent to the passing of title. Section 12 reads as follows:

"Application of Customs Act 1913 -

"(1) Subject to the provisions of this Act, the provisions of the Customs Act 1913 shall apply to any historic article the removal from New Zealand of which is prohibited by this Act in all respects as if the article were an article the export of which had been prohibited pursuant to an Order in Council under section 47 of the Customs Act 1913.

"(2) An historic article knowingly exported or attempted to be exported in breach of this Act shall be forfeited to Her Majesty and, subject to the provisions of this Act, the provisions of the Customs Act 1913 relating to forfeited goods shall apply to any such article in the same manner as they apply to goods forfeited under the Customs Act 1913.

"(3) Where any historic article is forfeited to Her Majesty pursuant to this section, it shall be delivered to the Minister and retained in safe custody in accordance with his directions:

"Provided that the Minister may, in his discretion, direct that the article be returned to the person who was the owner thereof immediately before forfeiture subject to such conditions (if any) as the Minister may think fit to impose".

8. The interpretation of the forfeiture provision was important because the carvings were never seized or condemned pursuant to the New Zealand legislation. The New Zealand Government argued that the legislation provided for automatic forfeiture. If this construction had been accepted then, by the domestic law of New Zealand, the carvings became the property of the Crown when they were exported. As they were within New Zealand at the time of their export, they were within the territorial jurisdiction of the New Zealand legislature at the moment when the forfeiture took effect. Therefore the New Zealand Crown became the owner of the carvings while they were still in New Zealand.

9. The defendants argued that forfeiture under the legislation only took effect either on seizure or later on condemnation and that the New Zealand Government had no claim because neither of these acts had taken place.

10. The High Court Judge concluded that the words "shall be forfeited" are equally capable of meaning shall be forfeited automatically or shall be liable to forfeiture. In the light of this ambiguity, the Judge considered the purpose of the New Zealand legislation which, he concluded, pointed firmly in favour of automatic forfeiture as the intention was to provide for the protection of certain cultural property and to control its removal from New Zealand.

1. The House of Lords subsequently dismissed the Government's appeal and affirmed the decision of the Court of Appeal: See Attorney-General of New Zealand v. Ortiz [1983] 2 W.L.R. 809(H.L.).

11. The Court of Appeal disagreed and found that the words provided for conditional forfeiture. The Court also found that it was not entitled to adopt the purposive approach to construction as there was no ambiguity in the meaning of the words.

12. Lord Denning M.R., went further than his brother Judges and challenged the jurisdictional basis of automatic forfeiture laws. In his view, automatic forfeiture in this case would have extra-territorial effect and that would be contrary to international law. Therefore, Lord Denning reasoned, the New Zealand Parliament could not have intended forfeiture to be automatic.

13. The resolution of the first issue of the English Courts therefore turned on a question of statutory interpretation. While the point will not necessarily be relevant in respect of the legislation of other States, it would indicate the need for a State to ensure that its law is capable of establishing title to the object in question beyond all doubt. An export prohibition simpliciter is unlikely to be effective where the object has in fact been illegally exported. At the very least it would seem that such laws must provide for automatic forfeiture. In New Zealand's case the Historic Articles Act 1962 has now been replaced by the Antiquities Act 1975 which provides that any artefact found in New Zealand after the commencement of the Act is to be prima facie the property of the Crown.

14. The Court of Appeal in considering the second issue (the enforceability of the New Zealand statute) held that the Crown's title to the carvings should not be enforced because (per Ackner and O'Connor LJJ) the New Zealand legislation is a penal law or because (per Lord Denning M.R.) it is a public law. Ackner LJ was influenced by the fact that the effect of the forfeiture provisions in the New Zealand legislation would be to deprive Mr. Ortiz of a valuable article without any compensation. The New Zealand Government had argued on the other hand that the purpose of the legislation was not punishment or the vindication of public justice but rather to ensure that New Zealand retained its cultural heritage within its territory. This argument was accepted in the High Court, where it was said:

"Comity requires that we should respect the national heritage of other countries, by according both recognition and enforcement to their laws which affect the title to property while it is within their territory. The hope of reciprocity is an additional ground of public policy leading to the same conclusion."

15. It is this second issue which will be of most interest when the case comes before the House of Lords.

16. Clearly, there are arguments why a court should recognise and enforce foreign legislation designed to protect cultural property, viz:

- (a) the "revenue, penal, and other like laws": exception ought not to be applied to legislation of the kind under consideration;
- (b) the need for reciprocity: General reciprocity would greatly improve the protection of the cultural heritage of all states;
- (c) international comity: Lord Denning M.R. said in the Ortiz case [1982] 3 All.E.R. 432,460: "The retrieval of such works of art must be achieved by diplomatic means. Best of all there should be an international convention on the matter where individual countries can agree and pass the necessary legislation".

17. More generally, while considerable work has been done in this area at the diplomatic level, particularly through UNESCO, and while there is general agreement in the international community about the principles at stake, it has been more difficult to formulate effective legal measures to combat the illicit traffic in cultural property. Though the 1970 Convention represents an important step in this direction, States have found problems in implementing it. The Courts of individual States therefore have an important role to play in developing the law to meet the needs that have arisen.

18. The Ortiz case is very much a test case. Its outcome will no doubt have a significant bearing on future attempts by States to recover historic and cultural property

smuggled out of their territory. The case has already highlighted the problems involved and the need for some form of international legal co-operation in this area.

19. If the Commonwealth is to take an initiative a number of further questions are raised:

- (a) Is there a need for a generally accepted definition of what constitutes "Cultural heritage and cultural property"? How is this to be defined?
- (b) What is the position of the bona fide purchaser? Should there be provision for fair compensation irrespective of questions of strict legal title? Should the fact that the purchaser of a cultural object acted in good faith affect negotiations for its restitution or return?
- (c) Is the adoption of a set of principles sufficient? If legal machinery is necessary to back up such principles then what form should this take? Is a formal Convention required or would a less formal arrangement suffice, under which member States agree to give effect to one another's domestic legislation on the protection of cultural property?
- (d) Should any arrangement have retroactive effect and if so how far back in time should it extend? It is arguable that some objects taken illegally from a State many years ago may be of such national importance that they should be returned notwithstanding the passage of time.
- (e) Under such an arrangement should States to which smuggled objects are removed be under an obligation to seize and return such objects or simply to provide a forum for the country of origin to have its case heard?
- (f) If States are to recognise and enforce foreign legislation dealing with the export of cultural property, what safeguards are required to prevent unreasonable claims by States based on such legislation? Is there a need for all such legislation to be cast in certain standard terms before another State court is required to give judicial recognition to it or should there be a residual discretion in such courts to refuse recognition and enforcement in any extreme situations?
- (g) Should there be any residual obligations placed on States once cultural property has been returned to them? Should they be required to make such objects available for public inspection in recognition of the principle that such objects are part of the heritage of all peoples and as such are an important aid to international understanding?
- (h) Finally, and perhaps most importantly, is the Commonwealth in a better position to deal with the problem of illicit traffic in cultural property than other international forums such as UNESCO, where the results achieved perhaps do not match the considerable amount of work that has been done? While the problems are inherently difficult, there are grounds for hope that a smaller, more closely knit group of States may have somewhat better success.

20. All countries must express deep concern at the continuing illicit traffic in cultural property. The difficulties that New Zealand has encountered in its attempt to recover the Maori carvings should be a matter of concern to all, as should the similar difficulties found by other member States in trying to recover many of their historic and cultural articles. In the Ortiz case, quite apart from the inherent importance of the panels themselves, the legal issues involved are of fundamental importance. Only through international co-operation backed up by effective legal machinery can these issues be satisfactorily resolved in the long term. It is to be hoped that the Commonwealth can make an important contribution.

**MUTUAL ASSISTANCE IN CRIMINAL MATTERS:
A COMMONWEALTH PERSPECTIVE**

Memorandum by the Commonwealth Secretariat
and a paper by Dr. DAVID CHAIKIN, Director
of the British Institute of Securities Laws;
Lecturer in Law at the London School of Economics,
London University and the COMMONWEALTH SECRETARIAT

The annexed paper by Dr. D.A. Chaikin and the Commonwealth Fraud Officer addresses problems of concern to Commonwealth Law Ministers both at Winnipeg in 1977 and at Barbados in 1980.

2. The paper was prepared by Dr. Chaikin and the Commonwealth Fraud Officer as a discussion document. It analyses the law relating to jurisdiction in criminal matters and then examines the various procedures whereby one country may provide judicial and non-judicial assistance to another in the investigation and prosecution of crimes. Given the importance that Commonwealth Law Ministers attached to international economic crime at Barbados in 1980 the paper tends to concentrate on mutual judicial assistance in matters relating to commercial crime. However, the analysis of law and practice is relevant to other areas of ordinary criminal law offences. Finally, the paper explores the various approaches which may be taken within the Commonwealth to foster and improve mutual assistance in criminal matters.

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ANNEX to LMM(83)29

**MUTUAL ASSISTANCE IN CRIMINAL MATTERS:
A COMMONWEALTH PERSPECTIVE**

By Dr.DAVID A. CHAIKIN,
Director of the British Institute of
Securities Laws;Lecturer in Law at the
London School of Economics, London University
and the COMMONWEALTH SECRETARIAT

Introduction

Commonwealth Law Ministers have always given attention at their meetings to matters involving mutual assistance in the administration of justice. However, except with regard to the Commonwealth Scheme for the Rendition of Fugitive Offenders and special areas such as international commercial crime and international child stealing, little attention has been given to the general subject of mutual assistance in criminal matters. Given the common legal traditions of most Commonwealth countries and the close bonds that bind the Commonwealth together, this is perhaps surprising.

2. The number of cases involving other jurisdictions in the detection, investigation, prosecution and enforcement of judicial orders must have increased dramatically as this century has progressed. Developments in communication, technology, transportation and the increased mobility of individuals, companies and capital have all contributed to a situation where the conception and commission of ordinary criminal law offences involve two or more different jurisdictions. Few jurisdictions, inside or outside the Commonwealth, have

profits of over \$40 million in the Montreal urban community in 1976. The researchers were of the view that although a 1980 amendment to the Canadian Criminal Code, when proclaimed could be an effective tool in dealing with loansharking activities, there was still room for improvement in that area, and gave as an example the fact that the amending Bill did not deal with the taking over by loan sharks of legitimate business.

It was found that there was a tendency for the courts to treat gamblers leniently, partly because the gambling laws permit and even encourage certain types of gambling under certain circumstances, and also because gambling cases are not presented to the courts as one part of a possible multi-faceted criminal enterprise. Labour corruption was regarded as being less common in Canada, however this type of corruption could increase beyond its current level, since historically social and criminological phenomena often appeared in the United States several years before they were visible in Canada.

In examining the activities of motorcycle gangs, the report pointed to the profitability of the legal activities undertaken by gang members, and lamented the fact that the criminal law did not focus on the activities of the gang itself, but rather on the activities of the individuals who form part of that gang. It was found that "white-collar" crimes are very lucrative, so that if the estimated losses to business which was projected by United States law enforcement authorities (valued at three per cent of the gross National Product) were applied to Canada, this would amount to \$6.3 billion annually. It was also felt that the incidence of this class of crime, namely: stock market frauds, fraudulent bankruptcies, frauds on Government and computer crimes was bound to increase, because of the increased opportunities provided by the growing complexity of the economic system and an increasing reliance on technology.

Finally under this head, the report examined various ways in which "laundering" of money obtained by crime takes place in order that it be made to appear that it was obtained legally, and its subsequent investment in legitimate business enterprises. As a secondary activity which flows from prior criminal activity, the researchers found that the criminal justice system is mainly directed towards the predicated criminal offences to the exclusion of these secondary activities, and warns that if left unchecked, these avenues could be used to monopolise complete sectors of the economy and to influence and corrupt politicians.

(b) Existing Criminal Law in Canada

The report states (not altogether surprisingly) that nothing in existing Canadian criminal law is expressly designed to provide for the types of remedies needed for the forfeiture of illicit profits on conviction. It points to a number of provisions in the Criminal Code which are designed only to remove from the hands of convicted persons, objects whose possession is unlawful, but all those mentioned are tangible objects. And even the general forfeiture provision contained in section 446 of the Criminal Code itself was seen to refer to a tangible and portable object. Intangibles, such as shares in a company, or an interest in a partnership or money in a bank account cannot be forfeited. Similarly things which are not portable, (i.e., capable of being brought before a Justice) such as real estate do not appear to fall within the terms of the section.

(i) Narcotic Control

Under the provisions of the Narcotic Control Act there is a limited power to forfeit the proceeds of illegal narcotic sales, for a police officer may seize any thing by means of or in respect of which he reasonably believes an offence under the Act has been committed, or any thing which may be evidence of the commission of such an offence. Since the primary purpose of such seizure is to gather evidence for the prosecution of the accused, it would seem that only things which are capable of being tendered in evidence may be seized. Moreover the Report points out that since the language of the Act appears to require proof that the actual bills seized were obtained from the purchaser of the narcotics; a money order, into which the cash had been converted could not be seized, with the result that large quantities of cash seized from persons who have been convicted of drug trafficking or importation, frequently had to be returned to the accused or his lawyer.

(c) Application of RICO to Canada

The researchers identified certain advantages, disadvantages and difficulties in implementing a statute similar to RICO in Canada. It was felt that it would be an advantage to be able to focus criminal proceedings on an organisation rather than on an individual as at present, and that this could be effectively used to combat the use or acquisition of legitimate business enterprises by persons involved in criminal activities. They also regarded the forfeiture provisions as helpful to the State, both as a means of removing the profit incentive from criminal activity and of depriving organised crime of its ill-gotten gains, and also in permitting the State to recover from criminal organisations at least part of the cost of investigations and prosecutions. The civil forfeiture provisions of RICO were also considered to be advantageous as they allowed action to be taken in cases where the evidence was insufficient for a criminal prosecution, they compensated the victim, worked as an economic punishment to the accused and most importantly they prevented the unjust enrichment of the individual.

The disadvantages were considered to be the cost in court time and money of prosecutions, and the constitutional difficulty which could be encountered because of the absence of jurisdiction in the Federal Government either, if civil forfeiture provisions were passed on their own, or if they were engrafted on to the criminal provisions as part of the penalty. The researchers perceived one area of particular difficulty in the high burden of proof placed on the Crown to prove the origin of funds involved in racketeering activity since the "tracing" of the money back to the criminal activity is well nigh impossible. In order to obviate this difficulty the Report recommended the introduction of a reverse-onus provision, which would place on the accused the burden of proving on the balance of probabilities that the money was not derived from racketeering activity once the Crown had demonstrated that the accused had participated in racketeering, and had accumulated assets of substantial value during that period.

(d) Recommendations of Evaluators

The Report found that the RICO statute had the potential to become an effective weapon in the fight against crime, because it provided the prosecution with a novel way of illustrating to the court and the public the economic underpinnings of organised crime, and recommended that Canada adopt similar legislation. The enactment of the RICO Statute as a separate piece of legislation did not find favour, it was recommended instead that the new legislation be incorporated into the Criminal Code. The Researchers did not favour the adoption of the Civil provisions, and warned that since the possibility of inappropriate or abusive prosecutions will always exist, consideration should be given to a requirement that the Attorney-General of a Province or his deputy must consent to any such prosecution. This last recommendation is one which requires careful consideration if the lack of investigatory support is not to detract the attention of the police away from the "leaders" to the "small men".

CHAPTER SIX: AUSTRALIAN EXPERIENCE

(a) Introduction

Recent amendments to the Customs Act of Australia, and in particular those effected by the Customs Amendment Act, 1979 (No.92) have greatly strengthened the hands of the law enforcement agencies in that country, by introducing stricter methods of investigation and proof, and tougher methods of seizure and confiscation for offences relating to narcotic drugs. The use of listening devices has been authorised, subject to certain safeguards which are designed to protect the right of the citizen; the forfeiture proceedings have been strengthened by shifting the burden of proof; and stringent provisions are made for confiscating the indirect proceeds from dealings in narcotic drugs by the recovery of pecuniary penalties.

The subjective territorial principle gave jurisdiction to the State where the actor was physically present at the time of the crime. The second extension, called the "objective territorial principle", established that a State has jurisdiction over crimes commenced outside the State but consummated within its territory. The "objective territorial principle" gave jurisdiction to the State where the "harmful effects" or the prohibited conduct were felt. Although it is recognised in the common law States, such as the United Kingdom⁴ and the United States,⁵ as well as in the civil law system, there is considerable disagreement as to its scope. Section 18 of the American Restatement of Foreign Relations Law (Restatement)⁶ confines the objective territorial principle to effects that are direct, foreseeable and substantial. It is arguable that this formulation is too open-ended and allows the State to assume jurisdiction where economic or social ulterior effects occur within its territory. Professor R. Jennings⁷ and other commentators contend that the objective territorial principle applies only where the effects are a "constituent element" or legally essential element of the offence. Any effect which is not a functional requirement of the crime must be "ex-hypothesis neutral and irrelevant". Unless the objective territorial principle is so restricted, it is submitted that the principle would lose its territorial character and will become an excuse for asserting universal or protective jurisdiction.

(ii) The Protective or Security Principle

17. The protective principle or the principle of security is a claim that a State has jurisdiction over crimes committed abroad which are directed against certain interests of the State. The jurisdiction for the protective principle lies in the inadequacy of a national law in punishing offences within its territory which are directed against the vital interests of other States. Offences within the ambit of this principle include attacks on the security, credit, political independence and territorial integrity of the State. The counterfeiting of a State's currency and seals and the falsifications of its official documents are, perhaps, the clearest example of the application of the protective principle.

18. Whilst the United States and the United Kingdom prefer the territorial and national basis of jurisdiction, other States have extensively relied upon the protective principle. The Harvard Research observed that there is a tendency to extend the application of penal law to punish political crimes committed by aliens abroad. This has led to a controversy over the propriety of the protective jurisdictional principle. It seems that the principle is open to abuse, and yet there is no generally recognised limitation on its application.

(iii) The Active Personality or Nationality Principle

19. It is universally accepted that a State has practically unlimited jurisdiction with respect to crimes committed outside its territory by a natural person or by a corporation which has the nationality of the State. The justification for basing jurisdiction on nationality is that a national owes allegiance to his State and that a State's treatment of its nationals is not a matter of concern to other States or to international law.

20. Although the nationality of an individual is conferred by the law of the State,⁸ there must exist a genuine link between the State and the individual.⁹ It has been suggested¹⁰ that the nationality of a corporation is in a similar position as an individual. However, there are differing views as to the national character of a corporation. Article 27 of the Restatement provides that the corporation has the nationality of the State which creates it. This proposition reflects the Anglo-American view of nationality of a corporation. On the other hand, the Harvard Research shows that most other States consider the nationality of a corporation as determined by the location of its seat or chief officer whilst a few States ascribe the nationality to where the corporation's principal activity takes place. The process of ascribing nationality is further complicated because States adhere to different and sometimes conflicting theories of corporate personality. The United States legislature¹¹ and courts assert jurisdiction over a corporation which is created in a foreign country where either the corporation has substantial links with the United States and its citizens, or is subject to the control of nationals of the United States. Other States are much less willing to "pierce the corporate veil". For example, the British Government¹² has emphasised that the separate legal personality of the parent company and its subsidiary, and the corporation itself and its shareholders, should be respected when applying doctrines of jurisdiction.

21. Another problem is that a conflict may occur between the territorial principle and the nationality principle. The conflict may exist if the laws are different or even if the laws are the same. For example, where more than one State determines that a corporation is its national, there may be multiple jurisdictions. It has been argued that the territorial principle must always prevail and that extra-territorial jurisdiction concepts, such as the

nationality principle, cannot be exercised to "contradict the local law at the place where the alleged offence was committed." This position does not rely on any international law principle as such, but rather provides the only solution which is not destructive of justice and international intercourse.

(iv) The Passive Personality Principle

22. The passive personality principle endows jurisdiction on a State for crimes committed by any person outside the territory if the victim of the crime is one of its nationals. It has been doubted whether this principle exists as a separate basis of jurisdiction. It is difficult to justify the principle except in so far as it is subsumed under the protective principle. It is submitted that although a State has an interest in the treatment of its nationals in a foreign State an attack on such nationals should not per se justify a State's intervention unless the nationality of the victim is the reason for the criminal conduct and not where it is merely incidental to the crime.

23. English and American courts have regarded the passive personality principle as contrary to international law. In R. v Jameson¹³ Lord Russell C.J. stated that international law requires a sovereign power to respect "the subject and the rights of all sovereign powers outside its own territory." Applying this view, the passive personality principle may be seen "at variance with the principle of the exclusive jurisdiction of a State over its own territory, but also with the well settled-principle that a person visiting a foreign country ... falls under the dominion of the local law".¹⁴

24. On the other hand, the penal codes of continental countries have provisions relying on the passive personality theory. In these States the passive personality theory is merely a subsidiary or auxiliary ground for assuming jurisdiction. Moreover, these States have restricted the passive personality principle to offences threatening the national's life, bodily well-being, health or liberty.

25. The principle of passive personality is not positively supported by international cases and authorities.¹⁵ However, although the principle has not gained general acceptance this does not mean that it is contrary to international law principles. It should be reiterated that the Lotus case indicated that States have a presumptive freedom of action unless there is an express prohibition founded on a rule of international law.

(v) The Universality Principle

26. Universal jurisdiction is a claim to jurisdiction over certain crimes against the international order. A State may assert jurisdiction over universal crimes if the criminal is found within its territory. The universal principle is of a residuary nature in that it is only relevant where the municipal criminal law of the State does not apply to the offence by virtue of the other principles of jurisdiction

27. It is well settled that it is a customary rule of the law of nations that there is universal jurisdiction to punish pirates. In Re Piracy Jure Gentium¹⁶ the Privy Council held that jurisdiction over pirates extends to piracy on the high seas and on any ship because a person guilty of such piracy has placed himself beyond the protection of any State. There are also other crimes which are founded in treaties that are subject to the principle of universality. For example, the International Convention for the Suppression of Currency Counterfeiting of April 1929, the Convention for the Prevention and Punishment of Terrorism of November 1937 and the Convention for the Suppression of Unlawful Seizure of Aircraft of September 1970 may be regarded as creating universal crimes. However, an English court has no universal jurisdiction over such crimes until an English statute¹⁷ is passed pursuant to the convention.

28. Finally, the universality principle by its very nature only applies to a limited number of crimes. It is of little importance in the field of economic crime, with the possible exception of counterfeiting. Nevertheless, it is submitted that there is a need for creating universal crimes particularly in the area of international maritime fraud.

C. The English Criminal Law and Jurisdiction

29. Given the pressure of time it has not been possible to examine the relevant law in other Commonwealth jurisdictions other than that of England. However, it is thought an analysis of the English law will be helpful given the influential role that it has played in the legal

systems of the majority of Commonwealth jurisdictions.

30. English criminal law has largely relied on the territorial principle in invoking criminal jurisdiction. The common law rule was that English courts enjoyed jurisdiction only in respect of conduct which took place within its territory. Professor G. Williams¹⁸ in a seminal article on jurisdiction pointed out that this rule is historically linked with the venue doctrine which required that a jury decide cases on the basis of its own knowledge of the facts, and that the jury must come from the locality in which the criminal acts occurred. Although the venue doctrine has been abolished, it is submitted that English criminal law is saddled with many jurisdictional obstacles directly emanating from its tenacious adherence to the territorial principle.

31. Under the territorial doctrine the determination of the locus or place of the crime assumes a critical importance. By answering the question "where did the crime take place?", one should be able to automatically decide whether there is or is not jurisdiction. However, this proposition ignores the difficulty that the crime may be committed in more than one country. The classic illustration is where the defendant in country A fires a shot across the border and kills a person in country B. In international law both the State where the defendant is physically present and the State where the effects of the defendant's criminal conduct are felt would be entitled to assume jurisdiction. However, the common law viewed the elements of a crime as largely indivisible and could not really countenance the notion that a crime could be committed in two different places.¹⁹ It is partly for this reason that the case law has not adequately provided any clear general principles to deal with the problem of offences that are committed in more than one State.

32. The common law attitude to jurisdiction has also been applied to the judicial interpretation of statutes creating new crimes. Although Parliament is supreme in its legislative competence and its powers are not limited by the doctrine of territorial jurisdiction, the courts have relied on a number of principles of statutory construction to circumscribe the extension of legislative power beyond its borders. There is the well established presumption²⁰ that Parliament does not intend to criminalise conduct in places outside the territorial jurisdiction of the English courts. This presumption applies unless there are clear and express statutory words to the contrary. There is also a presumption²¹ that Parliament does not claim jurisdiction which exceeds the limits established by "the common consent of nations". This presumption is necessary for reasons of international comity. It is not commonly relied upon by English courts because England has limited its jurisdictional competence more than is required by international law. In contrast to these traditional guides to statutory interpretation, Lord Diplock²² has expressed the unorthodox opinion that where a new statutory crime is created and the statutory language does not contain any geographical limitation, then the courts should not imply such a limitation except where it is required by international rules of comity. Although Lord Diplock's opinion that the presumption of territoriality should not be invoked willy-nilly is attractive, it has not gained any acceptance from other members of the English judiciary.

33. In England, statutory extensions to the territorial principle usually rely on the nationality or sometimes the residence of the party.²³ For example, the criminal law is applied to many offences committed by Crown servants abroad²⁴ or by military service personnel outside England.²⁵ The protective principle is also utilised for offences such as perjury²⁶ and electoral bribery,²⁷ and for offences relating to revenue and exchange control.²⁸ International crimes such as piracy are also within the English jurisdictional net.

(i) English Theories of Jurisdiction

34. The writers have adopted three theories as explaining where a crime is committed.²⁹ Firstly, the initiatory theory gives jurisdiction to the place where the physical acts of the offender take place. Secondly, the terminatory theory denotes jurisdiction to the country where the consequences of the crime, or the last constituent element of the offence takes place. Thirdly, the inclusionary theory confers jurisdiction on the State where any of the constituent elements of the offence are committed.

35. The initiatory theory assumes that jurisdiction coincides with the place where the act was committed, and considers the State in which the physical acts of the offender occur has the greater interest in prosecuting the criminal offence. The terminatory theory focuses on the harms which the offender has caused, and considers the State in which the injurious effects are felt has the primary interest in accepting jurisdiction. The inclusionary theory postulates that any State in which an essential element of the offence occurs, whether this

consists of physical conduct or proscribed consequences, has an equal right to assert jurisdiction over the offence.

36. The principal argument in favour of the terminatory theory is that "the State where the last element of the crime occurs is presumably the sufferer from it, and therefore has the greatest interest in prosecuting it."³⁰ Such a State would be entitled to invoke jurisdiction so as to protect persons within its territory and to guard against unlawful acts emanating from abroad. Professor G. Williams³¹ argues that States have a mutual interest in suppressing crime and there is "generally little reason to fear that the State where the offender physically acts will remain passive, even if the ill effects are not felt within its own borders." However, States have different laws governing criminal behaviour and it is not uncommon that a State where the physical offender is present is unable to prosecute the criminal. This is particularly so with economic crimes where many States have undeveloped and inadequate laws and where legal technicalities may result in an unmeritorious acquittal.

37. The most persuasive argument in favour of the initiatory theory is that a person should only be expected to know the law of a place where he is since it would be oppressive to punish him in any other State where his conduct produced illegal consequences. It is also likely that the witnesses would be in the State claiming initiatory jurisdiction, and that in contrast to the terminatory theory, the initiatory theory avoids the necessity of extradition. Moreover, the initiatory theory is easier to apply since the principal elements of the offence are certain, and it does not entail the legal fiction inherent in the terminatory theory that a person is deemed to act at a place other than where he is. Finally, the initiatory theory accords with the legal presumption that the "criminal law regulates persons within its territory, not that it protects persons within the territory."³² It is submitted that a presumption can hardly be conclusive because the function of the criminal law is also to protect those persons within the realm.

38. Since the inclusionary theory allows jurisdiction to be accepted if either the initiatory or terminatory theory is satisfied, it will have some of the advantages and disadvantages of both these theories. The unique advantage of the inclusionary theory is that it facilitates the prosecution of offenders whenever a constituent part of the offence is committed within the jurisdiction. The application of the inclusionary theory would bring many more offences involving a foreign element within the criminal jurisdiction of English courts. Whether an expansion of jurisdiction is desirable depends largely on whether one believes that the existing narrow territorial concept is appropriate. This issue will be discussed in due course. Finally, since there is no clear authority on whether the inclusionary theory would expose the accused to double jeopardy,³³ it is submitted that there is a need for a double criminality rule in relation to offences with a foreign element.

39. The writers have been divided as to which theory of jurisdiction the English courts have preferred. Professor G. Williams maintained in 1965 that the weight of authority seemed to adopt the terminatory theory. On the other hand Mr J. Lew considered that up to 1972 the English caselaw was equally divided between the initiatory and terminatory theories, but that the decision in *Treacy v D.P.P.*³⁴ and the more recent cases have embraced the inclusionary theory. Although many of the cases may be explained in terms of these theories, the judiciary³⁵ have only on a few occasions expressly relied on these doctrines. It is submitted that the English case law is rather confusing, largely because it has extended the territorial principle under the guise of legal fictions. It will be further argued that there is a modern tendency for the courts to expand the notion of territorial jurisdiction particularly in relation to the offence of conspiracy abroad to commit crimes in England.

(ii) Conduct and Result Crimes

40. Jurisdictional notions may be best understood by classifying offences as either "conduct crimes" or "result crimes".³⁶ Conduct crimes are offences in which the constituent elements of the *actus reus* include only the physical acts of the offender as well as, when relevant, the surrounding circumstances in which they take place. A conduct crime is completed once the physical conduct occurs. In a conduct crime jurisdiction lies where the conduct of the offender takes place. Once the crime is completed any consequential results are irrelevant, and jurisdiction cannot be invoked in the place where the results are affected. In contrast, a result crime is one where the essential constituent elements include not only the conduct of the offender but also the proscribed consequences of those physical acts. A court has jurisdiction over a result crime if any part of the proscribed result takes place within the territory.

41. A major difficulty is determining whether a specific crime is a conduct crime or is a result crime. Disagreement over this question in relation to the offence of blackmail resulted in a division of opinion in the House of Lords in Treacy v D.P.P.³⁷ In Treacy the defendant posted in the Isle of Wight a letter demanding money with menaces addressed to a Mrs X. in West Germany. In these circumstances the House of Lords had to decide whether the English court had jurisdiction to try the defendant for the charge of blackmail contrary to section 21 of the Theft Act 1968. Lord Hodgson,³⁸ with Lord Guest³⁹ in agreement, held that the writing and posting of a threatening letter in England constituted making a demand with menaces, and thus the English court had jurisdiction over the offence. In contrast, Lord Morris⁴⁰ and Lord Reid,⁴¹ in dissent, considered that the demand was made in Germany when it was received by the victim, and therefore there was no jurisdiction. Finally, Lord Diplock⁴² thought that even if the offence of blackmail was not completed until the victim received a threatening demand, nevertheless, this did not affect the right of the State to try the offence.

42. The decision in Secretary of State for Trade v Markus⁴³ provides a clear illustration of a result crime. An English company was established for the purpose of selling shares in an investment trust, the latter being managed by a Panamanian company. Agents of the English company visited investors in West Germany, showed them misleading brochures, and then transmitted signed application forms to London. Applications were "processed" in London only after the investor's money was deposited in a Swiss bank. The managing director of the English and Panamanian companies was charged with fraudulently inducing the investment of money, contrary to sections 13(1)(b) and 19 of the Prevention of Fraud (Investments) Act 1958.

43. The main bone of contention in Markus was whether the English court had jurisdiction with respect to the offence under s.13(1)(b). This provision contains two distinct and separate offences:

- (a) inducing a person by misleading, false or deceptive statement to take part in any arrangement for the investment of money, in property other than securities; or
- (b) inducing a person by such a statement to offer to take part in any such arrangement.

44. In Markus it was clear that the inducement, the offer to take shares and the payment all took place in Germany. It followed that the offence of "offering to take part in an arrangement" was completed in Germany and was not justiciable in England. However, the House of Lords held that this offence was not mutually exclusive from the "offence of taking part in an arrangement". The Law Lords agreed with the opinion of Lord Widgery C.J. in the Court of Appeal⁴⁴ that although an offer had been made by investors in Germany and the processing of the papers was conditional on such an offer being made, this did not preclude the prosecution from charging the offence of taking part in the arrangement. The court held that it had jurisdiction over the latter offence because the victims had not become parties to the arrangement until the application form had been processed in London.

45. Lord Diplock in the Markus⁴⁵ case explicitly adopted the conduct/result crime classification. He described both the offences in section 13(1)(b) as result crimes and concluded that jurisdiction would lie where any of the proscribed results (that is taking part or offering) took place. It is submitted that Lord Diplock's view represents a correct analysis in that the offences are defined by reference to the behaviour of the victim as a consequence of the accused's acts.

46. The decision in Markus had been considered by Mr J. Lew⁴⁶ as an example of the court exercising "excessive jurisdiction." Mr Lew argued that since "the offender's action in England did not amount per se to a criminal offence in England,"⁴⁷ it is contrary to international law for an English court to apply its laws to acts committed in a foreign state. It is submitted that this view is misconceived because it assumes that a crime can only be committed in the place where the offender is present and where his conduct takes place. It fails to give due weight to the important fact that the harmful consequences or proscribed results may be an essential element of the crime which is sufficient to ground jurisdiction.

47. There are special problems in determining where the proscribed results of a result crime have in fact occurred. In R. v Harden⁴⁸ the accused was charged with obtaining a valuable security by a false pretence. It was alleged that he had dispatched from England a letter

containing false pretence to a company in Jersey, which in response had sent a cheque to the fraudster in England. The Court of Criminal Appeal held that there was no offence in England because the "obtaining" occurred where the ownership of the property passed, in this case when the cheque was delivered to the post office in Jersey. The court expressly found that the defendant had agreed with the victim that the post office would act as its agent for the purpose of receipt.⁴⁹ The court assumed that its finding that the offence took place in Jersey necessarily deprived it of jurisdiction. It placed no significance on the fact that the defendant was physically present in England and the false pretences emanated from England. The argument that both Jersey and England shared jurisdiction with respect to the offence was never considered by the court.

48. Ten years later in the decision in R. v Tirado⁵⁰ the Court of Appeal refused to extend the Harden case and considerably limited its impact. In Tirado the accused had allegedly obtained money from persons in Morocco by falsely promising them employment in England. He had suggested to his victims that they send a banker's draft to him by using a Moroccan bank or by post. The court held that the offence of obtaining property by deception was justiciable in England. It refused to "take the law an inch beyond that which Harden had determined, namely that if a recipient of a valuable security wishes to show that he obtained it when it was posted to him, he has to be able to show an agreement, expressly or impliedly, whereby he had undertaken and accepted that posting should be equivalent to personal delivery so far as he was concerned."⁵¹ This is strong judicial language which suggests that the type of evidence required to establish such an agreement would need to be substantial. It will not, for example, be sufficient to rely on the contract doctrine known as the "postal rule".⁵² Thus, in Tirado the court held that since the fraudster had recommended alternative channels of communication and had been indifferent as to the method of delivery, it was open to the jury to decide that the post office was not his agent.

49. In determining the place of conduct in conduct crimes the courts are prepared to rely on legal fictions. Although a defendant may be physically present in country X, his conduct may be deemed to take place in country Y. Foreign conduct may also be considered as relevant to the commission of a conduct. For example, in Lawson v Fox⁵³ the hours driven by a lorry driver on the Continent were counted in ascertaining the existence of the offence of driving in excess of eleven hours in one day. The House of Lords said that it was irrelevant to the offence whether the conduct in France was lawful or not.

50. Finally, there is no authority as to jurisdiction with respect to crimes of omission. It is, nevertheless, submitted that the locus of criminal omissions is the place where the performance of the act is required. For example, a failure by a company to keep accounting records contrary to section 12(10) of the Companies Act 1976 would clearly give the English courts jurisdiction over the offence. This would be considered a conduct crime.

(iii) Inchoate Offences and Jurisdiction

51. Although inchoate offences are essentially conduct crimes, jurisdiction does not necessarily lie where the conduct takes place. The general rule is that jurisdiction over an inchoate crime belongs to the State that would have had jurisdiction if the substantive offence had been consummated.⁵⁴ The justification for this exception to the territorial principle seems to be that an English court is not prepared to hear evidence on questions of foreign criminal law.

52. The general principle is illustrated by the decision in R. v Governor of Brixton Prison, ex parte Rush⁵⁵ in which an application for extradition to Canada was refused in circumstances where the defendant was charged with conspiracy to defraud the public of \$100 million. The evidence showed that the defendant and others had sent circulars and letters from Canada to investors resident outside Canada. The latter were invited to become shareholders in two companies controlled by the applicant and to send cheques to post office boxes in Nassau or Panama. These cheques later were either transferred to Toronto or paid into a Nassau bank account. It was alleged that fraudulent attributes were given to the shares in these companies. The Divisional Court held that there was no offence of obtaining valuable securities by false pretences in Canada since these securities were obtained either when the cheques were put into the post, or at latest when received in Panama and Nassau. Since the indictable offence which they conspired to commit was completed when the cheques were obtained, no offence had been committed in Canada.

53. Similarly, a conspiracy to commit a crime abroad is not triable in England unless the contemplated crime is justiciable under English law. In Board of Trade v Owen⁵⁶ the

House of Lords held that a conspiracy formed in England to defraud a German export control department in Germany was not an offence in England. Lord Tucker observed that:

"... a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here ... It necessarily follows that a conspiracy of the nature of that charged (that is to defraud) - which, in my view was a conspiracy to obtain a lawful object by unlawful means, rather than to commit a crime - is not triable in this country since the unlawful means and the ultimate object were both outside of jurisdiction."⁵⁷

54. It is respectfully submitted this statement fails to take into account that a conspiracy to defraud, unlike other inchoate offences, may have an object that is not a substantive criminal offence.⁵⁸ It follows that jurisdiction over conspiracy to defraud should not be predicated on whether the object of the conspiracy is triable in England.

55. The general rule considered in Owen may be subject to certain exceptions. Lord Tucker in Owen⁵⁹ thought that a conspiracy in England to violate the laws of a foreign state might be indictable here if the performance of the conspiracy would produce a public mischief in England or injure a person in England by causing him damage abroad. The scope of this exception has not been tested. The exception is so widely worded that it may swallow up the rule. For example, it may be argued that a conspiracy to defraud English resident shareholders of a foreign company, which is not carrying on business in England, would fall within the rubric of the exception.

56. Another exception, supported by the decision in R. v Kohn⁶⁰ is that where a conspiracy formed in England contemplates the possibility that the crime may be committed within jurisdiction, then, even though the conspiracy is completely performed abroad it is justiciable in England. Thus, in Kohn, the court decided that a conspiracy formed in England to scuttle a Prussian ship with the object of defrauding Belgian insurance underwriters was indictable if the conspirators envisaged that the ship might be scuttled at an English port or within English territorial waters.⁶¹

57. The reverse situation is where a conspiracy is entered abroad to commit a crime in England. Professor G. Williams⁶² considers that such a conspiracy is a logical corollary to the Owen principle and would be justiciable in England, whilst on the other hand it has been argued that this would constitute a claim for extraterritorial jurisdiction which would be lawful only if it is based on an express statutory enactment. Unfortunately, there is no direct authority on the point, and it is submitted that the relevant principles, if any, have been obscured by the judicial inclination to resort to convenient but unsatisfactory legal fictions.

58. In R. v Baxter⁶³ the defendant in Northern Ireland posted fraudulent football pool claims to promoters in Liverpool. On a charge of attempting to obtain property by deception, it was held that the English court had jurisdiction on two alternative grounds. Firstly, the attempt was "still in being" when the fraudulent letters were received in England. Secondly, when a person "dispatches a missile" and arranges for its transport and delivery (these constituting an essential part of the attempt), he commits part of the crime within jurisdiction. The first explanation relies on a legal fiction that conduct may "constructively" be deemed to occur in a place where the defendant is not physically present. The second reason implicitly introduces the notion of "effects-based" jurisdiction, but does not impose any coherent limits on its application. It is submitted that these alternative explanations are inconsistent with each other in that the first suggests that attempt is a conduct crime and the second insinuates that attempt is a result crime.

59. In D.P.P. v Stonehouse⁶⁴ the defendant fabricated his death by pretending to drown in Miami with the intention that his wife would be able to claim on an insurance policy in England. The defendant was convicted of attempting to obtain property by deception. The following question was certified by the Court of Appeal to the House of Lords: "Whether the offence of attempting ... to obtain property in England by deception, the final act allegedly to constitute the offence of attempt having occurred outside the jurisdiction of the English courts is triable in an English court, all the remaining acts necessary to constitute the completed offence being intended acts necessary to constitute the completed offence being intended to take place in England." Although the House of Lords unanimously answered the question in the affirmative, it is submitted with due respect that the judgments did not directly tackle the question certified on appeal. All the judges placed special emphasis on the fact that the news of Stonehouse's death in America had been communicated by the media in England. Lord Salmon said that Stonehouse had intended to use the media as his

"innocent and willing agents" to inform his wife and insurers, and that this imparting of information was an essential part of the attempt. Similarly, Viscount Dilhorne thought that the false representations communicated by the media were analogous to false representations by post, and since they were intended to be communicated there was jurisdiction. Lord Keith and Lord Diplock seemed to have adopted the wide view of "effects-based" jurisdiction. Lord Keith considered that an offence is justiciable if the effects of the act intentionally operate or exist in jurisdiction, and Lord Diplock⁶⁵ assumed that jurisdiction over the completed crime would exist if the consequences were intended to be caused by him in England, and that this would determine jurisdiction over the inchoate crime. It is apparent that if the court in Stonehouse had addressed itself to the question which State would have had jurisdiction over the consummated offence the answer would clearly have been England, and according to the "logical corollary" of Owen, jurisdiction would lie over the inchoate offence.

60. The complex problem pertaining to jurisdiction over conspiracy is well illustrated by the case of Tarling v Government of Singapore.⁶⁶ The Government of Singapore sought the extradition of Tarling on 17 charges related to dealing in shares of two Hong Kong companies, which were owned by Haw Par Brothers International Ltd. (HPBIL), a Singapore company, and Haw Par Brothers (Hong Kong) Limited. (HPBK), its Hong Kong subsidiary. It was alleged that Tarling and other directors of HPBIL had fraudulently appropriated shares by purchasing them at below market value and selling them at a huge profit at the expense of HPBIL and HPBK. The scheme for executing the share deal was highly complicated and was neither disclosed to the independent directors of HPBIL nor to its shareholders. The House of Lords had to decide whether the English court would have had jurisdiction over the offence by hypothetically substituting England for Singapore. In relation to the charge of conspiracy to steal the House of Lords unanimously held that there was no jurisdiction. Lord Wilberforce argued as follows :

"It cannot be a crime triable (hypothetically) in England to conspire in Hong Kong to steal shares in a Hong Kong company (KD) the property of a Hong Kong Company (HPBHK). Equally clearly it cannot be a crime triable (hypothetically) in England to conspire in Hong Kong to steal shares in a Hong Kong company (KL) the property (allegedly although there was some doubt about this) of a company in England."⁶⁷

61. If the principle that jurisdiction over conspiracy to steal is the same as the substantive offence of theft is applied, it is evident that the offence of theft is only justiciable if it is committed at the place where the thief commits the act of appropriation or the place where the property is actually situated.⁶⁸ It is clear that jurisdiction cannot depend on where the owner of the property is to be found. Since there was no evidence of an act of appropriation in Tarling and since the shares of a company are located in the place of a company's registration,⁶⁹ in this case Hong Kong, there was no jurisdiction.

62. The question whether there was jurisdiction over the crime of conspiracy to defraud raises difficult issues in determining where the defrauding or proposed defrauding took place. The charge of conspiracy in Tarling was framed so as to obviate the jurisdictional obstacles. The indictment in Tarling alleged that the conspiracy consisted of the dishonest concealment of the disposal of shares belonging to HPBIL for the personal benefit of the directors with the intention of preventing the shareholders from requiring the directors to account for the profits. The House of Lords were divided on whether the indictment contained a justiciable offence. Lord Salmon⁷⁰ held that this charge should fail on exactly the same jurisdiction grounds as the charge of conspiracy to steal. The other three Law Lords applied the principle in D.P.P. v Doot,⁷¹ which had held that a conspiracy formed abroad to commit an offence in England is triable if acts in furtherance of the conspiracy were performed in England. Lord Wilberforce⁷² and Lord Keith considered that as there was no evidence of overt acts in Singapore in furtherance of the conspiracy to bring the case within the principle in Doot, the offence was not justiciable. On the other hand, Viscount Dilhorne expressly and Lord Edmund-Davies impliedly found sufficient evidence of overt acts so as to make the crime justiciable. Viscount Dilhorne considered that the continuing omission to reveal to shareholders the true state of affairs and the false representations made in the annual report of HPBIL were evidence of overt acts. However, Viscount Dilhorne did not base his decision on the so-called "overt acts" approach because he regarded the alleged overt acts as irrelevant averments in the indictment. Viscount Dilhorne relied on the principle that "the conspiracies formed in Hong Kong were directed to the law of Singapore, to deprive a Singapore company of assets it held itself and held by a wholly-owned subsidiary." This statement implies that jurisdiction over the offence of conspiracy to defraud is determined by the geographical location of the victims of the fraud. If this is correct, it is submitted that jurisdiction over such a conspiracy is considerable since at the

time of the fraud the victims may be located in more than one country.

(iv) Law Reform

63. It is generally agreed that the law relating to jurisdiction over criminal offences in England is neither clear nor logical. The Law Commission Report on The Territorial and Extraterritorial Extent of the Criminal Law⁷³ represents one attempt to clarify the present law. This report adopts the inclusionary theory of jurisdiction, a theory of which Lord Diplock has been its greatest advocate. The Report recommends that :

"Where any act or omission or any event constituting a prescribed element of an offence occurs in England or Wales, the offence should be deemed to have been committed there, even if other elements of the offence take place outside England and Wales."⁷⁴

64. The report rejects the notion of adopting the general rule of jurisdiction based on harmful effects because such a claim for jurisdiction would invite similar claims by other countries,⁷⁵ some of which have different conceptions of public policy. It is submitted that this argument has no empirical support, and, indeed, ignores the fact that many countries already claim extended jurisdiction on the widest grounds. The report favours a pragmatic approach in determining whether jurisdiction based on "harmful consequences" should be asserted for a specific crime and argues that "much must depend on the policy underlying the particular offence." It is clear from the previous discussion of the case law that the courts have been reluctant to ascertain the policy behind criminal offences and have preferred instead to apply legal fictions. It is thus difficult to see why the courts would take a policy-orientated view of jurisdiction in the future.

65. The appropriateness of the territorial principle as a comprehensive doctrine of jurisdiction may be questioned. It has already been mentioned that the historical conditions surrounding the development of the territorial principle are markedly different from today. The territorial principle was developed at a time when criminal conduct was locally based and when corporations did not have a predominant role in international life. Furthermore, the territorial principle is becoming increasingly irrelevant for the following reasons. Firstly, international criminals have transnationalised their activities, thus necessitating the introduction of new extraterritorial offences. Secondly, the growth of evasive activity with international links has meant that there are large loopholes in national criminal laws. Thirdly, the movement of the loci of power to transnational corporations has created special problems in enforcing criminal laws. Fourthly, the internationalisation of the world's capital markets has permitted new opportunities for international frauds which have only slightly discernible territorial connections with any one country. It is submitted that greater reliance should be placed on other principles of criminal jurisdiction, such as the nationality principle and the protective principle. The nationality principle avoids the difficulty of a court sitting in judgment on nationals and officials of another country, whose activities may not be criminal in the latter country. It is also an effective way of solving the problem of jurisdiction in relation to criminal offences committed by English nationals or corporations registered in England. This solution would be in accordance with the practice of the civil law States which claim extraterritorial jurisdiction based on the nationality principle.

D. United States Anti-Fraud Laws

66. The attitude of the English courts to questions of jurisdiction is irrespective and this is reflected in the attitudes of the prosecution authorities and the police. The judicial and police authorities in most Commonwealth jurisdictions appear to take a similar view. However, the position in the United States of America may usefully be contrasted with this restrictive approach. There is some evidence that United States jurisprudence in this matter is gaining more respect in certain Commonwealth countries and, of course, many Commonwealth countries have to contend with the problems faced by the United States authorities taking such a robust attitude to matters of jurisdiction and in particular the extraterritorial application of their laws. In briefly examining the relevant United States law attention will be focussed on the law and practice relating to securities frauds as this constitutes a useful comparative model. There is a trend in many States to extend regulatory laws beyond the national frontiers. The extraterritorial application by American courts of the anti-fraud provisions in the Federal securities laws provides a valuable illustration as to the possible approaches to the question of jurisdiction. Instead of engaging in a complex analysis as to where a securities fraud has occurred, the American courts have tended to grant extraterritoriality where this would promote the policy of the

securities laws. Similarly, the Securities and Exchange Commission (SEC) has advocated an expansive view of jurisdiction in its administrative hearings and consent decrees. Consequently, jurisdiction over fraud offences has been accepted in many circumstances where an English court would decline jurisdiction.

67. The United States has comprehensive Federal securities legislation which seeks to regulate improper securities transactions executed on a national securities exchange or through the facilities of inter-state communications. The most important Federal anti-fraud securities provision is Section 10(b) of the Securities Exchange Act 1934 and Rule 10(b)-5⁷⁶ made thereunder. The scope of Rule 10(b)-5 is uncertain and has been applied to factual circumstances far beyond the contemplation of its draftsmen.⁷⁷ Although a deliberate and wilful violation of Rule 10(b)-5 may constitute a criminal offence, criminal prosecutions are rare. The enforcement of the anti-fraud provision depends largely on the SEC instigating administrative or enforcement proceedings and, of course, private civil litigants assisted by lawyers operating under contingency fee arrangements.

(i) Legislative Jurisdiction under the Securities Exchange Act

68. There are two distinct issues involved in the exercise of US legislative jurisdiction over a securities transaction, which allegedly is in violation of the Securities Exchange Act 1934.⁷⁸ The first is the extraterritorial application of the 1934 Act under American constitutional law and also under international law. The second is the jurisdictional requirement under the particular provision it is sought to apply extraterritorially. The first issue is concerned with whether Congress has the power, or indeed has exercised this power, to make rules seeking to regulate such a transaction. The second issue involves the question whether the jurisdictional means that are an essential element of the particular violation can be proven - thus in a case under Rule 10(b)-5 - has the defendant utilised instrumentalities of inter-state commerce or the facilities of a national securities exchange? Although these issues are conceptually distinct, it will be shown that the SEC has asserted a view of jurisdiction which would practically eliminate the basis of the distinction.

69. A very important principle in American constitutional law is that the courts are duty bound to follow a Congressional directive on a statute, even if this would be contrary to "international law".⁷⁹ The major exception to this principle is that the American courts will not enforce a statute if it violates the "due process" clause of the Constitution.⁸⁰ Since the securities laws are silent as to their extraterritoriality,⁸¹ this constitutional restraint is not important and need not be discussed here. This is not to say that international law is irrelevant in the process of statutory interpretation. In construing legislation the courts naturally attempt to arrive at a result that would not be contrary to international law.⁸² The logical approach of the courts is to make a decision as to the existence of jurisdiction under international law as a guide to their interpretation of the statute. Indeed, the American courts have referred extensively to principles of international law, particularly to the subjective territorial principle, the objective territorial principle and the nationality principle as expressed in sections 17, 18 and 27 of the Restatement of Foreign Relations Law.⁸³ Whilst not adopting the Restatement as the final word on extraterritoriality of the 1934 Act, the courts have employed its principles as a framework for the analysis of jurisdiction.

70. The most aggressive advocate of an expansive view of jurisdiction has been the SEC. The SEC has argued that an incidental use of inter-State commerce in connection with the alleged fraudulent conduct is sufficient to ground jurisdiction, albeit the transaction is organised and executed wholly outside the United States.⁸⁴ The policy justification of the SEC view is that extraterritoriality is necessary for the proper enforcement of the securities laws and the protection of American investors and corporate issuers, and that it also benefits other countries by extending protection to their citizens. The SEC view has a number of significant implications. Firstly, since a breach of Rule 10(b)-5 requires some use of inter-State commerce, jurisdiction exists over any transactions anywhere in the world which in fact violated that rule. Thus, a plaintiff who could establish the substantive merits of his Rule 10(b)-5 claim would *ipso facto* be entitled to a remedy in the American courts. Secondly, the width of the SEC's approach is accentuated by the view of the courts that the use of inter-State commercial facilities in furtherance of a fraud need not be an essential element in the scheme, premeditated or even effective. Therefore, a foreign party who merely used American inter-State commercial facilities to make an appointment with the victim or to confirm the transaction would be within the scope of jurisdiction. In practice the SEC view has had a considerable impact in its process of administrative regulation and in its consent decrees.⁸⁵ It has also recently been accepted in some of the courts.⁸⁶

(ii) The Subjective Territorial Principle

71. The American courts have considered that the subjective territorial principle is applicable not only where part of the crime is committed in the United States, but also where no constituent element of the offence has in fact taken place within the territory. This broad view of jurisdiction is illustrated by the decision in Leasco Data Processing Equipment Corporation v Maxwell.⁸⁷

72. In Leasco an American corporation complained that the defendants, who were mainly British citizens and companies, had conspired to cause it to buy Pergamon stock at an unfair price in violation, *inter alia*, of section 10(b) of the 1934 Act. The stock of Pergamon, a British company, was neither traded on any US market nor listed on any national securities exchange. It was alleged that false and misleading financial information was given to Leasco's officials in London and New York. After signing an agreement in New York, Leasco through a foreign subsidiary, which the court described as its *alter ego*, acquired 38 per cent of the outstanding stock of Pergamon on the London Stock Exchange. The Court of Appeals held that jurisdiction existed because the misrepresentations which were made in New York were an "essential link" in the fraudulent scheme.⁸⁸ Such conduct was sufficient for jurisdiction, even though the critical misrepresentations that directly triggered the share purchases were made in London. The decision in Leasco would suggest that any conduct connected with the United States may ground jurisdiction provided that it has direct or indirect causal relationship with the fraudulent scheme.⁸⁹

73. In Bersch v Drexel Firestone Inc.⁹⁰ the Court of Appeals formulated authoritative guidelines on the issue of jurisdiction. In the Bersch case an American citizen brought a class action on behalf of thousands of investors who had subscribed to a public offering of shares in Investors Overseas Service, a Canadian corporation. Although the offering was aimed solely at foreigners, some three hundred and eighty Americans, including the plaintiff, participated in the subscription. The complaint alleged that the prospectus, which had been mailed from foreign post offices, was false and violated Rule 10(b)-5. The only relevant conduct within the United States was a partial drafting of the prospectus, and a series of meetings in New York between the issuer's officials, accountants and underwriters in order to "initiate, organise and structure" the offering. The defendants, with some justification, argued that this was merely preliminary to the work carried out abroad. The Court of Appeals, nevertheless, held that there was jurisdiction over the claim brought by the American plaintiffs but not with respect to the suit of the foreign plaintiffs.

74. An important innovation in Bersch was the creation of an analytical framework where the question of jurisdiction was separately answered in respect of the different classes of plaintiff. The court of Appeals made important distinctions between plaintiffs who were American residents, American citizens residing abroad and foreign nationals. In respect of the last category the court stated:

"The fraud, if there was one, was committed by placing the alleged false and misleading prospectus in the purchaser's hands. Here the final prospectus emanated from a foreign source... not only do we not have the case where all misrepresentations were communicated in the nation whose law is sought to be applied... but we do not even have the oft-cited case of the shooting of the bullet across a state line, where the state of the shooting as well as the state of the hitting may have an interest in imposing its law. At most the acts in the United States have helped to make the gun whence the bullet was fired from places abroad...."

75. The Court of Appeals concluded that there was no jurisdiction over the claims of foreign plaintiffs where the acts within the United States "are merely preparatory, or take the form of culpable misfeasance, and are relatively small in comparison to those abroad." It has been convincingly argued that the jurisdictional conduct necessary to sustain a foreign plaintiff suit encompasses only acts that are constituent of a Rule 10(b)-5 claim.

76. A different standard of jurisdictional conduct was adopted for plaintiffs who were non-resident American citizens. The Court of Appeals declared:

"While merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident." ⁹¹

77 It should be noted that "preparatory activities" were also described as "acts of material importance" in the fraudulent scheme, and it is arguable that this requirement is not inconsistent with the measure of conduct that had been considered necessary in previous decisions such as Leasco. Finally, the Court of Appeals viewed the claim of the American resident plaintiffs as involving an application of the "effects-based" jurisdiction, which will be discussed in due course.

78. The guidelines established in Bersch are very important, and apply to transactions in both domestic and foreign securities, whether or not they are registered with the SEC or traded on a national securities exchange. Whether the Bersch guidelines provide formal rules or merely contain elements of public policy is not clear. Another problem is that the application of the Bersch standards may constitute an exorbitant exercise of jurisdiction because the jurisdictional standard is weaker in the case of American victims of fraud than injured foreign investors. Nevertheless, these guidelines have been followed in several major cases. In ITT v Vencap⁹² the Court of Appeals held that jurisdiction would exist over claims by a foreign plaintiff if it could be established that the American territory had been used for the "perpetration of fraudulent acts themselves", as opposed to merely preparatory conduct which would be sufficient for an American plaintiff. Similarly, in Securities and Exchange Commission v Kasser⁹³ the SEC was granted an injunction in circumstances where it was alleged that the United States had been used as an operating base for the export of fraudulent securities by a Canadian company to foreign plaintiffs. The court of Appeals found jurisdiction even though the fraud had no substantial impact on the United States.

(iii) The Objective Territorial Principle

79 The American courts have interpreted the objective territorial principle as applying to conduct which occurs outside the territory but causes an effect within the State. The first leading securities case to apply this principle was Schoenbaum v Firstbrook.⁹⁴ In Schoenbaum the Court of Appeals for the Second Circuit stated:

"We believe that Congress intended the Securities Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges, and to protect the domestic securities market from the effect of improper foreign transactions in American securities. In our view neither the usual presumption against extraterritoriality nor the specific language of s.30(b) show Congressional intent to preclude application of the Securities Exchange Act to transactions regarding stock traded in the United States, which are affected outside the United States, when extraterritorial application is necessary to protect investors."⁹⁵

80. This statement has two far-reaching implications. Firstly, it accepts the idea that jurisdiction may be asserted over foreign conduct that has violated the 1934 Act if there are harmful effects on an American interest. Secondly, it expresses the belief that the 1934 Act should be applied extraterritorially whenever this will further the perceived policy behind the statute.

81. "Effects-based" jurisdiction has been applied in other cases. In Travis v Anthes Imperial Ltd.⁹⁶ the court held that there was jurisdiction where American investors suffered losses, even though the foreign stock was neither listed nor traded on an American national securities exchange. Similarly, in Bersch v Drexel Firestone Inc.⁹⁷ the Court of Appeals held that an American resident who had relied on a false prospectus emanating from abroad was entitled to sue under Rule 10(b)-5. According to the court, the American resident did not have to establish that the defendant's material conduct occurred within the United States. The Bersch case is thus clear authority for the view that in the case of American residents jurisdiction may be based on domestic effects per se

82. Finally, "effects-based" jurisdiction is to some extent circumscribed by section 18 of the Restatement which requires that the effects within the US be substantial, direct and foreseeable'. Although these criteria have not been fully defined, the cases suggest some important characteristics. In the Bersch case the Court of Appeals held that it was insufficient for the purposes of jurisdiction to assert that the fraud had an effect on the American economy or American investors generally. It was not enough to claim that domestic or foreign investors' confidence in the American securities market had been undermined. The court said that there must be a direct connection between the fraud and

the American securities market. This means that the impairment of the security's value must result from the fraud itself and not merely from the other party's reaction to having been injured.⁹⁸

(iv) The Federal Securities Code and Reform

83. The American Law Institute's proposed Federal Securities Code has dealt with the question of extraterritorial application of the Federal securities laws.⁹⁹ The Code advocates very broad powers of extraterritoriality, but permits the SEC to create exemptions from the Code because of policy reasons. Section 1604 of the Code provides that within the limits of international law the Code applies to the following transactions:

- (a) sales, offers... of securities, proxy solicitations, tender offers... that occur within the United States although initiated outside the United States;
- (b) activities of non-residents of the United States who are registered issuers or registered persons under the Code, directors, officers, and stock holders of registered issuers;
- (c) an attempt, solicitation, or conspiracy outside the United States to commit a violation of the Code within its territory to the extent that the Code's criminal provisions apply to the relevant conduct;
- (d) any other prohibited, required or actionable conduct whose constituent elements occur to a substantial, but not necessarily predominant extent within the United States, or some or all of whose constituent elements occur outside the United States but cause a substantial effect within it, of a type that the Code is designed to prevent, as a direct and foreseeable result of the conduct;
- (e) an act initiated within the United States although it occurs outside the United States.

84. This provision has embraced the territorial principle simpliciter in (b), the subjective territorial principle in (e), the objective territorial principle in (a) and (d) and also probably the protective principle in (c). It is evident that the Code has advocated a very broad notion of extraterritoriality. The Commentary to the Code noted that the phrase "constituent elements" in (d) is not limited to acts essential to the establishment of the "prohibited, required, or actionable conduct".

E. Conflicts of Jurisdiction

85. There are at least three types of situations where conflicts of jurisdiction might arise between States. Firstly, where transactions involve persons and assets in several countries, each country may be in a position to claim jurisdiction. The existence of concurrent jurisdiction may result in problems of double jeopardy. Secondly, where there is a conflict between domestic law and international law, it is submitted that the generally accepted norms of international law should be applied. However, most States do not regard international law as controlling domestic law. Thirdly, a conflict may arise where the exercise of jurisdiction involves conflicting requirements of conduct as imposed by two or more States. The conflict of enforcement jurisdiction may seriously affect the relations between States, and requires greater elaboration.

86. It is clear that if two States exercise jurisdiction in a case so that a person is subject to inconsistent requirements of conduct, then, a dispute between the States and hardship to that person will arise. American courts have on occasions issued an injunction or subpoena to produce documents which have required action or inaction abroad by a party, who is thereby exposed to civil or criminal sanctions under the applicable foreign law.¹⁰⁰ American discovery orders requiring production of documents in violation of foreign bank secrecy laws are particularly troublesome. The American courts have been reluctant to defer to foreign laws, interests or courts. For example, in SEC v American Institute Counsellors, Inc.¹⁰¹ a district court judge ordered the Swiss Credit Bank to transfer certain assets from Switzerland to the United States, even though such a transfer would violate Swiss banking and customs law. The judge refused to defer to Swiss law because of Swiss Credit Bank's participation in a securities violation and because control of assets was necessary for the protection of investors. As in many cases involving conflicts of enforcement jurisdiction, the judge's order had the effect of precipitating a consent agreement between the party and the SEC.

87. Where there is a potential conflict of enforcement jurisdiction it is desirable for a State to take into account all relevant interests including the interests of other States.

88. Section 40 of the Restatement outlines a number of factors that may be considered in minimising such conflicts. Section 40 provides that where two States enjoy jurisdiction to prescribe and enforce rules of law imposing inconsistent conduct upon a person, each State "is required by international law" ¹⁰² to consider in good faith moderating the exercise of its enforcement jurisdiction in the light of the following factors:

- (a) the vital national interests of each of the States; ¹⁰³
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person; ¹⁰⁴
- (c) the extent to which the required conduct is to take place in the territory of the other State;
- (d) the nationality of the person; ¹⁰⁵ and
- (e) the extent to which enforcement by action of either State can reasonably be expected to achieve compliance with the rule prescribed by that State.

89. Section 40 essentially advocates a government interest analysis or conflict of laws approach. The aim is to find the "proper law", by balancing the interests of the parties and involved States, and thereby "do justice". American courts have sometimes relied upon section 40 in resolving conflicts of jurisdictions. In SEC v Banca Della Svizzera Italiana ¹⁰⁶ a Swiss bank, operating in New York through a subsidiary corporation, acted for an undisclosed principal in the purchase and sale of shares on the New York Stock Exchange. The American SEC alleged that there was a "strong probability" that the purchasers of the shares were engaged in insider dealing. A court order directing the Swiss bank to disclose the identity of its principals and to answer interrogatories was upheld by the Southern District Court of New York. Milton Pollack D.J. considered that since the Swiss bank had acted in bad faith, in that it made deliberate use of Swiss non-disclosure laws to evade the American securities laws of insider trading, disclosure should be ordered with severe contempt sanctions if that order was not complied with. The judge noted that the American Government had a vital national interest in the enforcement of its securities laws, whereas the Swiss Government had not expressed any opposition to the disclosure order. At the same time the judge also considered that the remaining section 40 elements were tipped in favour of the SEC - the Swiss bank had profited from the transaction; the Swiss bank had a transnational character; and the answering of interrogatories would take place in the United States. It is, of course, debatable whether the court in the Banco Della case did give adequate consideration to the policy interests at issue, as well as to the sensitive matters of international relations and economic policy. ¹⁰⁷ Even if it did, it seems that section 40 does not necessarily eliminate conflicts of jurisdiction because it does not assure that the courts of two States will reach the same result in applying the provision. For example, a Swiss court may have considered that the secrecy of commercial transactions is fundamental to the integrity and success of Swiss financial institutions and that this factor overrides any American interest. It is thus submitted that although section 40 provides a more flexible position, the problem of conflicts of jurisdiction can be best solved by relying on international negotiations and agreements, which precisely set limits on the exercise of overlapping jurisdictions.

International Judicial Assistance

90. In most states the relevant authorities, whether executive, judicial or legislative, do not have authority beyond their territorial jurisdiction. This limitation on jurisdiction is evident at both the legislative and enforcement levels. In general, national laws have no application to conduct that takes place entirely outside the territory of the national State. Similarly, the power to conduct investigations, to collect evidence, to "arrest" criminals and to seize the "fruits" of their crimes beyond the national territory is extremely limited. Another restriction is that the performance of official acts by external regulatory agencies in another State will be considered an infringement of national sovereignty, ¹⁰⁸ even if the external State's laws explicitly allow such action.

91. The most important method of removing such restrictions is international judicial assistance. The phrase "international judicial assistance" describes a series of devices by

which States co-operate in the enforcement of law. It is a general term which includes but is wider than international legal assistance. International legal assistance means that a requested State supports the enforcement of laws of an external State by carrying out enquiries or taking procedural steps on its own territory and passing on the results for a specific proceeding. International judicial assistance is distinct from international legal assistance because it also entails extra-legal co-operative links between States. The collection and dissemination of intelligence, the targeting of criminals and informal investigations are examples of international judicial assistance, where legal procedures are not involved. International judicial assistance is therefore wider and less constrained by legal process. International judicial assistance can take place merely as a result of administrative fiat by the executive arm of government.

92. International judicial assistance is usually granted to external authorities on the basis of comity, declarations of reciprocity, bilateral treaties or multilateral conventions. Co-operation is based on mutual trust and common interest. Diplomatic and political considerations are crucial. Where a State has considerable economic or military influence in another State the latter may be obliged to give the requisite assistance. It is not unknown for States to unilaterally take the jurisdiction of another country.¹⁰⁹ Some States, noticeably the United States,¹¹⁰ will provide international judicial assistance to external courts and agencies despite the lack of a reciprocal action by the external authority. All these factors suggest that international judicial assistance should be viewed not only in its legal context but also in its political and social dimensions.

93. Having regard to the history and legal traditions of Commonwealth countries it may again be helpful to focus attention on the position in England. In the United Kingdom little attention has been given to international judicial assistance. This may be explained by a number of considerations. When the United Kingdom had an Empire judicial assistance between the "mother" country and its colonies and dependent States was largely unnecessary. The United Kingdom had authority to pass legislation with respect to its colonies and overseas possessions which were not sovereign States. Its Imperial jurisdiction embraced a wide range of matters including extradition. For example, the Fugitive Offenders Act 1871 dealt with, *inter alia*, persons accused of crimes and escaping from the colonies to the United Kingdom. Also, section 5 of the Extradition Act 1873, which provided for the interrogation of witnesses on behalf of foreign territories, was applicable in almost all territories which were subject to British rule. In certain crimes the United Kingdom passed legislation extending the jurisdiction of its colonial courts. For example, the Slave Trade (East African Courts) Act 1874 conferred jurisdiction on East African courts in regard to slave vessels, slaves, goods and effects. Furthermore, with essentially the same civil service, informal methods of co-operation including the transmission of intelligence were easily attained.

94. With the development of the Commonwealth of Nations and the creation of independent sovereign States, it was no longer possible or appropriate to enact imperial legislation or unduly rely upon the former methods of co-operation.¹¹¹

95. Different considerations inhibited the British Government from granting judicial assistance in criminal matters to Civil Law jurisdictions. These States had a fundamentally different system of criminal justice, which was treated with distrust and suspicion. There was also the problem of determining on what legal basis the authorities in the United Kingdom could be obliged to afford assistance when the individual concerned had committed no offence against the law of England. These concerns were to some extent set aside when the United Kingdom entered into extradition treaties with foreign States and enacted the Extradition Act 1870. However, outside the ambit of extradition law and practice, the United Kingdom has failed to provide any comprehensive measure of international judicial assistance.

96. A number of recent developments have brought into question the traditional British approach. As has already been pointed out, the nature of international crime has dramatically altered in the past fifty years.¹¹² The ease of communication and relative freedom of movement had led to a growth of crimes in which elements may be committed in more than one State. The tendency for criminals to use international boundaries as a means of escaping justice has exacerbated the difficulties of law enforcement. This has been compounded by the revolution in information and communications technology.

A Investigations

(i) Informal Investigations

97. Informal co-operation between law enforcement authorities and in particular individual officers is a crucial element in combatting international crime. The extent of informal co-operation is impossible to assess, although there can be no doubt that it does occur at all levels and is probably the most important practical consideration in the fight against international crime. A few Commonwealth countries station police officers overseas as liaison officers attached to their diplomatic missions deliberately to foster this form of co-operation. A good example of this are the 61 liaison officers of the Royal Canadian Mounted Police stationed in 31 different countries. Of course, countries in close geographic proximity invariably develop close informal working relationships at an operational police level. Obvious examples of this in the Commonwealth would be Singapore and Malaysia and certain African countries. In a limited number of cases these informal relationships are given official or legislative backing.

98. The promotion of informal co-operation between judicial and police authorities was recognised as an important factor by the Commonwealth Law Ministers at their last meeting in Barbados in May 1980. In the context of international commercial crime, Commonwealth Law Ministers endorsed the proposal that a Commonwealth Fraud Liaison Scheme be established to inter alia facilitate and foster such co-operation. This is recognised in the terms of reference of the Commonwealth Fraud Officer who was appointed in November 1981 by the Commonwealth Secretary-General as a result of the Ministers' initiative.

99. To a certain extent the existence of such organisations as ICPO-Interpol and the Customs Co-operation Council tended to institutionalise the informal network which existed before their creation. Although this process is probably inevitable and has many advantages, the importance of informal co-operation, invariably developed on the basis of a personal relationship, should not be underestimated. Direct informal contact between officers can and often does result in the taking of action which would be impossible if the formal and institutionalised procedures had been followed. Of course, in many cases these more formal procedures may later be gone through to cover the earlier informal contact.

100. In so far as informal co-operation must in the vast majority of cases involve either a common interest between the relevant officers or a personal relationship it is naturally limited in its scope. Police officers are wisely reluctant to disclose sensitive information to persons they do not know and trust. Cases have occurred where information has been passed on to officers who have either abused it or mishandled it. It must also be admitted that some police agencies are by nature unduly secretive and suspicious of other authorities, both domestic and foreign. Furthermore, as in all walks of life some law enforcement officers are just unco-operative and narrow minded.

101. Certainly the more that can be done to broaden police officers' perspectives and allow them to develop contacts at the international level the better for everyone. The temporary secondment of officers to the General Secretariat of ICPO-Interpol provides a useful mechanism, but one that is not taken full advantage of by most Commonwealth countries.¹¹³ The development of regional contact groups and the convening of regional meetings obviously facilitates this sort of contact and must be commended on this basis. An interesting development in this regard is the institution of annual meetings of Caribbean Police Chiefs.

102. To a very real extent the reluctance of police agencies to provide effective co-operation, on any lawful basis, to officials from another jurisdiction results in a vicious circle. Apart from creating mistrust and fostering a generally unco-operative attitude, it prevents its own officers gaining an international perspective and establishing effective working contacts in that other jurisdiction. It is unfortunate that many senior officers do not take a longer term view and see the provision of assistance in such cases as an economic investment of their admittedly limited and stretched resources. The law enforcement authorities of certain developing countries cannot properly be criticised for lack of zeal in responding to requests from ICPO-Interpol and other agencies when they themselves are treated with suspicion and even derision. The attitude unfortunately taken by some police officers, particularly in the more developed jurisdictions, is that requests from and to these countries are merely an excuse for trying to persuade their own government of the need for a foreign trip.

103. Many countries will not co-operate with a foreign authority unless the alleged offence

satisfies the principles of double criminality and/or reciprocity.¹¹⁴ Double criminality requires that the offence is punishable in both the requesting and the requested States. Reciprocity means that assistance is only given if the requesting country would grant the same or similar assistance if the positions were reversed. Some States also insist on a minimum standard of seriousness of the offence. A report prepared by the General Secretariat of ICPO-Interpol¹¹⁵ has concluded that many countries will not provide assistance to a foreign investigation in relation to certain economic crimes, such as securities and commodities manipulation, tax evasion and exchange control offences. It is thus crucial for a law enforcement agency to find out the relevant foreign law early in the investigation, so that attempts at forging co-operation are neither futile nor unnecessarily costly.

104. The constitutional propriety of conducting informal investigations on behalf of external authorities must also be kept in mind. The essential objects of a police investigation are the prevention of crime and the detection of and punishment of criminals. These objects necessarily define the ambit of the police's functions, but the police enjoy considerable discretion in fulfilling their duties. There are, however, limits. In Attorney-General for Hong Kong v Ocean Timber Transportation Ltd.¹¹⁶ it was held that the privilege of investigating a company pursuant to a search warrant would be abused if the police disclosed the content of corporate documents to an external agency, without the consent of the company. It is submitted that if the corporate information was collected without resorting to any legal process the result may have been different. There is a lack of English authority as to the propriety or otherwise of transmitting intelligence or information collected by the police. Moreover, with the exception of involuntary statements,¹¹⁷ all evidence whether it is obtained by illegal or unfair means is admissible in court subject to the judge's discretion. For example, there have been a number of cases in which the courts have admitted evidence obtained by surreptitious surveillance.¹¹⁸

(ii) Formal Investigations

105. Formal investigations involving international elements present special problems. For example in the United Kingdom although a Department of Trade inspector appointed under section 165 of the Companies Act 1948 enjoys significant investigatory powers, these do not extend beyond the territorial jurisdiction of the United Kingdom. He has no legal means of administering oaths to the directors of United Kingdom registered companies who are in foreign States, or to collect evidence overseas. A number of Department of Trade inspectors' reports¹¹⁹ have highlighted the difficulties in conducting effective investigations in circumstances where the principal participants flee the jurisdiction, taking documents and other evidence with them. These obstacles to the investigatory process are aggravated when foreign law enforcement agencies or self-regulatory authorities¹²⁰ provide no or meagre assistance or co-operation.

106. It is virtually unknown for a law enforcement agency or authority to be given powers of inspection other than those under the legislation of its State. However, a number of recent developments have suggested the possibility that one State may empower the officials of another State to conduct investigations on its behalf. In 1980 it was suggested to the Commonwealth Law Ministers' Meeting¹²¹ that in appropriate circumstances the same inspectors may be appointed under the relevant provisions in the Companies Acts of other Commonwealth jurisdictions. This would, in effect, enable inspectors to conduct an international investigation. Similarly, in 1982 the New Zealand Government appointed the Australian Government's Royal Commission on Drug Trafficking as a Commission of Inquiry in New Zealand.¹²² This almost unprecedented action empowered the Australian authority to hear evidence in New Zealand, and to compel New Zealand residents, believed to have knowledge of certain drug syndicates, to appear as witnesses before the Royal Commission. Naturally, the Commission would be required to comply "in every respect" with New Zealand's statute and case law.

107. The Report submitted to the 1980 Commonwealth Law Ministers' Meeting on the development of co-operation in commercial crime enforcement also drew attention to the practical advantages in different countries with interests in a particular matter pooling their investigatory resources and sharing the information obtained. This has already occurred to a limited extent in the Commonwealth in a few cases involving illicit trafficking in narcotics and in two cases involving the collapse of businesses with activities in a number of countries.

B. Evidence

108. The collection of evidence for either civil or criminal proceedings presents special legal and practical problems in cases where such evidence is located in a foreign jurisdiction. Firstly, there is the problem whether the foreign State will permit evidence to be taken in its territory by the method proposed by the parties or authorities. Secondly, there may be limits imposed by the law of a State on the nature and extent of evidence that may be requested. Thirdly, there is the difficulty of compelling an overseas witness to give evidence in aid of domestic proceedings. Fourthly, the courts of a requesting State may be reluctant to admit evidence obtained in a foreign jurisdiction, particularly in criminal cases. Fifthly, the costs involved in searching, collecting and translating foreign evidence may deter a law enforcement agency or a civil litigant from pursuing the matter.

(i) Voluntary Procedures

109. Obtaining evidence located in a foreign jurisdiction creates acute problems which are not found in wholly domestic cases. Many States, primarily those within the civil law tradition, view the taking of even voluntary testimony by persons other than their own officials as an infringement of their territorial sovereignty. The civil law system's view is best understood by reference to its dependence on its judicial officers, and not the parties themselves, to carry out all procedural acts including the taking of depositions. Of course, where there is a foreign prohibition on the taking of testimony, arrangements can be made to secure the attendance at the trial of parties and witnesses resident in a foreign country. The high cost, the difficulties of organisation and personal inconvenience rules out this as a practical alternative except in the most important cases. Moreover, there is no means of forcing an unwilling witness who is out of jurisdiction to attend the trial. It is clear from Stuart v Bakis Co.¹²³ that the attendance of witnesses cannot be enforced except by the writ of subpoena, and such writ cannot extend beyond territorial jurisdiction.

110. In the case of the United Kingdom, if the foreign law allows, and the witness is co-operative, testimony may be given either by an out-of-court deposition or by commission. In R.v Upton S.T. Leonard Inhabitants¹²⁴ it was pointed out that English courts are extremely reluctant to admit evidence taken out of court in criminal cases because the reliability and credibility of a witness's testimony cannot be directly challenged by cross-examination. In particular, the demeanour of the witness, which may be vital to the issue of guilt, would not be scrutinised by a jury. Thus, as a general rule the English courts, unlike those of Scotland and of most other countries, will not admit evidence in criminal trials which is not given by a witness attending the trial in the presence of the accused. In exceptional cases, such as when witnesses are dangerously ill, the courts will sometimes admit out-of-court depositions. Furthermore, under section 2 of the Criminal Justice Act 1967, as amended¹²⁵ written statements taken outside the United Kingdom may now in certain circumstances be tendered as evidence in criminal proceedings. However, under this provision it is open to any other party to object to the statement being tendered and to insist that the maker of the evidence be called to give oral evidence, which is often impracticable when the witness is abroad.

111. The early authority of R. v Budgel¹²⁶ stated that at common law the taking of evidence before a judge by way of commission was never permitted in criminal cases. Under section 4 of the Evidence by Commission Act 1831 (repealed) the courts had a limited power to issue commissions for the examination of witnesses, but this did not apply to indictments¹²⁷ or felonies.¹²⁸ Moreover, section 3 of the Evidence by Commission Act 1885, gave an English court the power to request a judge or court in India or the colonies to take depositions, and such depositions were admissible in proceedings in England to the same extent as if they had been taken before an English judge. The 1885 Act provided an effective means of securing evidence abroad in criminal cases, but it was repealed by the Evidence (Proceedings in Other Jurisdictions) Act 1975. There is now no method of taking the evidence of a witness on commission overseas in criminal cases. A Director of Public Prosecutions Working Party Report¹²⁹ has suggested that this provision in the 1885 Act should be reintroduced and extended to foreign as well as Commonwealth courts. Alternatively, it is submitted that section 32 of the Criminal Justice (Scotland) Act 1980 should be applied to England. Section 32 of the 1980 Act provides for the taking of evidence on commission, where the court is satisfied that the evidence is necessary for the proper adjudication of the trial, and there would be no unfairness to the accused in such a case. In the absence of a statutory provision authorising the taking and receipt of evidence by commission, relevant and probative evidence may not be available in a criminal trial.

112. In contrast to criminal proceedings, the court's power to take and admit foreign evidence in civil cases is wider. Formerly, evidence was taken by ordering a writ of commission to issue in the Queen's name,¹³⁰ but this practice has been superseded by

other and more convenient methods. Under the Rules of the Supreme Court ¹³¹ an order for the examination of witnesses both in and out of jurisdiction may be issued, where it appears necessary for the purposes of justice. ¹³² The order may take one of three different forms. ¹³³ Firstly, the High Court is empowered to appoint a special examiner to take evidence in a foreign jurisdiction, provided that this is allowed by the foreign government. ¹³⁴ Secondly, a British consular official may be appointed to act as a special examiner in a foreign State where there is a Civil Procedure Convention between the United Kingdom and that State, ¹³⁵ or if there is no such convention with the consent of the Secretary of State. ¹³⁶ Thirdly, letters of request ¹³⁷ may be issued to the judicial authorities of a country in which evidence is required.

113. The appointment of an examiner is in the "highest degree" a matter of discretion for the court. ¹³⁸ Before issuing an order for the examination of a witness abroad, the court must be satisfied that the witness can give relevant and material evidence, ¹³⁹ that the witness cannot conveniently be brought to England, ¹⁴⁰ and that the request is *bona fide* ¹⁴¹. Furthermore, it is well established by the decisions in Berden v Greenwood ¹⁴² and Re Boyse, Crofton v Crofton ¹⁴³ that an order will not be made where it is essential that the witness should be cross-examined at the trial. The court may also refuse to grant an order where the costs of executing the application are prohibitive. ¹⁴⁴

114 The appointment of an examiner is not available in all countries. For example, in Switzerland a special examiner who exercises his functions could be charged with economic espionage. ¹⁴⁵ In such cases it is necessary to rely on the letters of request procedure. This is a compulsory method of obtaining evidence, and will be discussed in the next section. Finally, although the use of examiners provides an appropriate method of taking evidence abroad in accordance with English procedure, ¹⁴⁶ its main disadvantage is that, except in a few countries, the witness cannot be compelled to attend an examination.

115. The voluntary obtaining of evidence in the United Kingdom for use abroad is governed by the Consular Relations Act 1968. ¹⁴⁷ Section 10(1)(a) of the 1968 Act provides that:

"A diplomatic agent or consular official of any state may, if authorised to do so under the laws of that state, administer oaths, take affidavits and do notarial acts required by a person for use in that state or under the laws thereof."

116 This provision imposes minimum judicial obstacles in obtaining evidence located in the United Kingdom. It is principally used in civil cases, but it is not known how extensively since in such matters the foreign mission acts without reference to the United Kingdom authorities. There is, however, no power to compel a witness to attend before a consul.

(ii) Compulsory Procedures

117 In cases where a witness out of jurisdiction refuses to volunteer information or where the relevant foreign law prohibits or limits the use of the deposition or commission procedures, it is necessary to enlist the assistance of the foreign legal authorities in order to obtain and secure the required evidence. The customary method of obtaining the assistance of foreign authorities is by means of a letter of request (letters rogatory). Letters rogatory are a formal request from one country to another requesting that the latter country perform some judicial act. This procedure is available in civil and sometimes in criminal cases, and is used by both governments and private parties.

118 A country may honour a request for judicial assistance on the basis of comity or pursuant to a treaty obligation. The common law and civil law systems have markedly different views on comity and the procedures for observing letters of request. In Common Law States the letters rogatory procedure is primarily intended to assist parties who have difficulties in obtaining relevant evidence. In Civil Law States this procedure is used for investigations into cases which have not yet come into court.

119. Yet again we may perhaps be forgiven for concentrating on the relevant law and practice in the United Kingdom and more particularly in England, given the special Civil Law considerations in Scotland. A number of Commonwealth jurisdictions have in their laws provisions similar to that of section 13 of the Evidence Act of Seychelles. This section states "except where it is otherwise provided by special laws now in force in Seychelles or hereafter enacted, the English Laws of evidence for the time being shall prevail."¹⁴⁸

120. In the United Kingdom letters of request are executed either through administrative

assistance given by the police, or by virtue of the relevant statutory provisions now in force. The first statutory provision is section 5 of the Extradition Act 1873 which in practice governs the formal taking of evidence in England and Wales for the purpose of criminal proceedings in a foreign country. The second provision is section 5 of the Evidence (Proceedings in Other Jurisdictions) Act 1975 which allows the taking of evidence for foreign and Commonwealth criminal proceedings, and section 2 of the 1975 Act which applies to evidence requested in foreign civil cases.

121. Under section 124 of the Extradition Act 1870 a foreign diplomat or consul could apply directly to a judge of the High Court, who was empowered to order the taking of evidence for the purposes of a foreign criminal proceedings. This procedure was cumbersome¹⁴⁹ and expensive, and was replaced by a simpler, summary procedure in section 5 of the Extradition Act 1873. Section 5 of the 1873 Act provides that the Secretary of State may issue an order requiring a magistrate or a justice of the peace to take evidence¹⁵⁰ for the purpose of "any criminal matter" pending in any court or tribunal of a foreign State. There is no case law on section 5 of the 1873 Act. In practice the scope of section 5 is given a broad interpretation by the British Government.¹⁵¹ It is considered that the section 5 procedure extends to any foreign State, including those countries in which there is no extradition arrangement under section 2 of the Extradition Act 1870. The procedure thus falls outside the extradition machinery *per se*. It does not, however, apply to Commonwealth countries. Furthermore, it is available in respect of "any criminal matter", which is interpreted as not limited to extradition crimes within the meaning of the Extradition Acts. Nor is it necessary for the matter to be criminal in the United Kingdom it is sufficient for it to be criminal in the law of the requesting State.

122. An important limitation on section 5 is that it cannot be used in respect of a criminal matter of a "political character". This means that the procedure cannot be used for preliminary enquiries. It is necessary that there be a precisely established offence, a clearly defined and named suspect, and specific evidence implicating that suspect so that he has a case to answer.¹⁵² The section 5 procedure is therefore not helpful in gathering intelligence concerning the associates of suspected criminals or criminal activities in general. On the other hand, by virtue of section 1(3)(d) of the Suppression of Terrorism Act 1978, the "political crime" exception is not available under section 5 of the 1873 Act in cases which originate in a State which is a party to the European Convention on the Suppression of Terrorism and in offences covered by the 1978 Act.

123. Section 5 is most frequently used in serious cases particularly where evidence is requested from an accused person. In these circumstances it is considered that a judicial proceeding is necessary to safeguard the interests of the accused. However, an accused person cannot be obliged to give evidence in a court even under a section 5 order and a witness cannot be required to answer a question where the answer would incriminate him. Therefore, section 5 is a compulsory proceeding of a limited nature because it does not derogate from the common law privileges.

124. That section 5 is not intended to provide an easy and quick means of transmitting information to foreign authorities is indicated by the current practice in processing foreign requests. Almost all requests by foreign courts in relation to criminal matters are passed through diplomatic channels to the Home Office¹⁵³ where action under section 5 is considered. The approach taken by the Home Office is flexible. Where the case concerned is not serious, or the evidence requested not of unusual significance and the requesting court does not specify that evidence on oath is needed, it may be decided not to issue a section 5 order for the evidence to be taken formally before a magistrate. Instead, the police will be asked to take the evidence by way of written statement. This is not a compulsory proceeding because no one is obliged to answer police questions. It is, however, the more usual method of executing foreign requests. For example, in 1980, 135 cases were dealt with in this way, whereas only 25 orders were issued under section 5.

125. The taking of evidence in civil and commercial matters for use in foreign courts was previously governed by the Foreign Tribunals Evidence Act 1856. The 1856 Act enabled the United Kingdom to comply with its obligations under the numerous bilateral civil law conventions¹⁵⁴ which it had concluded with foreign States. The 1856 Act was repealed and replaced by the Evidence (Proceedings in Other Jurisdictions) Act 1975, which gives effect to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 1970.¹⁵⁵

126. The 1975 Act¹⁵⁶ does not simply apply to the Hague Convention, but introduces new enabling provisions for taking evidence which is required in foreign proceedings. Unlike the

Hague Convention, the 1975 Act applies to countries which have not ratified the Convention, and applies not only to civil proceedings, which are either pending or in contemplation,¹⁵⁷ but also to criminal proceedings which have been instituted.¹⁵⁸ Under sections 1(a) and 5(1)(a) of the 1975 Act, requests for assistance may emanate only by or on behalf of a foreign court or tribunal. The 1975 Act applies to foreign courts of law and administrative tribunals or agencies, such as the American Securities Exchange Commission and the Commodity Future Trading Commission. However, in stark contrast to the United States,¹⁵⁹ the House of Lords has decided in Rio Tinto Zinc Corporation v Westinghouse Electric Corporation¹⁶⁰ that the 1975 Act cannot be used, directly or indirectly, for the purposes of criminal investigatory proceedings. It is submitted that the requirement that criminal proceedings be instituted means that requests for judicial assistance by grand juries in the United States, or by investigatory magistrates on the Continent; or foreign Commissions of Inquiry would be refused by English courts. Thus the 1975 procedure will not provide judicial assistance in the early stages of a criminal investigation.

127. In dealing with a request for evidence from a foreign court, the courts in the United Kingdom are guided by a number of principles. The court must first decide whether it has jurisdiction to make an order and, secondly, whether it ought to exercise its discretion in making or refusing an order. Under section 1 of the 1975 Act the court has jurisdiction in civil cases where the requesting court exercises jurisdiction in any other part of the United Kingdom or in a country or territory outside the United Kingdom. Under Section 5 of the 1975 Act the court has jurisdiction in a criminal case where the requesting court is exercising jurisdiction in a country or territory outside the United Kingdom.¹⁶¹ An important question is whether a court in the United Kingdom has jurisdiction when a foreign requesting court has improperly assumed jurisdiction over the subject matter or over an individual or corporation. For example, if an American court exercised jurisdiction in a transnational securities fraud in violation of the accepted principles of jurisdiction in international law, must the request for information be refused by the United Kingdom court? Under section 4 of the Protection of Trading Interests Act 1980 a court in the United Kingdom is prohibited from making an order under section 2 of the 1975 Act for giving effect to a request issued by or on behalf of a court or tribunal of an overseas country if it is shown that the request infringes the jurisdiction or is otherwise prejudicial to the sovereignty of the United Kingdom. It is also provided by section 4 that a certificate issued by the Secretary of State to the effect that a foreign request infringes the jurisdiction or is prejudicial to the sovereignty of the United Kingdom shall be conclusive evidence of that fact. It may be argued that section 4 of the 1980 Act applies only when the request for assistance infringes jurisdiction and not when the foreign court has improperly assumed jurisdiction over the subject matter or the person. Mr. D. L. Jones¹⁶² has contended that in the absence of a certificate from the executive, it is difficult to see how a request under the 1975 Act can infringe the jurisdiction of the United Kingdom if it complies with the terms of the Act. On the other hand, section 4 of the 1980 Act is so vaguely worded that a court in the United Kingdom may be entitled to refuse to accede to a foreign request if it considered that it related to a matter which was properly within its jurisdiction and not properly within the jurisdiction of the requesting court. If, however, the courts in the United Kingdom adopted a narrow view of the jurisdictional competence of foreign courts, this would amount to a repudiation of article 12(b) of the Hague Convention, which provides that the execution of letters rogatory should not be refused solely on the ground that the requested State claims exclusive jurisdiction over the subject matter of the action.

128. Another jurisdictional requirement is that the courts in the United Kingdom must be satisfied that the evidence is required for the specific purpose of civil or criminal proceedings, but not both. The courts in the United Kingdom will ordinarily accept the foreign court's statement of the purpose of the letters of request. However, the House of Lords in Westinghouse questioned the American judge's characterisation of the letters of request. The Law Lords refused permission for Westinghouse to take evidence from Rio Tinto Zinc officials in England because the letters rogatory were not issued for the sole purpose of civil proceedings and, indeed, were issued for the collateral purpose of anti-trust criminal proceedings. Lord Diplock¹⁶³ said that it was an abuse of process to give effect to letters rogatory which were manifestly used by the Department of Justice for a grand jury investigation. It is submitted that this ruling will create difficulties in executing letters of request in the United Kingdom on behalf of an American court in circumstances where parallel civil and criminal proceedings have been instituted and where the purpose for which evidence is required is not clearly ascertainable.

129. The court's discretion to accede to a foreign request for evidence is influenced by the following considerations. In the Court of Appeal in Westinghouse¹⁶⁴ Lord Denning M.R. said that it was the duty of the court to do all it could to assist a foreign court "just as

the English court would expect the foreign court to help it in like circumstances." 165 The principle of reciprocity underlies all requests for assistance by foreign courts. In Seyfang v G.D. Searle and Co. 166 Cook J. thought that the court should apply the same principles as those which the courts apply in the calling and examination of witnesses in proceedings initiated in domestic cases. A fundamental principle in English law is that the court will not exercise its discretion if an application is frivolous, vexatious or an abuse of process. 167 Thus, in Seyfang, the court, in its discretion, refused to order medical experts to give evidence against their wishes, particularly where they had no involvement with the facts of history of the matter in issue, and where their evidence could not be given without a breach of confidence and without considerable personal inconvenience and expense.

130. In executing letters rogatory the courts enjoy wide powers. Whilst in criminal cases 168 the power to make orders is limited to the examination of witnesses, either orally or in writing, and the production of documents, in civil cases 169 the court has more extensive powers, including the power to make orders for the inspection, photography, preservation, custody or detention of any property. The more restricted powers available in criminal proceedings reflect the domestic doctrine that interrogatories and "discovery" are never allowed in criminal proceedings. Of course, no one can be compelled to give or produce any documents which he could not be compelled to yield in criminal proceedings in the United Kingdom or in the courts of the country making the request. 170 The letters rogatory procedure may also be used against companies. For example, in Penn-Texas Corporation v Murat Anstalt 171 it was held that a company cannot be ordered to attend an examination on oath, whilst in Penn-Texas Corporation v Murat Anstalt (No.2) 172 the Court of Appeal held that the company may be ordered to attend and produce specified documents by its proper officers. These powers may be supported by a subpoena. By virtue of section 4 of the 1975 Act the High Court 173 may issue a subpoena enforceable throughout the United Kingdom for the attendance of a witness before an examiner or commissioner appointed to take evidence outside the jurisdiction of the court.

131. Lord Keith in Westinghouse 174 claimed that the 1975 Act had allowed greater scope for collaboration among different jurisdictions in the United Kingdom and between those jurisdictions and the jurisdictions of other countries. Although letters rogatory are still valuable, it is submitted that they are inadequate, especially in criminal cases. The letters rogatory process was created in the 19th century when communications between governments travelled by ship and persons stayed in gaol indefinitely awaiting trial. Today, letters of request still travel slowly, 175 generally through diplomatic channels, taking six or seven months to be completely transferred, and are responded to in an equally slow fashion. Letters rogatory are expensive, involve numerous formalities and technical legal issues. They are also subject to three important limitations, which are discussed in the next section.

(iii) Limits

(a) Fishing Expeditions

132. The United Kingdom and all the Continental countries which were signatories to the Hague Convention specifically reserved 176 the right not to execute letters of request which were issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government's reservation was intended to incorporate the procedural rule that forbids discovery in the nature of "fishing expeditions", or pre-trial discovery which is part of the American practice. Under the United States Federal Rules of Civil Procedure a party may request discovery of anything which "appears reasonably calculated to lead to the discovery of admissible evidence." 177 The scope of discovery in the United States is thus broader than the English limit of admissible and material evidence. Requests for discovery in the United States are often vague, apply to persons who are not parties to the action, 178 and can be for depositions as well as documents.

133. In England a court will never allow pre-trial discovery. There are a large number of authorities 179 which show that English courts are hostile to any "fishing expedition". In Radio Corporation of American v Rauland Corporation 180 Devlin J. held that a party was not required under English law to answer questions or produce documents which were not admissible and relevant to the evidence to be adduced at the trial. He formulated a classic distinction between evidence which is admissible and relevant to the issues at the trial, and evidence which is in the nature of pre-trial discovery which may "lead to a trial of inquiry which may of itself lead to direct, relevant evidence for trial." Lord Goddard in the same case considered that any "endeavour to get in evidence by examining a person who may be able to put the parties in the way of getting evidence" is a "fishing expedition" which is

never permitted in English courts. In American Express Warehousing v Doe ¹⁸¹ a request of an American court for evidence to be taken from English insurance brokers was acceded to on the ground that the evidence was in fact required for the trial. The court relied upon the statement of the American judge that such evidence would be examined at the trial and that its admissibility would be determined at that time. Similarly, the Court of Appeal in Re Westinghouse Electric Corporation ¹⁸² accepted a United States District Court judge's statement that the evidence would be "not merely for pre-trial procedures" but for "actual use at the trial", as refuting the suggestion that the American plaintiff was engaged in a "fishing expedition". However, on appeal to the House of Lords in Rio Tinto Zinc Corporation v Westinghouse Electric Corp. ¹⁸³ it was held that the observations of the foreign judge were not conclusive and that an objective examination of the testimony sought indicated that there was a "fishing expedition".

134. The attitude of the English courts to pre-trial discovery has not changed since the enactment of the Evidence (Proceedings in Other Jurisdictions) Act 1975. ¹⁸⁴ Two provisions in the 1975 Act implicitly reject American notions of pre-trial discovery. Firstly, section 2(4) of the 1975 Act provides that a person shall not be required to state what documents are in his possession, custody or power, nor to produce documents appearing to the requesting court to be, or likely to be in his possession, custody or power. This provision prohibits a general order for the discovery of documents. Thus, in Westinghouse, the House of Lords refused to honour a request by an American judge for "any memoranda, correspondence, or other documents relevant" to an American antitrust civil suit because the request did not specify particular documents. An important consequence of this fishing limit is that the broad investigatory civil demands of agencies such as the Securities Exchange Commission, the Commodities Futures Trading Commission and the Federal Trade Commission cannot be applied extraterritorially by way of the letters rogatory process against United Kingdom individuals or companies. Secondly, section 2(3) prohibits an English court from making an order requesting any particular steps to be taken, unless they are steps which are to be required by way of obtaining evidence for the purpose of civil proceedings. It is submitted that this provision gives effect to the classic distinction formulated by Devlin J. in Radio Corporation.

135. Other rules that are relevant in this context include Order 39 of the Supreme Court Rules, which provides that evidence cannot be obtained from non-parties before the trial except in extreme circumstances, for example, where a person is ill, abroad, or cannot give evidence effectively. Furthermore, a plaintiff may obtain discovery of the identity of a wrongdoer and access to bank accounts and related documents from non-parties pursuant to the principles formulated in Norwich Pharmacal Co. v. Customs and Excise Commissioners ¹⁸⁵ and Bankers Trust Co. v Shapira. ¹⁸⁶

136. Finally, it is interesting to note that civil law countries may have wider right to discovery in English courts than do common law countries. This is because civil law countries do not recognise the distinction between pre-trial and trial proceedings. All material which is sought by a civil law court will be relevant to the final trial and thus cannot be characterised as evidence for the purpose of fishing. This view is supported by an obiter dictum of Lord Diplock in Westinghouse, ¹⁸⁷ where he indicated that whether evidence under the 1975 Act is evidence for the purpose of the trial or evidence for the purpose of pre-trial discovery is determined by the procedural system of the requesting court. It is submitted that if this view is correct it is anomalous and undermines the English court's negative view of "fishing expeditions".

(b) Privilege and Confidentiality

137. The execution of letters rogatory on behalf of foreign courts may be precluded by considerations of privilege or confidentiality. ¹⁸⁸ Under section 3(1) of the Evidence (Proceedings in Other Jurisdictions) Act 1975 a witness may claim any privilege provided either under the law of England or under the law of the requesting States. The privilege extends to giving answers to any questions and to producing any document. In the case of civil and criminal proceedings in England, section 14(1) of the Civil Evidence Act 1975 ¹⁸⁹ states that a person has the right to refuse to answer any question or produce any document or thing that might expose that person or his spouse to a criminal prosecution or fine under English law.

138. In Westinghouse the House of Lords held that the English companies were entitled to withhold documents, that otherwise had to be produced, by claiming privilege under section 3. In this case the production might have exposed the defendants to penalties for intentionally or negligently acting in breach of Article 85 of the Treaty of Rome, which has the force of law in England.

139. This contrasts with the United States which allows an individual, but not a company, to claim a privilege against self-incrimination, pursuant to the Fifth Amendment of the United States Constitution.

140. Generally, a privilege against self-incrimination would be lost if the relevant foreign prosecuting authority stipulated that it will grant immunity against prosecution. However, the British Government's Aide Memoire to the American Government in relation to the Westinghouse litigation contended that the Department of Justice's grant of immunity to the Rio Tinto executives undermined the Hague Convention. The House of Lords speaking with "the same voice as the executive" in Westinghouse refused to recognise the American grant of immunity because this was contrary to public policy. ¹⁹⁰

141. Another ground for refusing to disclose information in England is legal professional privilege. The general principle stated in Garfield v Fay ¹⁹¹ is that all communications between a party and his legal advisers, including foreign legal advisers, are privileged from disclosure if they are confidential and made by or to the adviser in his professional capacity for the purposes of getting legal advice. Calcraft v Guest ¹⁹² is authority for the proposition that in England this privilege belongs to the client and may be waived by him, but not by the legal adviser. Lord Halsbury in Bullivant v Attorney-General for Victoria ¹⁹³ pointed out that the legal professional privilege does not apply where the communication or documents came into existence as a step in a criminal or illegal act. Re Whitworth ¹⁹⁴ shows that a prima facie case of fraud or illegality must be made out before the privilege is lost.

142. Though not strictly a matter of letters rogatory procedure, mention may also be made of the decision in A.M. and S. Europe Ltd. v The Commission. ¹⁹⁵ In this case the European Court of Justice held that correspondence between a company and its legal advisers, but not its in-house lawyers, is protected by legal privilege in an antitrust investigation by the Commission's inspectors. The European Court also considered that it, and not the courts of Member States, would decide whether a particular document enjoyed such protection.

143. Another matter which may also be referred to is the provision in the 1981 English Companies Act ¹⁹⁶ amending the lawyer/client privilege in respect of a Department of Trade inspection. This provision protects barristers and solicitors from disclosing any privileged communication made to them in that capacity and enables a client to claim privilege in respect of the correspondence and discussions with his lawyer.

144. In addition to the various statutory prohibitions on the disclosure of certain kinds of information, such as commercial information obtained by the government under section 41 of the Fair Trading Act 1973, there is the doctrine of public interest privilege, formerly known as Crown privilege. This is a wide and vague doctrine which enables a party or the appropriate Minister to refuse to disclose documents for the purposes of a judicial hearing.

145. In Conway v Rimmer ¹⁹⁷ the House of Lords indicated what it considered the correct approach to the clash of interests which arise whenever there is a question of public interest immunity. Lord Reid said that the essence of the matter is a weighing, on balance, of the two public interests, that of the nation or the public service in non-disclosure and that of justice in the production of documents. He further considered that there is a distinction between disclosing the "contents" and the "classes" of documents. Although a minister's certificate to the effect that disclosure of the contents of a document would harm the national or public interest is not conclusive, nevertheless, the court will be slow to question his opinion or even to go as far itself as to inspect the document. On the other hand, in class cases the minister's certificate is more likely to be open to challenge, but there are certain classes of documents which ought not to be disclosed.

146. In Lonrho Ltd. v Shell Petroleum Co. Ltd. ¹⁹⁸ the plaintiff sought to obtain transcripts of evidence given by oil-giants Shell and BP to the Bingham inquiry into "oil sanctions busting" in South Africa. The Attorney-General objected and issued a certificate stating that the disclosure of this information would be contrary to the public interest. The

House of Lords, after considering the balance of public interest, held that even without the minister's certificate the evidence should not be disclosed because it had been obtained on the understanding that it would be treated confidentially. The House of Lords said that witnesses would be far less forthcoming at the inquiry if the express undertaking of confidentiality was ignored. The Law Lords applied the principle in D. v National Society for the Prevention of Cruelty to Children ¹⁹⁹ that "where there is a pledge to keep (information) confidential, the courts should respect that confidence and should in no way compel a breach of it, save where the public interest clearly demands it, and then only to the extent that the public interest requires."

147. In Burmah Oil Co. Ltd. v Bank of England ²⁰⁰ the House of Lords refused to order disclosure of certain documents which were likely to be vital in establishing that the sale of the company's stake in British Petroleum to the Bank of England was unconscionable. The Law Lords inspected a number of documents but held that they were not of sufficient relevance to override the public interest objection to their production.

148. The decisions in Lonrho and Burmah indicated that the presence or absence of a governmental interest is not conclusive, but is a compelling factor which may alter the balance of public interest in favour of the governmental body claiming public interest privilege. However, a completely different approach to the question of public interest immunity was taken in Air Canada v British Airport Authorities. ²⁰¹ In this case Bingham J. decided to privately inspect ministerial documents with a view to ordering their production in a civil action by Air Canada against the British Airport Authorities and the Secretary of State for Trade. The judge clearly recognised the uniqueness of the claim for production:

"Documents as close to the inner processes of government have never previously been ordered to be produced in any litigation... in none have its working papers been the subject of production."

149. The judge, however, considered that such documents were likely to be crucial, if not determinative, of the outcome of the substantive action. The decision in Air Canada in favour of production represents a considerable departure from the previous authorities which have assumed that disclosure of documents at the highest level of government will not be ordered. The authoritativeness of Air Canada is thus questionable.

150. A clear case when production will not be ordered is if it would embarrass the government in its relation with foreign States. For example, in Buttes Gas Oil Co. v Hammer (No.3) ²⁰² the Court of Appeal refused to order disclosure of documents to a private defendant to support a contention that Buttes and the ruler of Sharjah had engaged in a fraudulent conspiracy, which would have been a defence to the alleged slander of the plaintiffs. Brightman and Donaldson L.JJ. held that disclosure was contrary to the public interest where documents were addressed to and emanated from the rulers of Sharjah and Umm al Qaywayn and which related to a territorial dispute between these sovereign States and two oil companies which had oil concessions in these States. Lord Denning M.R. emphasised that the court should not allow the discretionary process of discovery to offend the comity of nations. It is submitted that the case of Buttes illustrates the difficulty of obtaining the assistance of courts where a sovereign State has allegedly engaged in an economic crime.

151 The public immunity doctrine also encompasses situations where disclosure would amount to a contempt of court or a breach of confidence. In Schering Chemicals Ltd. v Falkman Ltd. ²⁰³ the Court of Appeal upheld an injunction restraining Thames Television Ltd. from showing a documentary film on the drug Primodos because the film was based on confidential information given to the film's producer. Shaws L.J. considered that the communication in a commercial context of confidential information imposed a fiduciary duty on the recipient to maintain that confidence unless the giver consented to disclosure. He pointed out that the public interest in non-disclosure may be overborne where the subject matter was inimical to the public, for example, in cases of crime, fraud or other misconduct which threatened individual safety. On the other hand, in British Steel Corpn. v Granada Television Ltd., ²⁰⁴ the House of Lords held that journalists have no public interest immunity protecting them from the obligation to disclose their sources of information, where that information was unlawfully obtained by a third party and where discovery was necessary in order to do justice. Lord Wilberforce said that a claim of immunity based on the argument that if disclosure was ordered the sources of information would "dry up" had been rejected by previous authorities, ²⁰⁵ and that journalists should be in no better position than priests - confessors, doctors, bankers and other recipients of confidential information. Lord

Salmon, dissenting, relying on the New Zealand case of Broadcasting Corporation of New Zealand v Alex Harvey Industries Ltd.,²⁰⁶ considered that the "newspaper rule" that the press was immune from disclosing its sources of information on discovery was not confined to cases of libel, but was of general application, save in exceptional circumstances where, for example, the security of the State required disclosure. He pointed out that there was a legitimate public interest in knowing about the affairs of nationalised industries such as British Steel, especially since the public did not have the same power to call relevant documents and discover faults as did ordinary shareholders.

(c) Legislation and Public Policy Limits

152. Courts and regulatory agencies have often asserted an authority to obtain information and documents from individual corporations which have little, if any, contact with the State. United States courts have claimed personal jurisdiction over foreigners on the basis of "a transitory presence or sporadic business transaction", which according to International Shoe Co. v State of Washington²⁰⁷ may provide sufficient "minimum contacts" with the State, or on the open-ended "effects-doctrine" as exposed in Leasco Data Processing Equipment Corp. v Maxwell.²⁰⁸ There is a long line of authorities such as U.S. v Imperial Chemical Industries²⁰⁹ where American courts have found jurisdiction over foreign parent companies based on the activities of a subsidiary in the United States, in complete disregard of the separate legal personality of the parent and subsidiary companies. The United States also claims jurisdiction over companies that are at least 25 per cent controlled by American interests, even though the company has no active business in the United States.²¹⁰ The assertion of extraterritorial discovery orders is not confined to the United States. Belgium, the Netherlands, Norway, Germany and the European Economic Commission have claimed personal jurisdiction over foreign-based firms. Many States consider that such extensions of investigatory jurisdiction conflict with their national interests,²¹¹ and have passed "blocking" or "protective" statutes. For example, Canada,²¹² Australia²¹³ and New Zealand²¹⁴ have passed laws to protect business records of companies operating in their territory. In addition, a number of countries such as Switzerland have strict laws protecting domestic manufacturing or trade secrets.

153. The United Kingdom has enacted the most comprehensive legislation defending its commercial interests, namely the Protection of Trading Interests Act 1980. The 1980 Act replaces the former Shipping Contracts and Commercial Documents Act 1964. Although the 1980 Act was introduced primarily as a reaction to United States attempts to impose unilaterally and extraterritorially its own domestic and economic policies in the antitrust area,²¹⁵ it applies equally to overseas countries and to American agencies regulating fraud such as the Securities and Exchange Commission and the Department of Justice.

154. Under section 1 of the 1980 Act the Secretary of State is given three distinct powers to counter actual or proposed foreign measures in relation to international trade. The most important is the power to give directions to a person carrying on business in the United Kingdom prohibiting compliance with foreign measures.²¹⁶ The section is limited to foreign measures which apply to things done outside the territorial jurisdiction of the country which enacted such measures and to things done by persons carrying on business in the United Kingdom. The Secretary of State has discretion to make such directions to the extent that the foreign measures "are damaging or threaten to damage the interests of the United Kingdom."²¹⁷ Section 2 specifically deals with the regulation of documents or information demanded by foreign courts or authorities. This section provides that the Secretary of State may give directions prohibiting compliance with a requirement that a person in the United Kingdom shall provide to any court, tribunal or authority of an overseas country any commercial document or commercial information not within its territorial jurisdiction. It is apparent that section 2 is wider in scope than section 1 in that it could apply to a person(s) who may merely have a fleeting presence in the United Kingdom. A direction may be given in the following circumstances:

- (i) where the foreign request infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom- or
- (ii) if compliance with the foreign requirement would be prejudicial to the security of the United Kingdom or the relations of the Government of the United Kingdom with the Government of any other country;
- (iii) where the request is not for the purposes of civil or criminal proceedings already instituted in the foreign country; or
- (iv) where the request is for general discovery of documents.²¹⁸

155 The Secretary of State's power is very wide. His power is not limited to United Kingdom companies or to United Kingdom territory and may be applied extraterritorially.

For example, it could be invoked against a foreign company doing some business in the United Kingdom which has been requested to produce a document located in a third country, other than the United Kingdom or the requesting State. It is arguable that the Act contradicts the very principle that the law was designed to guard against, namely the extraterritorial application of laws. On the other hand, enforcement jurisdiction is limited by the principle of nationality. Section 3(3) of the 1980 Act stipulates that penalties for non-compliance with a direction do not apply to non-United Kingdom citizens or companies incorporated outside the United Kingdom. Moreover, the United Kingdom has emphasised in a diplomatic note ²¹⁹ to the United States that the Secretary's discretion will take into account all the aspects of any case including the extent of British and other interests and considerations of international comity. This will not obviate the difficulty that British orders forbidding the release of non-British documents requested for American discovery purposes may be in conflict with the laws of another State and may hinder law enforcement.

156. Unlike the 1964 Act, which only prohibited the obtaining of documents directly from an individual, the 1980 Act applies to depositions and letters rogatory.²²⁰ Section 4 of the 1980 Act limits the application of the Evidence (Proceedings in other Jurisdictions) Act 1975. It provides that U.K. courts shall not give judicial assistance to a foreign court or tribunal if the requesting body infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom. A certificate of the Secretary of State to the effect that it infringes that jurisdiction or is so prejudicial shall be conclusive evidence of that fact.

157. The 1980 Act is unique in that it gives the Secretary of State authority to decide on the scope of traditional judicial matters, such as the limits of discovery. The result is that the Secretary has virtually unlimited power to determine the amount of assistance to be accorded to foreign courts and tribunals subject to a statutory veto by Parliament. Furthermore, the Act ensures that foreign trading matters affecting the national interest may be determined by the government rather than by the judiciary. For example, the British Government has recently prohibited British companies from complying with a United States embargo on the provision of equipment and technology for the £4 billion gas pipe-line between Siberia and Western Europe.

158. An interesting question is whether the 1980 Act provides a defence of sovereign compulsion for corporations which have refused to produce documents under American discovery orders. It is arguable that in relation to prohibition under the 1980 Act an English company has a complete defence to American discovery orders, if it can establish that its actions or non-actions were required by English law and that accordingly any other conduct would have involved an English criminal offence. However, it seems that the notion of foreign illegality excuse is not part of American law. In Societe Internationale Pour Participation Industrielle et Commerciale S.A. v Rogers ²²¹ the United States Supreme Court formulated two principles. Firstly, liability under a foreign non-disclosure law is not generally a defence to a valid discovery order. Secondly, the imposition of sanctions should take into account a party's inability despite good efforts to comply with the discovery order. Subsequent cases have suggested that there is a very substantial requirement of good faith. For example, in In re Ampicillin Antitrust Litigation the District Court of Columbia ²²² held that Beecham, a United Kingdom company, had not made sufficient bona fides efforts to secure waiver of an order by the British Government, pursuant to the Shipping Contracts and Commercial Documents Act 1964, not to produce numerous requested documents. The court considered that a mere protest by the British company to the United Kingdom authorities was not sufficient: it was necessary that the company make strenuous efforts to seek reconsideration, modification or review of the government's order, or enter into direct negotiations with the British Government.

159. On the other hand, another line of American authorities in the 2nd Circuit Court of Appeals ²²³ have suggested that the courts should not order production of documents where it would be illegal under the foreign law of the situs of the documents. For example, in Ings v Ferguson, ²²⁴ it was held that production of documents will not be ordered contrary to a Canadian statute prohibiting disclosure where the defendant was only a witness and where material evidence could have been secured by letters rogatory. These 2nd Circuit cases dealt with a non-party witness and it is arguable that this factor might distinguish these cases from Societe. Nevertheless, there are a number of recent American decisions which indicate that the courts are more willing to allow foreign courts to decide the scope of discovery in situations where their legitimate interests are at stake. Although it is preferable that governments seek extra-judicial assistance from foreign authorities, rather than impose unilateral discovery orders, this does not resolve the underlying jurisdictional conflicts. There is common consensus that international negotiations and agreements are the

most effective methods of dealing with such conflicts.

C. Intelligence

160. Potentially the most vital element in international judicial assistance is the communication of timely and accurate intelligence which may facilitate the detection and prevention of crimes. Where an international element is involved in criminal matters, intelligence may assume an enhanced role because not only does it stimulate investigations across frontiers, but also may provide information which will effectively guide and link investigations between different States. Intelligence may also be more easily transmitted than evidentiary documents between law enforcement agencies in different jurisdictions. This is illustrated by the case of Attorney-General for Hong Kong v Ocean Timber Transportation Limited.²²⁵ On 12 June 1978 the Royal Fiji Police supplied the Commercial Crimes Bureau of Hong Kong (CCB) with certain information. As a direct consequence, the CCB suspected that the directors of Ocean Timber Ltd. had committed a number of criminal offences, including conspiracy to defraud and theft. The directors were charged with these crimes, and a search warrant was issued under section 50(7) of the Police Force Ordinance by the Central Magistracy on the information supplied by an inspector from the CCB. On two occasions the inspector, acting under the warrant, seized a number of private and confidential documents belonging to Ocean Timber Ltd.. The Royal Fiji Police asked to be supplied with copies of these documents so as to assist in its investigation of suspected crimes of dishonesty under the laws of Fiji. The CCB refused to assent to this request but agreed to allow inspection of the originals. Ocean Timber Ltd. sought two declarations from the Hong Kong court. Firstly, that the documents or copies should be not allowed to be removed from Hong Kong without the express consent of the corporation. Secondly, that the documents should not be permitted to be examined or delivered to any person other than a person directly concerned with the investigation of the crime set out in the information on which the search warrant had been issued.

161. At the court of first instance it was accepted by all parties that the Crown was entitled to obtain the documents pending the completion of the investigation of offences alleged to have been committed within Hong Kong. The Attorney-General made two propositions. He first argued that the police could disclose documents either directly or by way of copies to any person they thought fit. Alternatively, he argued that the Hong Kong police could disclose documents to the police forces of a friendly State within the Commonwealth for the purpose of assisting criminal investigation of a matter properly within the jurisdiction of that State. Both these propositions were rejected by the judge of first instance and the Court of Appeal.

162. The judge considered that the proposition that the police could disclose documents to anyone they considered fit was too wide. He said that the power to enter, search and take possession of documents is given to police to assist them in their investigation. The judge thought that the propriety of disclosing seized documents is limited to showing them to witnesses, experts or others who will assist the police in investigation of crimes committed in the jurisdiction of Hong Kong. He also rejected the proposition that international co-operation provided a basis for permitting the disclosure of documents. Jurisdiction in criminal matters was generally territorial and a search power could not apply to transactions within Hong Kong. It did not matter that a foreign police force could be trusted not to abuse any confidence reposed in it by the Hong Kong police.²²⁶ For these reasons, the judge considered that the balance of competing public interest must, as a matter of principle, be decided in favour of upholding the possessory rights of the company. Since those rights were threatened outside Hong Kong the judge granted the declarations.

163. The Court of Appeal unanimously affirmed this decision. Huggins J.A. made the following telling comment:

"Where a statute authorises an official to do an act which necessarily interferes with the general rights of one of the Queen's subjects such interference must not exceed what is reasonably necessary to attain the object of the act authorised. The present statutory provision allowing the issue and enforcement of search warrants was to enable the police to obtain evidence which may assist in the conviction of a person for an offence with which he is charged or of which he is reasonably suspected to be guilty. This must, however, be an offence triable in Hong Kong. It is untenable to contend that the police of Hong Kong have the power to apprehend persons for offences committed abroad - no warrant could have been issued to search for documents which would merely throw light on the character or activities of a person liable to apprehension in Fiji but not in Hong Kong."

164. It is submitted that a court in the United Kingdom would probably accept the reasoning and result of the decision in Ocean Timber. The implications of Ocean Timber in transmitting evidence documents seized under a search warrant are clear. Its impact on intelligence is, however, debatable. The Hong Kong Legal Department has taken the view that Ocean Timber prevents the police from providing co-operation which would involve the sending of information based on materials seized or brought into police custody. This seems to be a very restrictive view. The court in Ocean Timber upheld the corporation's possessory rights in the relevant documents: it did not explicitly refer to the use of intelligence gleaned from those documents. For example, if the documents indicated the names and activities of the associates of the suspected criminals, then such intelligence could be communicated to a foreign police force. It is difficult to see on what grounds a corporation might claim possessory rights with respect to that information.

D. Extradition

165. The law and practice regarding extradition forms an important part of international judicial assistance in criminal matters. The creation of the modern extradition treaties in the eighteenth and nineteenth centuries marks the effective beginning of international co-operation in the suppression of crime. Other forms of mutual assistance, such as bilateral or multilateral conventions dealing with criminal activities, are regarded as "off-shoots" of the extradition process. Extradition has two features which distinguish it from other modes of judicial assistance. Firstly it involves the formal surrender by one State of a suspected or convicted criminal to the authorities of another State for the purposes of criminal prosecution and punishment. Secondly, it represents a highly developed formal arrangement which enshrines the principle of reciprocity. It would, however, be wrong to assume that formal extradition has been an effective mechanism for controlling crime, particularly commercial or corporate fraud. The legal and practical difficulties of ensuring extradition have led to alternative and less formal arrangements between States with historical and close political and economic ties.

(i) Informal and Irregular Procedures

166. There are a number of legal and extra-legal devices that may be seen as practical alternatives to formal extradition. The most extreme methods, such as the abduction or kidnapping by agents of one State and the return of the fugitive to another State, with or without the co-operation of the authorities of the latter State, violate basic human rights and also, perhaps, international law. The reliance by States on private "volunteers" to apprehend fugitive criminals may be objectionable, but it is not illegal. For example, the seizure of Ronald Biggs, the British fugitive train robber, in Brazil by private individuals and his subsequent placement in custody in Barbados did not impose any duty on the United Kingdom to refrain from requesting his extradition. The United Kingdom was thus entitled to take advantage of Bigg's fortuitous presence in Barbados.

167. "Disguised extradition" is an informal method by which a State, with the prime motive of extradition, uses its immigration laws to return a fugitive to another State. Expulsion and deportation orders on the grounds of illegal entry by an alien or the undesirable presence of a foreign resident provide the State with an important discretionary device in giving international judicial assistance. There is a temptation to use such procedures where there is no extradition treaty; where the extradition treaty does not cover a specific fraud offence; where there are long delays and huge costs in extradition, a common occurrence in fraud cases; or where the complex and often technical procedures of extradition are likely to inhibit extradition.

168. Traditionally, the English courts have assumed an ambivalent attitude to the British Government's use of deportation orders as an alternative to formal extradition. For example, in R. v Governor of Brixton Prison, ex parte Soblen,²²⁷ Dr. Soblen, a fugitive convicted of espionage in the United States, unsuccessfully challenged the British Home Secretary's deportation order specifying the United States as his destination. The Court of Appeal considered that although the deportation order was prima facie lawfully issued on the ground of Soblen's illegal entry into the United Kingdom, the order would have been illegal if it had been made mala fide.²²⁸

169. It is interesting to note that the Court of Appeal in the Soblen case held that there was no evidence that the Home Secretary had acted with an ulterior purpose even though he had specified the United States as the destination of the deportee. This case illustrates the difficulty of establishing bad faith, particularly since the court has no power to compel the

Home Secretary to disclose the reasons for his decision or the materials on which he acted.
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170. Although the improper use of deportation orders has been described as an illegal evasion of the judicial safeguards and procedure which are a necessary concomitant of formal extradition, this has not stopped the practice. Indeed, it has been said that deportation as a method of co-operation in the international suppression of crime may be more frequent than formal extradition.

171. It is clear that when a fugitive is arrested abroad and brought back to England by irregular or illegal means the English court has jurisdiction to try him for any offence with which he is charged. Lord Goddard C.J. said in R. v O.C. Depot Battalion R.A.S.C.²³⁰ that once a fugitive is in legal custody before the court it is no defence for him to say: "I was arrested contrary to the laws of State A or State B where I was actually arrested."

172. Although the court has jurisdiction to try the offence, it has also a discretion to prevent an abuse of its process.²³¹ If, for example, the British authorities participated in the illegality of the removal of a fugitive, an English court might dismiss the charges against the defendant. This occurred in Re Mackeson.²³² In 1977 Sir Rupert Mackeson was charged with sixteen offences of obtaining services by deception concerning the collapse of his Mayfair travel agency. Whilst on bail, Mackeson left England and travelled to Zimbabwe (then called Rhodesia). There was no extradition treaty in force between the United Kingdom and Rhodesia and subsequently Mackeson was deported as an "undesirable resident" to England. In ruling that the charges against Mackeson should be dropped, Lane L.C.J. found that the Metropolitan Police had asked for the "disguised extradition" of Mackeson. The judge said that the detention of Mackeson by the Rhodesian police on the plane to London and the delivery of him to the British police, who were waiting as pre-arranged at Heathrow airport, was evidence that the "real reason" for his deportation was a "back-door" extradition request from the police.

(ii) Formal Extradition

173. The proposals that have been made for amendment and alteration to the Commonwealth Scheme for the Rendition of Fugitive Offenders will be brought before the Commonwealth Law Ministers in a separate report and require no discussion here.

E. Recognition and Enforcement of Foreign Judgments in Criminal Cases

174. It is a general rule that the penal or criminal laws of a foreign State will not be enforced directly or indirectly in England. A similar rule applies to foreign penal judgments.²³³ It has been claimed that there are three discernible reasons for this rule. First, in Huntington v Attrill²³⁴ the Privy Council considered that a penal law is an exercise by a State of its sovereign power which "by the law of nations is exclusively assigned to the domestic forum." Second, English courts have had in the past limited confidence in a foreign State's administration of justice and particularly foreign judgments emanating from a criminal prosecution. Third, there are numerous practical difficulties arising from the enforcement of foreign judgments and the transformation of judgments in international law.

175. There are two views as to when a law will be regarded as a non-enforceable penal law. The first view is that expressed in Huntington to the effect that the character of the law depends on whether it is for the satisfaction of a private wrong or for the punishment for the infraction of a penal law.²³⁵ In Huntington a New York law, which was designed to protect the public against fraudulent conduct by promoters of a corporation, provided that the directors of a corporation should be personally liable for its debts where false reports of its financial condition had been published. Creditors were entitled to recover sums under the statutory provision in satisfaction of their outstanding claims. A creditor instituted a suit under the statute in a New York court and obtained judgment for a large sum of money. He later brought an action on the judgment in Ontario. Although the New York courts had decided that the statute was of a penal character, the Privy Council held that the American classification was not binding on the Ontario court. The Privy Council expressed the view that the statute was remedial, and not penal, since it allowed a creditor to enforce a liability in his own interest and thus protected his own private rights.²³⁶

176. The implication of the decision in Huntington is that where a private party brings a civil suit based on a law which provides public and private remedies, such as the United

States Federal Securities Anti-Fraud laws, the ensuing judgment will be enforceable in England. It has been pointed out that the critical factor, according to Huntington, is the identity of the party at whose instance the suit is brought rather than the substance of what is being enforced. Consequently, if Huntington is correct, then, the numerous American regulatory laws will be enforceable in England at the request of a private party.

177. A different view as to the enforcement of penal laws was expressed in Attorney-General of New Zealand v Ortiz.²³⁷ In this case the New Zealand Government sought an injunction to restrain the sale by auction in London of a valuable Maori carving which had been illegally exported from New Zealand contrary to the Historic Articles Act 1962 and an order for the return of the carving. At first instance, Staughton J. held that section 12 of the 1962 Act provided for the automatic forfeiture to the Crown of an illegally exported article. He also held that the 1962 Act was enforceable in England because the purpose of the forfeiture provision was the preservation of national property and not the punishment for breach of the law. These views were rejected by the Court of Appeal which held that the 1962 Act did not provide for automatic forfeiture,²³⁸ and even if it did, such a law was not enforceable in England. Ackner L.J., with whom O'Connor L.J. agreed, considered that the 1962 Act was a non-enforceable penal law because it sought to vindicate a State's rights through confiscation. Lord Denning M.R. thought that the 1962 Act was a non-enforceable public law.²³⁹ He defined a public law as that class of laws which are an exercise by the sovereign government of its sovereign authority over property within its territory or over its subjects wherever they might be. In Lord Denning M.R.'s opinion, an English court will not enforce a foreign public law which purported to exercise sovereignty beyond the limits of the foreign State's authority. The implication of Lord Denning M.R.'s view is that the character of a foreign judgment will depend on whether it is in respect of a claim which is a manifestation of a foreign State's sovereign authority. If this is the case, it is arguable that the punitive damage awards under the United States anti-fraud securities laws should not be enforceable or registrable in England because in such cases the public interest is being enforced indirectly through the agency of the plaintiffs, rather than directly through regulatory bodies such as the Securities and Exchange Commission.²⁴⁰

178. The decision in Ortiz supports the view that where a foreign court orders the forfeiture of assets derived from theft, fraud or other criminal offences, such an order would not be enforceable in England. Similarly, a forfeiture order issued by an English court will not generally be enforceable in a foreign State. However, where a forfeiture order is made effective so as to reduce the property into the possession of a State, then, according to Brokaw v Seatrain U.K. Ltd.,²⁴¹ the English courts will enforce the title to the property. This means that an English court has jurisdiction to enforce an actual possessory title even though it emanated from a penal order. Thus, if in Ortiz the Maori carving had been seized and condemned in New Zealand and reduced into the possession of the New Zealand Government, the English court would have enforced the government's proprietary title.

179. The strict rule requiring non-enforcement of penal laws applies not only to criminal judgments but also to preventative criminal actions, such as injunctions, civil suits and administrative hearings at the request of a public body. This is illustrated by Schemer v Property Resources Ltd.²⁴² In that case the receiver of a Panamanian company, accused of fraudulent practices contrary to the Securities Exchange Act 1933, sought to have himself appointed as the receiver of the assets of that company's subsidiaries in England. Goulding J. denied the application on the ground, *inter alia*, that the receiver was a public official who had been appointed at the request of the Securities and Exchange Commission, and who was charged with reducing into possession the assets of the company in order to prevent the commission or continuance of a penal offence. This decision effectively curtails the enforcement of the civil injunctive suit by the Securities and Exchange Commission in an English court.

180. It is submitted that the general rule which prohibits the enforcement of foreign penal judgments should be reconsidered. The rule which views the enforcement of foreign penal judgments as impinging on the sovereignty of the State ignores the contemporaneous process whereby the enforcement of the penal judgments of its own courts abroad would widen the potential range of its sovereignty. In both national laws²⁴³ and international conventions²⁴⁴ there is an increased willingness to enforce foreign penal judgments. The most important recent initiative is the European Convention on the International Validity of Criminal judgments 1970, which seeks to assimilate a foreign criminal judgment from the sentencing country into the legal system of the enforcing country. The European Convention obliges a requested State to enforce the criminal judgment of another contracting State,

unless the principle of double criminality is not satisfied, or if the judgment is not final and enforceable in the requesting State, or where certain exculpatory grounds apply.²⁴⁵ Acceptance of the Convention has been lukewarm. It has been signed by a mere seven European States which have similar criminal legal structures. It is arguable that the English criminal justice system is so different from the States on the Continent that England is unlikely to accede to the European Convention. On the other hand, the European Parliament has declared that harmonisation of laws within the European Common Market extends to civil, commercial and administrative laws, as well as criminal laws.²⁴⁶ Changes in the English criminal legal system as a result of its membership of the European Economic Community is a distinct possibility in the future.

181. The recognition of a foreign penal judgment is distinguishable from its enforcement. A judgment must be recognised before it can be enforced. Moreover, a judgment may be recognised in a negative sense without it being positively enforced. Although the common law authorities are inconclusive on the issue whether a foreign criminal judgment would be recognised so as to prevent an English criminal prosecution for the same offence,²⁴⁷ some academic writers view the double jeopardy principle as applying to foreign criminal judgments. If this view is correct, it is submitted that an English court would nevertheless be entitled to refuse to recognise a foreign penal judgment where it considered that the criminal act was committed on its territory. This is because no foreign penal judgment can bind an English court from exercising its proper jurisdiction over a criminal offence.

182. Recognition may be possible in other circumstances. It should, for example, be possible for an English court to take into account an offence tried abroad in imposing a sentence on a convicted criminal. Similarly, where a court is ordering that a person be disqualified for participating in the control or management of a company, pursuant to section 188 of the English Companies Act 1948 as amended,²⁴⁸ it is submitted that the basis of the disqualification order could be the conviction of that person before a foreign court for an offence of fraud in relation to a company. The wide wording of the statutory provision should be noted: the court is empowered to make a disqualification order "where it appears that... an officer... has been guilty of any fraud in relation to the company..."

183. Finally, recognition of foreign penal judgments may be important for administrative and self-regulatory bodies. For example in England it should be possible for the Department of Trade, pursuant to section 3 of the Prevention of Fraud (Investments) Act 1958, to refuse to grant a dealer's licence in securities to a person who has been convicted of a fraud in a foreign jurisdiction. However, since the Department of Trade would have the onus of proving that an applicant is not a fit and proper person to be given a licence, there is considerable scope for challenging the integrity of the foreign conviction.

184. In the report on commercial crime that was submitted to the Commonwealth Law Ministers' Meeting in Barbados in 1980 it was envisaged that information relevant to the standing of an individual or company seeking, for example, registration as a dealer in securities or a licence as an off-shore bank, could be collated by the Commonwealth Fraud Officer and provided on request to relevant authorities.

F. Bilateral Forms of Co-operation

185. The most important form of bilateral co-operation in criminal matters is bilateral extradition arrangements. For the purpose of investigating crime one or two countries have gone a step further and entered into bilateral mutual legal assistance treaties. In addition, double taxation treaties provide a limited method of exchanging information between taxation administration which may be valuable in investigating tax evasion or more usually only cases of tax fraud.

186. Few Commonwealth countries have ever considered entering into treaty obligations relating to mutual assistance in criminal matters. The reasons for this are manifold and do not solely depend on legal considerations. Common law countries are generally in a position to provide assistance to other jurisdictions and do not normally require or expect comity or reciprocity. On the other hand, most common law legal systems have great difficulty in accepting evidence obtained out of jurisdiction for the purposes of a criminal trial. Therefore, it has been argued that there is no obvious need for an elaborate treaty system within the common law world, in the absence of a radical shift away from the hearsay and best evidence rule in criminal law trials. Whether this is so or not, there is little doubt that very real practical advantages may be obtained in the execution of a bilateral arrangement with countries which do not necessarily espouse the flexibility of the common

law world in the provision of assistance. Therefore, there is great value in considering the most significant model for a bilateral mutual legal assistance treaty - that of the Swiss-United States Treaty on Mutual Assistance in Criminal Matters.²⁴⁹

187. The Swiss-United States Treaty is unique in that it marries a common law evidentiary system with a Napoleonic civil law system. The Treaty permits a request for legal assistance concerning criminal matters ²⁵⁰ to be directly communicated between the United States Department of Justice and the Swiss Federal Office for Police Matters. Legal experts in both authorities assist each other in a spirit of co-operation in overcoming important differences between the two countries in the investigatory process, evidence-collection procedures and admissibility rules. The Treaty also enables the Swiss bank secrecy rules to be waived in certain cases.

188. The Treaty provides that wide-ranging "compulsory assistance measures" may be rendered in either investigations or in proceedings in respect of offences committed within the jurisdiction of the requesting State. "Compulsory assistance measures" include but are not limited to:

- (a) ascertaining the whereabouts and addresses of persons;
- (b) taking the testimony or statements of persons;
- (c) effecting the production or preservation of judicial and other documents, records or items of evidence;
- (d) service of judicial and administrative documents; and
- (e) authentication of documents.

189. The Treaty also makes an important distinction between general legal assistance in criminal matters and special legal assistance for the prosecution of organised crime. General legal assistance can only be invoked if the principle of double criminality ²⁵¹ is satisfied and the offence is in the schedule of offences in the Treaty.

190. Special legal assistance is available for the investigation and prosecution of organised crime. Special legal assistance may be invoked where the perpetrator of the criminal act is reasonably suspected to be "knowingly involved in the illegal activities of an organised criminal group" and is either a member, affiliate or participant in any important activity of the group, or is a public official who has knowingly violated his duties in order to assist such a group. The term "organised criminal group" ²⁵² is precisely defined since it serves as the basis for rendering legal assistance which is wider in scope than traditional Swiss practice. Where organised crime participation is reasonably suspected, legal assistance will be granted for fiscal offences, such as tax evasion ²⁵³ or foreign currency violations, or for political offences. In cases of organised crime the Swiss authorities will give assistance even if the relevant offence is not punishable in Switzerland. The Swiss Government's strong opposition to organised crime is evident in that fundamental principle of speciality is waived. Where the organised crime provisions apply, documents, testimony or other evidence obtained by the requesting State may be used without restriction, provided that the requested State is notified of such use and is given an opportunity to comment.

191. Under the Treaty legal assistance includes the disclosure of banking information. Where such disclosure is mandatory, the Swiss authorities will identify bank account beneficiaries, where possible, examine banking transactions and exchange information. Authentication of banking records for the purpose of complying with the American rules of admissibility of evidence is also within the purview of legal assistance. Neither Article 47(b) of the Swiss Banking Act nor article 273 of the Swiss Penal Code Limit the disclosure of banking information, except as provided by Article 10(2) of the Treaty. Article 10(2) forbids the disclosure of bank secrets of third parties who appear to have no connection with the offence under investigation, except where the offence is "serious", the evidence sought is of "substantial significance", and the information or evidence has not been obtained elsewhere despite reasonable efforts by the requesting State.

192. It may be useful to discuss briefly the effectiveness of the 1973 Treaty as a mechanism for international judicial assistance. During the first four years of the Treaty's implementation the American authorities made 131 requests whereas the Swiss authorities made 41 requests for judicial assistance. It is noteworthy that in 1980-81 the number of requests has significantly increased, indicating that as both sides become more familiar with the legal system of the other State the scope of assistance is immeasurably increased. The Treaty has been particularly useful in corporate fraud and narcotics investigations. Indeed, most of the requests relate to crimes against property where the offender has used the

normal commercial ties between the two States so as to avoid suspicion. It has been estimated that evidence obtained under the Treaty has contributed to about 80 convictions and guilty pleas in the United States and approximately 35 convictions in Switzerland.²⁵⁴ Practical examples may seem to illustrate the importance of these statistics. For example, the Italian financier Sindona could never have been convicted in the United States on numerous counts for his role in the collapse of the Franklin National Bank without the bank records from Zurich and Geneva which were obtained under the Treaty.²⁵⁵ In another case the Swiss authorities identified intermediaries who had received and/or handled bribes in connection with an offence under investigation in the United States. The Swiss authorities were willing and able to give assistance even though such intermediaries were not named in the documents containing the American request.²⁵⁶ Indeed, under the Treaty it is possible to disclose the names of individuals or corporations who are involved in any way in the facts being investigated abroad. It is sufficient for the purposes of assistance that such parties participated in an act constituting one of the elements of the offence under investigation; it is not necessary that they be prima facie guilty of an offence or even have allegedly contravened a law. The Treaty may thus be effective where the American authorities do not know the identity of the criminal actors or their associates.

193. It would be wrong to create the impression that there have not been areas of great difficulty with the interpretation and application of the Treaty. One area which has evoked considerable disagreement is that of insider dealing regulation. In a nutshell, although the Americans consider insider dealing unlawful, it is rarely dealt with as a criminal offence, but more usually in the civil courts or through administrative enforcement proceedings. Insider dealing is not a criminal offence in Switzerland and until recently has not necessarily been regarded as seriously as it has in the United States. Given the requirement for double criminality the Swiss have been unwilling to provide assistance in compulsory matters to the various United States administrative agencies charged with "policing" the American law. A number of cases have arisen where the United States judicial and administrative authorities have attempted to force disclosure of banking information from Swiss financial institutions which in Switzerland is protected by the law. After much negotiation and a degree of antagonism the Swiss and United States governments have recently entered into a Memorandum of Understanding which in large measure resolves these problems.²⁵⁷

194. It has been claimed that the United States-Swiss Treaty provides a model for mutual assistance treaties between common law and civil law States. The United States Department of Justice has concluded similar treaties with Turkey, Colombia and the Netherlands and is negotiating treaties with Italy, France and Germany. The Swiss authorities have commenced discussions with Canada on this subject and preliminary negotiations with other countries which adhere to the common law concept of criminal law and procedure have been initiated. However, the United Kingdom Government has withdrawn from negotiations with the Swiss authorities for a bilateral treaty on judicial assistance in criminal matters. The British Government in a diplomatic note²⁵⁸ in 1981 rejected the Swiss Government's suggestion of a bilateral treaty. The note stated:

"The draft treaty... has been examined by the competent authorities in the United Kingdom. The latter have said, however, that they do not favour the conclusion of treaties on this subject since the system of criminal justice in the United Kingdom does not under present legislation, lend itself easily to the application of mutual assistance agreements... The United Kingdom Government... consider it preferable that the assistance rendered to the Swiss authorities should continue to be on the basis of comity rather than in accordance with a reciprocal treaty."

195. Such an approach by a common law jurisdiction is understandable given the present state of the law. Although, there are few cases where evidence obtained overseas can be satisfactorily introduced into a criminal trial in England without the attendance of the witness, the British approach appears to ignore the significance that information, which is not necessarily admissible in evidence, can have on the course of a criminal investigation. Experience suggests that a significant number of investigations have been frustrated by the inability to secure the co-operation of the Swiss authorities. Police officers as individuals would be the first to support this observation, and there is confirmation in many published reports by inspectors appointed under the English Companies Act and in the statements of such bodies as the City Panel on Take-overs and Mergers.

196. Perhaps an even more compelling reason for the reassessment of the traditional stance of common law countries is the recent enactment of the Swiss Federal Act on International

Mutual Assistance in Criminal Matters,²⁵⁹ which came into force on 1 January 1983. Article 8 of this Act provides:

"(1) As a rule, a request (i.e. for assistance in matters requiring compulsion) shall be granted only if the requesting State guarantees reciprocity. The Federal Office for Police Matters of the Federal Department of Justice and Police may require a guarantee of reciprocity if this is deemed necessary."

197. In the past the Swiss authorities have administered the general requirement for reciprocity with a good deal of flexibility. However, this rather relaxed attitude must now change. Unless, Commonwealth countries are prepared to "guarantee reciprocity" in the execution of requests from Switzerland, the Swiss authorities cannot accede to requests for assistance from that country. When it is remembered that it is a criminal offence under Swiss law for a person to conduct an investigation or assume any other judicial role other than in accordance with Swiss law, the implications of this new statutory requirement for reciprocity should be obvious.

198. Whilst the Swiss-United States Treaty provides a useful model it is likely that many Commonwealth countries would not require the same degree of co-operation in for example such matters as organised crime. A draft treaty prepared by the Swiss authorities as a basis for discussion with common law countries has been furnished to the Commonwealth Secretariat.

199. Although in this context the paper focusses attention on judicial co-operation in criminal matters between Switzerland and common law jurisdictions, given the significance of Switzerland as a financial centre and the reputation that it has for operating strict banking secrecy laws, similar considerations apply with equal force to other countries. It might also be added that, as an increasing number of Commonwealth countries develop as off-shore financial centres with their own forms of banking secrecy, the ease with which co-operation is afforded within the Commonwealth may decline. This is a matter which appears to have received little consideration in any forum.

200. A potentially important bilateral form of co-operation is the double taxation conventions. However, such conventions provide only a limited method of exchanging financial information between tax administrations. For example, Switzerland has entered into double taxation conventions with France, Germany, the United Kingdom and the United States, all of which contain a clause providing for the exchange of taxation information.²⁶⁰ It is expressly stipulated in these conventions that information will only be exchanged for the purpose of correctly applying and preventing the abuse of such conventions. It is arguable that under such conventions a taxpayer can avoid any exchange of information between the taxation authorities by renouncing the advantages of the applicable convention.

201. Internal national legislation may restrict the exchange of taxation information. For example, the British Inland Revenue is prohibited under section 6 of the Taxes Management Act 1970²⁶¹ from disclosing information except for the purposes of their duties or for the purposes of any prosecution for an offence relating to inland revenue or in such cases as may be required by law. The secrecy obligation is ameliorated by section 77 of the Finance Act 1978 which provides that the Inland Revenue may disclose to the taxation authorities of another member State of the EEC any information required to be so disclosed by virtue of the Directive of the Council of the European Communities.²⁶² Disclosure of taxation information to other member States is subject to a requirement of confidentiality²⁶³ and is only allowed for the purposes of taxation or to facilitate legal proceedings for failure to observe the laws of the receiving State.²⁶⁴

G. Multilateral Forms of Co-operation

202. There is a distinct trend towards multilateral agreements of mutual assistance in the field of criminal law. This has been brought about by a recognition that a large number of crimes have extraterritorial elements and by the acknowledgement that the failure to provide co-ordinated assistance between groups of States has facilitated abusive practices. The forms of positive collaboration between States have ranged from international treaties that deal with universal crimes, such as drugs trafficking and counterfeiting, to draft conventions that seek solutions to controversial crimes, such as industrial fraud, cultural property offences and bribery. Regional treaties and international banking supervision are other forms of multilateral co-operation.

203. There are a number of international conventions which create international crimes or come close to establishing a universal jurisdiction over certain conduct. For example, the Geneva Convention for the Suppression of Currency Counterfeiting, 1929, fosters international co-operation in stamping out counterfeiting of currency. Another example is the Geneva Convention on the High Seas, 1958, which codifies the rule of customary international law that piracy is a universal crime. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, deals with the problem of aviation terrorism.²⁶⁵ The issue of jurisdiction is often a contentious one in formulating a multilateral agreement. For example, the United Kingdom Government objected to the drafting of Article 4 of the International Agreement on Illicit Payments, which would have imposed an obligation on States to accept criminal jurisdiction over bribery offences when these have effects within the territory of the State or are committed by a national of the State. The United Kingdom delegation said that this would represent a fundamental departure from the country's territorial rules on jurisdiction and that there would be difficulty in enforcing a law based on such a jurisdiction.²⁶⁶

204. An inherent conflict of interest between developed and developing nations is evident in the formulation of an international agreement to deal with the problem of industrial fraud. Industrial fraud is the practice of making a copy of a commercial product with an established trade mark and passing it off as the genuine item. "Piracy" of inventions and industrial designs also causes economic damage to a developed country's trade in the developing countries. The Paris Convention for the Protection of Industrial Property,²⁶⁷ establishes standards of substantive law with respect of industrial property, declares counterfeiting of commercial goods to be unlawful and leaves appropriate sanctions to the national law of the Convention States. The draft International Agreement to Combat Counterfeited Goods is a significant improvement on the Paris Convention because it allows owners of trade marks which have been fraudulently reproduced to directly approach national authorities and have imports seized. The developed countries²⁶⁸ such as the United States, Japan, Australia and members of the EEC hope that the Draft Agreement will develop into an Anti-Counterfeiting Code and will be introduced in the General Agreement on Tariffs and Trade. The developed nations in the main see the problem simply as one of "theft of technology".²⁶⁹ In contrast, the developing countries, which are both the primary source and market of counterfeited goods, are extremely reluctant to sign any code on industrial fraud.²⁷⁰ These States see the main issue as one of economic competition and argue that the refusal of developed countries to transfer technology and the imposition of tariff barriers against their goods are the underlying causes of international industrial fraud.

205. International conventions dealing with copyright infringement face similar obstacles as conventions concerning industrial fraud. The Berne Convention for the Protection of Literary and Artistic Works, 1886, and the Universal Copyright Convention, 1952, are the principal multilateral copyright conventions. These conventions are supplemented by other multilateral agreements relating to the protection of producers of records²⁷¹ and regional agreements relating to television and broadcasting.

206. The principle of "national treatment" is incorporated in Articles 4 and 6 of the Berne Convention and Article 11 of the Universal Convention. This means that under the conventions foreign copyright owners are accorded the same rights as nationals, and that the local courts apply the local national laws in copyright to both national and foreign authors. Since the copyright laws of various nations differ in substance, there is formal reciprocity but not material reciprocity. Whilst the western developed nations have sought to widen the property rights of authors, the developing nations have tried to impose definite limits on the proprietors of copyright.²⁷²

207. A serious problem particularly for developing countries has been the illicit trafficking of cultural property. In November 1970 the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Convention requires States to draw up an inventory of cultural property containing detailed descriptions and photographs of archaeological treasures, culturally and artistically valuable objects used in religious ceremonies, paintings, sculptures and church property. This represents, according to Mr. A. Bossard,²⁷³ Secretary-General of ICPO-Interpol, a major step in facilitating the international circulation of information about stolen cultural property. Previously, a principal cause of delay in investigating stolen works of art has been the difficulty encountered by the police in obtaining good photographs of stolen articles. By establishing national inventories of cultural property, States can precisely identify items of stolen property and ICPO-Interpol can rely on such information to draw up speedy and accurate international stolen property notices.

208. The formulation of international codes of conduct for transnational corporations (TNCs) is another important development.²⁷⁴ The scope and the machinery for monitoring and implementing the codes are matters of protracted and fierce disagreement. Difficult questions as to the definition of TNCs, ²⁷⁵ the applicability of the code to government corporations ²⁷⁶ and the binding nature of the codes have not yet been resolved. The developed countries consider that TNCs' codes should not be mandatory because it would be impracticable, given the existing diversity in laws, policies and objectives among States. The developing countries argue that voluntary codes would be ineffective. However, even voluntary codes are not without merit, provided there is some international regulatory or supervisory agency responsible for monitoring the conduct of TNCs.

209. The search for regional networks of inter-State co-operation by geographic, political or social entities is another form of international collaboration. The European Convention on Mutual Assistance in Criminal Matters, 1959, the Benelux Treaty on Mutual Assistance, 1967, the Treaty on Mutual Assistance between countries of the Arab League, 1966, and the attempt by the Association of South East Asian nations to formulate a treaty on mutual assistance are examples of regional inter-State co-operation.

210. The European Convention on Mutual Assistance in Criminal Matters, 1959, has been signed by 15 nations, including France, Germany, Italy and Switzerland, but not the United Kingdom. Under the auspices of the Council of Europe negotiations are under way to extend the concept of Mutual Assistance to all West European nations. The Convention's provisions for mutual assistance, include chapters on the processing of letters rogatory, ²⁷⁷ the service of writs, the appearance of witnesses and experts, and the communication of judicial records. The Convention contains the principles of double criminality and reciprocity and also imposes a duty on contracting States to use their respective judicial services in furtherance of the "widest measure" of mutual assistance. The Convention does not affect the obligations incurred under bilateral or other multilateral international conventions which contain clauses governing specific aspects of mutual assistance. The Convention has been of limited practical value for many areas of crime enforcement. For example, in the context of commercial crime although it was once envisaged that mutual assistance would include the lifting of bank secrecy for common law fraud crimes and tax fraud, this proposal has not yet come to fruition.

211. Under the sponsorship of the Benelux Commission for the Study of the Unification of Laws²⁷⁸ the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters was signed in June 1962 and ratified in December 1967.²⁷⁹ The Benelux Treaty is unique in that it contains extensive measures concerning inter-State police co-operation between Belgium, the Netherlands and Luxembourg. The following significant provisions are found in the Benelux Convention. Firstly, Article 26 of the Treaty permits the dispatching of investigators to another State so as to continue investigations and to be present when letters rogatory are executed. In such cases the investigator has the same status as police officials of the neighbouring territory. Secondly, Article 27 provides an opportunity for official investigators to continue "shadowing" a suspected criminal in another Treaty State, provided it concerns an extraditable offence. Thirdly, in cases of emergency, there is a right to chase a suspected criminal of an extraditable offence across the border and the right to arrest such a criminal, provided that the "hot pursuit" is uninterrupted and is within a radius not exceeding ten kilometres inside the foreign territory. Fourthly, Article 33 creates the possibility of "lending out" convicted criminals for the purpose of participating in and aiding a foreign investigation.

212. The need for elaborate investigative co-operation in the Benelux Treaty arises from the considerable ease of travel and the extent of border crimes in these small States. The Treaty has been hailed by Mr J. Nepote, a former Secretary-General of ICPO-INTERPOL, as a "first step towards disregarding the concept of national sovereignty" ²⁸⁰ and as a model for future international collaboration. This optimistic analysis is tempered by the fact that the treaty is not particularly useful where a criminal passes through more than three States. Moreover, the treaty should be seen in the context of three unusually friendly neighbouring States which have expressed a genuine desire to harmonise and unify their legal rules and procedures. Indeed, in spite of the conditions favouring extensive co-operation, the parties took fourteen years to agree on a final draft of the Treaty and another five years to ratify it. It is clear that the difficulties encountered in reaching any agreement on inter-State collaboration should not be underestimated.

213. The internationalisation of banking in the 1960s has produced considerable changes in

the banking system. The expansion of banks across national territories through subsidiaries and branches in a large number of countries and the growth of offshore markets which operate outside the controls of national central banks has created in effect a "supervisory vacuum". These developments, coupled with the collapse and failure of a number of banks in the United Kingdom, Germany and Italy in 1973-74, precipitated increased co-operation among banking supervisory authorities. In December 1975 the Governors of the world's major central banks endorsed the Concordat of the Group of Ten. The Concordat promulgated the following fundamental principles²⁸¹ for co-operation:

- (a) host and parent bank authorities should share joint responsibility for the supervision of foreign banking establishments;
- (b) no foreign banking establishment should escape supervision; and
- (c) host countries should allow direct inspection by parent national banking authorities of offshore facilities operated by banks with headquarters in the parent country.

214. Although these measures were principally directed at improving the banking authorities' ability to monitor the liquidity, solvency and country risk of national banks, the Concordat principles could apply equally to the regulation of the propriety of international banking operations. A small number of industrialised countries have recommended that national bank supervision should encompass the investigation of criminal activities of its offshore banks and that host nations should lift bank secrecy where grounds of suspicion of criminal activity exist. These proposals have not been accepted. Moreover, it should be noted that the Concordat explicitly provides that bank inspection cannot be used as a means of identifying tax evasion per se.

215. A considerable problem in the East Caribbean has been the creation of "free banking" sovereign crime zones. Free banking zones are located next to airports, are legally autonomous and are not subject to any supervision by local customs, immigration, banking or police authorities. Under the auspices of the International Monetary Fund (IMF), the East Caribbean Currency Authority (ECCA) was created with the object of becoming a central bank for the smaller countries of the East Caribbean. It was proposed that the ECCA would assert its authority so that "dirty money" would not be allowed into the national banking systems, banking licence applications would be vetted and depositors and accounts would be inspected with a view to discovering "irregularities". The ECCA has met with strong opposition. The proposed ECCA initiative has not been fully implemented in spite of considerable pressure from the IMF and the United States Government.

Developing Mutual Assistance in Criminal Matters

216. Assuming that Commonwealth countries would recognise the political, social and economic advantages in developing greater mutual assistance in criminal matters the question arises as to how best this may be achieved. There are no immediate or simple answers. The matter is one for deliberation the more so because in many jurisdictions to achieve effective improvements there would have to be legislative changes. The writers of this paper have therefore set out a number of possible approaches ranging from a Commonwealth scheme for mutual assistance in criminal matters to merely a refinement of the existing informal procedures.

(1) A Commonwealth Scheme for Mutual Assistance in Criminal Matters

217. The Government of Australia submitted a Memorandum to the Commonwealth Law Ministers Meeting in Winnipeg, Canada, in 1977²⁸² suggesting that a meeting be convened by the Commonwealth Secretariat to negotiate a scheme analogous to the 1966 Scheme for the Rendition of Fugitive Offenders for general mutual assistance in criminal matters. This suggestion is attractive given the success of the Commonwealth Scheme for the Rendition of Fugitive Offenders. However, whilst the Australian delegation raised the matter again at the Meeting the matter was taken no further.

218. It seems clear that a Commonwealth-wide initiative in this field would in practical terms have to be conceived as a "scheme" and not an international convention. The weakness in basing such an initiative on a "scheme" is, of course, that individual countries are left with greater discretion in the adoption, implementation and administration of the "agreed" provisions. Whilst the Commonwealth Scheme for the Rendition of Fugitive Offenders has encountered practical difficulties it must be regarded as a success and could, it is respectfully submitted, provide a conceptual basis for a wider initiative. Of course, it would be wrong to underestimate the problems involved in developing an acceptable

Commonwealth Scheme for Mutual Assistance in Criminal Matters. Whilst there is comparatively little scope for fundamental disagreement on the desirability of returning fugitive offenders for ordinary criminal law offences to another Commonwealth country to face a fair trial there are exceedingly more controversial issues in arriving at a general scheme for mutual assistance in criminal matters. It is only necessary to consider the possible difference in views of Commonwealth countries on such matters as the provision of assistance in taking compulsory measures to secure and provide evidence, the admissibility of evidence obtained out of jurisdiction and the enforcement of foreign judicial orders, for example, in regard to the forfeiture or seizure of property associated with criminal activity. On the other hand, there are many matters where a consensus of opinion could be achieved with relative ease. After all, there are important common legal traditions in most Commonwealth countries.

219. Should Law Ministers consider it desirable that a formal scheme be devised for the Commonwealth then it may be appropriate for the Commonwealth Secretariat to undertake a more thorough study and then convene a meeting of relevant officials to develop a satisfactory draft. The British delegation to the 1977 Commonwealth Law Ministers' Meeting thought that "further exploration of the subject by the Secretariat" would be appropriate. A similar approach to that adopted in regard to the recognition of judgments and orders, and the service of process within the Commonwealth would seem to commend itself. ²⁸³

220. It has been suggested that regional as opposed to a Commonwealth wide initiative would be more practicable. With respect, this may be doubted. Whilst there are special considerations pertaining to jurisdictions in close and regional geographic proximity the wider Commonwealth perspective should not be sacrificed. Regional initiatives should be in addition to and not in derogation from a Commonwealth initiative. Of course, on the basis of the experience gained in the Commonwealth initiative in regard to mutual assistance in civil matters the convening of regional working meetings may be appropriate.

(2) Bilateral Arrangements

221. The Australian Government in the memorandum to which reference has already been made, ²⁸⁴ referred to the Swiss-United States Treaty on Mutual Assistance in Criminal Matters which has been discussed earlier in this paper. ²⁸⁵ The Australian Government expressed the view that this treaty might provide a useful model for Commonwealth countries in arriving at satisfactory bilateral arrangements with other Commonwealth countries. Of course, the Swiss-United States Treaty involves the relationship of a common law and civil law criminal process, and may therefore require adaptation before it is readily acceptable to two common law jurisdictions. Of course, the Swiss-United States Treaty does provide a sound model for any Commonwealth country desirous of entering into a bilateral arrangement with a civil law jurisdiction and the Swiss Government has prepared a draft treaty, based on the United States one, for other common law countries.

222. The bilateral approach does have certain advantages over the multilateral approach. Governments are given greater freedom to determine exactly what obligations are undertaken and exactly to whom. This is an important political consideration and in practical terms means that bilateral development may proceed somewhat more expeditiously than a multilateral initiative. Furthermore, bilateral arrangements may be entered into with countries outside the Commonwealth on essentially the same terms as those within. This consideration might be particularly important where a Commonwealth country is already committed to some kind of regional initiative.

223. Commonwealth Law Ministers may feel that there would be advantage in the Commonwealth Secretariat undertaking further studies in this area with a view to arriving at a suggested draft treaty for Commonwealth countries which might serve as a model for the negotiation of bilateral arrangements. There might well be merit in convening a meeting of relevant officials to determine an appropriate Commonwealth model.

224. It should be emphasised that the suggestion that a Commonwealth Scheme for Mutual Assistance in Criminal Matters should be devised in no way effects the right of any Commonwealth jurisdiction to enter into a bilateral arrangement with any other country, inside or outside the Commonwealth, and to this extent the multilateral and bilateral approaches are not mutually exclusive. Indeed, the bilateral approach could be satisfactorily combined with the multilateral approach giving Commonwealth countries the "right" to secure co-operation and assistance in appropriate cases.

(3) Unilateral Initiative

225. It is for every country to determine what assistance it is prepared to give the agents of a foreign jurisdiction in their endeavour to administer their own criminal judicial process. The creation of a Commonwealth Scheme for Mutual Assistance in Criminal Matters, along the same lines of the Commonwealth Scheme for the Rendition of Fugitive Offenders, not reinforced by bilateral treaty obligations, would not vest in any Commonwealth jurisdiction the "right" to secure co-operation or assistance in another Commonwealth country, although there would, of course, be an expectation that such would be forthcoming in accordance with the Commonwealth Scheme, where the relevant jurisdiction had brought it into its domestic law.

226. There is no way of avoiding the practical problem that whatever approach is taken, in the end Commonwealth countries will have to consider amending their domestic laws to accommodate requests from overseas and, from their own standpoint - perhaps more importantly - extend the admissibility of evidence acquired from overseas. As already mentioned earlier in this paper, few Commonwealth countries have even considered this problem let alone prepared draft legislation which would significantly resolve these complex procedural and evidentiary difficulties. In the circumstances, Commonwealth Law Ministers may feel that there would be advantage in the Commonwealth Secretariat further studying the relevant laws and procedures and prepare suggestions as to how some of these problems might be resolved in the context of a Commonwealth initiative.

(4) Informal Assistance

227. Whilst there is considerable scope for increasing informal co-operation and assistance, in the final analysis where a criminal trial is involved resort will have to be made to judicial procedures. It is the absence of effective formal legal procedures for obtaining information and evidence from overseas, which is usable or admissible in evidence, before the domestic courts that remains at the heart of the problem. Police and judicial authorities are mandated and orientated to the criminal process whereby an offender is dealt with by the national courts according to the ordinary rules of procedure and evidence. Whether these procedures and rules are at all adequate for coping with the modern international criminal remains to be seen. But the fact remains that unless police officers have a hope of securing evidence from overseas which will result in a good chance of achieving a successful prosecution before their own criminal courts few will be prepared to deal with the matter on any other basis. For example, in practice very few ordinary police officers are concerned with loss prevention or the strategic use of intelligence where such is not referable to a potential prosecution. The restrictive attitude of prosecutory authorities in certain Commonwealth jurisdictions both to the legal question of jurisdiction over crimes and to the practicality and cost of securing evidence overseas which may not in the final analysis be admissible in court, has led to a disturbing level of disenchantment and even frustration on the part of law enforcement officers. This has been especially so in regard to organised crime and commercial crime. Perhaps, even more disturbing is the reputation that certain countries are rapidly acquiring as centres for either operating criminal enterprises or laundering the proceeds of crime committed elsewhere. Many law enforcement officers feel that these unfortunate developments are directly related to the issues raised in this paper. Given the concern expressed by Commonwealth Law Ministers at their previous meetings about the level and extent of organised international commercial crime the significance of these developments should not be underestimated.

228. Whatever approach Law Ministers feel may be appropriate in regard to the provision of increased mutual judicial assistance in criminal matters on a more formal basis, devising a suitable scheme or programme will inevitably take time. In the short term Commonwealth Law Ministers may feel able to encourage prosecutors and law enforcement officers to adopt less parochial attitudes to requests for information and assistance from overseas than is presently adopted in some instances. This would have the immediate advantage of fostering a greater degree of goodwill and confidence at the law enforcement level. The Commonwealth Fraud Officer, whose appointment in November 1981 was partly as a result of the recognition by Law Ministers at their last Meeting that "co-operation on a police force-to-police basis" was not a complete answer, ²⁸⁶ has experienced some difficulty in assisting Commonwealth countries, particularly from the developing world, in securing effective co-operation from other police forces within the Commonwealth. In particular, some police forces feel unable to accede to a request for assistance, even if conveyed to them through the ICPO-Interpol network, with any degree of urgency. In other cases, requests are simply ignored or accorded a degree of priority which makes a mockery of international co-operation. Many police agencies refuse to acknowledge the practical

importance of inquiries relating to loss prevention and will not provide information, even where they are able to do so under their law, which would assist another jurisdiction in avoiding loss through the commission of a crime. The situation is exacerbated by the reluctance of ICPO-Interpol to become involved in the provision of assistance at this level where a specific crime has not been identified. Commonwealth Law Ministers may consider that it would be appropriate to reassert the importance of co-operation at this level and encourage their law enforcement agencies to accord this aspect of combatting crime a higher priority.

Conclusions

229. The paramount conclusion that the writers come to, is that there is a significant problem in the provision of judicial assistance in criminal matters at an international level, both within the Commonwealth and outside. Whilst informal co-operation and the utilisation of the ICPO-Interpol network is of considerable significance, neither resolve all the problems. There is a disturbing trend for domestic law enforcement agencies, for a variety of reasons, to almost give up when a substantial foreign element is involved in the commission of a crime. Unless urgent and proper attention is given to the problems confronting those called upon by society to investigate and prosecute criminals operating on an international level our legal systems are being asked to fight with their hands tied behind their backs. The successful convictions that are achieved in this context can only represent an exceedingly small proportion of the cases which could and should be brought before the courts if the arms of the legal system were freed.

230. The present writers would commend the suggestion of the Australian Government in its Memorandum to the Commonwealth Law Ministers' Meeting in Winnipeg, Canada, in 1977, that serious thought should be given to the creation of a Commonwealth Scheme for Mutual Assistance in Criminal Matters. This Scheme could usefully be reinforced by the negotiation of bilateral treaties with Commonwealth and non-Commonwealth countries along the same lines as the Swiss-United States Treaty of 1973, with suitable amendments. In the short term domestic law enforcement authorities should be encouraged, and if necessary given the resources, to more enthusiastically follow-up requests for assistance and information from other jurisdictions. In particular, there should be greater attention to the use of strategic and operational intelligence at the international level and greater emphasis should be given to the use of loss prevention techniques in certain areas of law enforcement.

Footnotes

1. See for example, American Law Institute, Restatement (Second) of the Foreign Relations Law of the United States (1965), ch.1, s.7 (The Restatement).
2. R.Y. Jennings, "Extraterritorial Jurisdiction and the United States Anti-Trust Laws," (1957) 33 British Yearbook of International Law 146, p.147.
3. The Lotus Case, (1927) P.C.I.J., Series A, No. 10.
4. See for example, Queen v Nillins (1884) 53 L.J.M.C. 157 (the offence of obtaining goods by false pretences is committed where the goods are obtained); King v Oliphant [1905] 2 K.B.67 (falsification of documents); Queen v Bull (1845) 1 Cox C.C. 281 (forgery).
5. See for example, Ford v United States (1927) 273 U.S. 593 (U.S. Supreme Court).
6. The Restatement, supra n.1, p.52.
7. R.Y. Jennings, supra n.2, p.158.
8. The Exchange of Greek and Turkish Populations (1928) P.C.I.J., Series B, No.10.
9. Nottebohm Case (1955) I.C.J. Rep. 4.
10. The Restatement, supra n.1, p.74.
11. See for example, The Foreign Asset Control Regulations 1959.
12. United Kingdom's Aide-Memoire to the European Commission in Imperial Chemicals Industries Ltd. v E.C. Com's (1972) 11. Com. Mkt. L.R. 555.

13. (1896) 2 Q.B. 425.
14. Lotus Case (1927) P.C.I.J., Series A, No.10, p.94, Per Judge Moore
15. The passive personality principle is, however, recognised in some treaties. See for example, the Convention on Offences Committed on Board Aircraft, Art.4(b), which provides that a State may exercise jurisdiction if the offence has been committed "against a national or permanent resident of such a State."
16. [1934] A.C. 585 (P.C.) The jurisdiction of piracy is now provided for by s.4 and the Schedule of the Tokyo Convention Act 1967. See also Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd., F.T. Commercial Law Reports, 30 June 1982, where it was held that maritime theft without force is not piracy.
17. See for example, Forgery and Counterfeit Currency Act 1982, the Hijacking Act 1971, the Protection of Aircraft Act 1973, and the Internationally Protected Persons Act 1978.
18. G. Williams, "The Venue and Ambit of the Criminal Law," (1965) 81 Law Quarterly Review 276, 395 and 518.
19. See for example, the judgments of Lord Reid and Lord Morris in Treacy v D.P.P. [1971] A.C. 537, pp. 552 and 555 (H.L.)
20. Lawson v Fox [1974] 1 All E.R. 738, p.785, per Lord Diplock. (H.L.); Bank Voor Handel en Scheepvaart v Slatford [1953] 1 Q.B. 248, p. 258, per Devlin J.
21. Theophile v The Solicitor General [1950] A.C. 186, p.195, per Lord Diplock (H.L.); Schibsy v Westeholz [1870] Q.B. 155, p.160, per Lord Ellenborough ("Can the island of Tobago pass a Law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?")
22. Treacy v D.P.P. [1971] A.C. 537, p.561 (H.L.).
23. See generally, M. Hirst, "The Criminal Law Abroad", (1982) Criminal Law Review 496. See also R. v Kelly [1981] 2 All E.R. 1098 (H.L.).
24. Criminal Justice Act 1948, S.31.
25. Army Act 1955, S.70.
26. Perjury Act 1911, s.1(5). Perjury is sometimes treated as an application of the territorial principle, but it is better considered as an illustration of the protective principle because its effects are not limited to the constituent elements of a crime.
27. Representations of the People Act 1949, s.155.
28. Exchange Control Act 1947 (suspended).
29. See G. Williams, *supra* n.18, p.518, where the initiatory and terminatory theories were first formulated. See also J. Lew, "The Extraterritorial Criminal Jurisdiction of Criminal Courts", (1978) International and Comparative Law Quarterly 168, where the inclusionary theory was added to Professor Williams' classification.
30. G. Williams, *supra* n.18, p.518.
31. *Id.*, p.518.
32. *Id.*, p.519.
33. In Treacy v D.P.P. [1971] A.C. 537, p.562, (H.L.), Lord Diplock claimed that the inclusionary theory would not expose the accused to double jeopardy, but it is respectfully submitted that his view is not supported by the authorities he cites.
34. [1971] A.C. 537 (H.L.).

35. See for example, Treacy v D.P.P. [1971] A.C. 537, pp. 558 and 560, per Lord Hodgson and Lord Diplock respectively. Cf. D.P.P. v Stonehouse [1978] A.C. 55, p.78 (H.L.) where Lord Salmon doubted that these theories had any "practical utility".
36. G. Gordon, Criminal Law in Scotland, (1978), 2nd ed. W. Greene & Co..
37. [1971] A.C. 537 (H.L.).
38. Id., p.558. Lord Hodgson also thought that it was open to the court to treat the demand as a "continuous demand subsisting until the addressee received it."
39. p.558.
40. pp.554-555.
41. pp.-550-551.
42. pp.560-561.
43. [1976] A.C. 35.
44. [1974] 3 All E.R. 705 (C.A.)
45. [1976] A.C. 35, p.61.
46. J. Lew, *supra* n.29, pp.177-179.
47. Id., p.78.
48. [1963] 1 Q.B. 8 (C.C.A.); Cf. R. v Ellis [1899] 1 Q.B. 230 where the accused was convicted of obtaining goods by false pretences in circumstances where the pretences had been made in Scotland but the goods had been obtained in England.
49. In D.P.P. v Stonehouse [1978] A.C. 55, p.74 (H.L.) Viscount Dilhorne doubted whether jurisdiction in Harden depended on the ground that the post office was the agent of the maker of the false pretences.
50. (1974) 59 Cr. App. R.80 (C.A.).
51. Id., p.85. See also Treacy v D.P.P. [1971] A.C. 537, p.563 (H.L.), where Lord Diplock said that Harden should be reconsidered, and suggested that it should be overturned in the light of the new offence found in s.15 of the Theft Act 1968.
52. The "postal rule" provides that if the offeror and intended recipient of the money has made known that acceptance should be communicated by post, the post office will be deemed to be the agent of the offeror for receipt of notification of acceptance, including the transmission of money. Anson's Law of Contract, ed. A.G. Guest, (1979), 25th ed. Clarendon Press Oxford, pp.42-44.
53. [1974] A.C. (H.L.)803. This decision accords with the general policy of preventing persons driving on English roads when their competence is impaired and is consistent with the terminatory theory of jurisdiction.
54. Similarly, the jurisdiction over a crime committed by a secondary party is determined by the State which enjoys jurisdiction over the principal offender. Robert Miller (Contractors) Ltd. and Robert Miller [1970] 2 Q.B. 54.
55. [1969] 1 W.L.R. 165.
56. [1957] A.C. 602 (H.L.).
57. Id., p.634.
58. See R. v Sinclair [1968] 3 All E.R. 241 (C.A.), which is authority for the view that a conspiracy to defraud may consist of a dishonest agreement to commit a direct

interference with another person's proprietary or legal rights, which may neither be criminal nor tortious.

59. Board of Trade v Owen [1957] A.C. 602, pp.630-631 (H.,L.)
60. (1864) 4 F.F. 68. See also the obiter dicta in R. v Cox [1968]. 2 All E.R. 410, p.413, and Board of Trade v Owen [1957] A.C. 602, p.630-631.
61. The proposition in Kohn is difficult to reconcile with cases on conditional intent, such as R. v Eason [1971] 2 Q.B. 315, which held that if a dishonest person has the intention of stealing only what he finds worth stealing he has no present intention to steal, and also with definition of conspiracy in section 1(1) of the Criminal Law Act 1977, which refers to agreements to pursue a course of conduct necessarily involving the commission of an offence.
62. G. Williams, *supra* no.18, p.530.
63. [1972] 1 Q.B. 1.
64. [1978] A.C. 55 (H.L.).
65. P.67. Lord Diplock and Lord Edmund Davies described the offence as a "result crime".
66. (1980) 70 Cr. App. R.77 (H.L.).
67. *Id.*, p. 110.
68. J.C. Smith, "Theft, Conspiracy and Jurisdiction: Tarling's Case", (1979) Criminal Law Review 220.
69. R. v Williams [1942] A.C. 541 (P.C.); London and South American Investment Trust v British Tobacco Co. (Australia) [1927] 1 Ch. 107; Brossard v Smith [1925] A.C. 371, (P.C.).
70. (1980) 70 Cr. App. R. 77, p.132.
71. [1973] 1 All E.R. 940 (H.L.).
72. (1980) 70 Cr. App. R. 77, p. 110.
73. Report on the Territorial and Extraterritorial Extent of the Criminal Law, (1979), Law Commission.
74. See also s.7 of the Crimes Act 1961 (N.Z.) for a similar provision.
75. Law Commission Report, *supra* n.73, para, 7.
76. Rule 10(b)-5 provides:
 - "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of inter-state commerce, or of the mails, or of any facility of any national exchange,
 - (i) to employ any device, scheme, or artifice to defraud
 - (ii) to make any untrue statement of a material fact, or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
 - (iii) to engage in any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security."
77. B. Rider & H.L. Ffrench, The Regulation of Insider Trading (1979) Macmillan, Ch.3.
78. Schoebaum v Firstbrook 405 F. 2d. 200, p.210 (2d Cir. 1968).

79. U.S. v Aluminium Corporation of America 148 F. 2d 416 (2d Cir. 1954).
80. Leasco Data Processing Equipment Corporation v Maxwell 468 F. 2d 1326, p.1334 (2d Cir. 1972).
81. Note section 30(b) which provides: "The provisions of this title or any rule or regulation thereunder, shall not apply to any person in so far as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent evasion of the title." The section was narrowly construed in Schoenbaum v Firstbrook 405 F. 2d 200 (2d Cir. 1968) which held that s.30(b) has no application to persons engaged in isolated foreign transactions.
82. See for example, Murray v Schooner "Charming Betsy" 6 U.S. 64 (Sup. Ct. 1804).
83. Restatement (Second) of Foreign Relations Law of the United States (1965).
84. See brief for the SEC as amicus curiae in Schoenbaum v Firstbrook 405 F. 2d 200 (2d Cir.1968).
85. See for example the SEC consent decree with Investors Overseas Service, Sec. Ex. Act Rel. No. 8088
86. See for example, Continental Grain v Pacific Oilseeds 592 F. 2d 409 (D.C. Minn.1979).
87. 468 F. 2d 1326 (2d Cir 1972).
88. Id., p.1330.
89. The decision in Leasco has been followed in a number of other cases. For example:
 - (i) where a series of fraudulent communications, using international telephone and mail facilities, were made by a foreign corporation to a U.S. resident. Travis v Anthes Imperial 473 F. 2d 515 (8th Cir.1973);
 - (ii) where securities were offered and sold to U.S. investors with fraudulent representations which stressed the issuer's ties with the U.S. SEC v Capital Growth 391 F. Supp 593 (1973)
 - (iii) where U.S. inter-state commerce facilities were used in the preparation and distribution of fraudulent prospectuses to U.S. residents. SEC v United Financial Group Inc. 475 F 2d 354 (9th Cir. 1973);
 - (iv) where the impugned transaction concerned trading in securities that were listed on a U.S. stock exchange. Selzer v Bank of Bermuda Ltd. 385 F Supp. 415 (S.D.N.Y. 1974); Roth v Fund of Funds 405 F. 2d 421 (2d Cir. 1968).

All these cases involved American victims of fraud perpetrated by foreigners. The American courts were willing to extend the protection of Federal law to these plaintiffs even though the material conduct occurred outside the United States.

90. 519 F. 2d 974 (2d Cir. 1975).
91. 519 F. 2d 974, p. 988.
92. 519 F. 2d 1001 (2d Cir. 1975) Cf. ITT v Cornfield 462 F. Supp. (SDNY 1978) where it was held that there was no jurisdiction over a Rule 10(b)-5 claim by foreign shareholders of a foreign corporation against its foreign directors even when the allegedly fraudulent transaction occurred on the American securities exchange.
93. 548 F. 2d 109 (3d Cir 1977).
94. 405 F 2d 200 (2d Cir 1968).

95. Id., p. 206.
96. 473 F. 2d 515 (9th Cir. 1973).
97. 519 F. 2d 974 (2d Cir. 1975).
98. Id., p. 986.
99. See generally, W. Painter, "Proposed Changes in United States Securities Laws" in The Regulation of the British Securities Industry, ed. B.A.K. Rider, (1979), Oyez Pub. Ltd.; p.142 et seq.
100. See for example, In Re Uranium Contracts Litigation 480 F. Supp. 1138 (ND.III.1979); Arthur Anderson v Finesilver 546 F. 2d 338 (10th Cir. 1976). See also in regard to the Siberian Pipeline affair Aida Feliciano v Reliant Trading Co et al (1982) U.S. Court of Appeal 3rd Cir. Case No.82-1176.
101. (1975-1976 Transfer Binder) C.C.H. Fed. Sec. L. Rep. 1195 (D.D.C. 1975).
102. There is no authority supporting the conclusion that this is an international legal obligation.
103. Vital national interests refer to overriding interests, such as national security or general welfare.
104. The type and severity of a penalty imposed on a party, if it disobeys foreign laws are the relevant considerations in determining whether to modify enforcement jurisdiction.
105. American courts are more willing to waive jurisdiction over a foreign party who would be forced to disobey the laws of his country, than it would waive jurisdiction over an American corporation faced with an inconsistent foreign law. See U.S. v General Electric Co. 115 F. Supp.335 (D.C.N.J. - 1953); Molophone Co. v U.S. 352 U.S. 903 (Sup. Ct. - 1956).
106. Ref. No.81. Cir. 1836 (M.P.) Nov.16, 1981 (S.D.N.Y. 1981). See also U.S. v First National City Bank, 396 F 2d 897 (2d Cir. 1968) where the balancing formula in section 40 was also applied.
107. See also, Societe Internationale Pour Participacione Industriel et Commercial S.A. v Rogers 357 U.S. 1977 (Sup Ct. 1958) where it was indicated that a party who had made deliberate use of foreign law to evade American law might be subject to sanctions; Application of Chase Manhattan Bank 297 F. 2d 611 (2d Cir. 1962) where the court upheld the District Court's modification of subpoena duces tecum on a showing that compliance would violate Panamanian law; Ings v Ferguson 282 F.2d 149 (2d Cir. 1960) where it was held that if a party served with a subpoena duces tecum was only a witness and the evidence could have been secured by letters rogatory, the subpoena had to be modified so as not to require production of documents protected by Canadian law; and First National Bank of New York v I.R.S. 271 F. 2d 616 (2d Cir. 1959) where production of record was not ordered because this would violate Panamanian law.
108. See for example, article 271 of the Swiss Penal Code, 1937-71.
109. For example, the United States seizure of the Panama Canal.
110. United States Department of Justice, Civil Division Practice Manual, (1976), Volume 1, International Judicial Assistance, p.53. See also In re Request for Judicial Assistance from the Second District Criminal Court, Seoul, Korea, 428 F. Supp. 109 (N.D. Cal.1977), aff'd. 555 F. 2d 720 (9th Cir. 1977).
111. Opening address by Mr. E.C. Anyaoku, Deputy Commonwealth Secretary General, Meeting to discuss the Commonwealth Scheme for the Rendition of Fugitive Offenders, Marlborough House, London, 22 November 1982.
112. W. Clifford, White Collar and Corporate Crime: The Modern Challenge to Commonwealth Criminal Justice, (1977) Commonwealth Secretariat.

113. B.Rider, Supplementary Report on the International Criminal Police Organisation (ICPO-Interpol), (1980) LMM(80)2 Commonwealth Secretariat.
114. See Appendix I.
115. Report No.5 submitted by the General Secretariat of ICPO-Interpol to the 45th General Assembly Session, ICPO-Interpol, 1976, on International Frauds and Commercial Crime.
116. Court of Appeal No. 86, 1978 (Hong Kong), (1979) HKLR 298.
117. See R. v Sang [1979] 2 All E.R. 1222 (H.L.) where it was considered that the judge's discretion is limited to admissions, confessions and generally to evidence obtained from the accused after the commission of the offence. See also Report of the Royal Commission on Criminal Procedure, Chairman Sir C. Phillips, (1981), HMSO, Cmnd. 8092, paras. 4.131-4.134.
118. See R. v Ali and Hussain [1965] 2 All E.R. 464 (C.C.A.); R. v Stewart (1970) 54 Cr. App. R. 210 (C.A.); R. v Keeton (1970) 54 Cr. App. 267 (C.A.)
- 119 See for example, Report on Affairs of Ferguson and General Investment Ltd. (formerly known as Dowgate and General Investments Ltd.); CSI Investment Ltd., Investigations under s. 165(b) of the Companies Act 1948, Report by J. Jackson Q.C. and K.L. Young, T.D., F.C.A., (1979), HMSO.
120. See for example, First Report of the Insider Dealing Tribunal, Chairman Mr. Justice Barker, (1982), Government of Hong Kong.
121. See B. Rider, The Promotion and Development of International Co-operation to Combat Commercial and Economic Crime, (1980) LMM(80)2 Commonwealth Secretariat.
122. Noted in (1982) 8 Commonwealth Law Bulletin 843.
123. (1884) 55 L.J. Ch. 791. On the other hand, an officer of the court may be ordered to attend without the issue of a subpoena. Re General Financial Bank (1888) W.N.47.
124. (1847) 10 Q.B. 827; 116 E.R. 313.
125. Criminal Justice Act 1967 s.2 as amended by the Criminal Justice Act 1972 s.46.
126. (1727) 1 Barn. K.B. 20; 94 E.R. 13.
127. R. v Briscoe (1831) 1 Dowl. 520.
128. R. v Bignell (1851) 16 L.T.N.S. 394.
129. Working Party Report on Investigation and Prosecution of Company Fraud, Chairman Mr. J. Jardine, (1979), unpublished, Director of Public Prosecutions, para. 72 and see Part III Canada Evidence Act.
130. The ground for granting a commission to examine a witness depended on the special circumstances of the case. Jessup v Du Port (1740) Barn. Ch. 197; 27 E.R. 609.
131. R.S.C. 1965, Ord. 39, r.1.
132. The phrase "purposes of justice" means the interests of all the parties. Berdan v Greenwood (1880) 20 Ch.D. 764n. (C.A.).
133. See Halsbury's Laws of England (1976), 4th ed. Butterworths, Vol. 17, paras. 294-304.
134. R.S.C. 1965, Ord. 39, r.2(1)(b).
135. Id., Ord. 39, r.2(2)(a).
136. Id., Ord. 39, r.2(2)(b).

137. Id., Ord. 39, r.2(1)(a).
138. Berdan v Greenwood(1880) 20 Ch. D. 764n (C.A.)
139. Armour v Walker(1883) 25 Ch. D. 673
140. Lawson v Vacuum Brake Co. (1884) 27 Ch. D. 137 (C.A.)
141. Merland v Huggins (1842) 11 L.J. Q.B. 271.
142. (1880) 20 Ch.D. 764n, p.766, per Baggallay L.J., p.768, per Cotton L.J. (C.A.).
143. (1882)20 Ch.D. 760.
144. Baddeley v Bailey (1893) W.N. 56; Cf. Macauley V Glass (1902) 47 Sol. Jo. 71.
145. See Swiss Penal Code, Article 271.
146. The examiner administers an oath to the witness, conducts an examination, which may include cross-examination, on questions prepared by the applicant, signs and seals the document and returns his commission to the relevant court.
147. Section 10 of the 1968 Act is reflected in a number of the Consular Conventions between the United Kingdom and other States. See for example, Article 26 of the Consular Convention with Austria, HMSO., Cmnd.2278.
148. See also s.5, Singapore Criminal Procedure Code.
149. An amendment of practice in 1907 required the Foreign Office to act as a channel between the foreign diplomatic mission and the court.
150. The magistrate or justice of the peace is obliged to take evidence in the same way as if the witnesses were appearing in connection with a charge for an indictable offence. Section 5 also provides for the giving of evidence, answering of questions and production of documents.
151. Working Party Report, Review of the Law and Practice of Extradition in the United Kingdom, (1982), unpublished, Home Office, para. 18.6. See also s.43, Singapore Extradition Act; Ch.76, s.27 of Ghana Extradition Act 1960 (No.22).
152. On the other hand, it is not necessary for the subject to have been charged and arraigned before a court. Id., para. 18.6.
153. Foreign requests for assistance will be received initially in the Nationality and Treaty Department of the Foreign and Commonwealth Office, who will then send them as appropriate to the Home Office (C3 Division), the Scottish Office, the Northern Ireland Office or the Senior Master at the Royal Courts of Justice.
154. See RSC 1965, Ord. 39 r.3 for a list of convention countries. These bilateral conventions codified or introduced practices which went beyond the vague and uncertain duties imposed by international comity.
155. The Hague Convention provides a master code for the 26 nations that have signed it and for the 10 nations, including the United Kingdom and the United States, which have ratified it. In implementing the Convention the ratifying countries have agreed to follow the practices and procedures of the requesting State in order that the evidence obtained or other judicial acts performed will be of use in the forum of the requesting State. Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, (1969) 8 International Legal Materials 804, p.806.
156. See also R.S.C. 1968, Ord. 70, which sets out the relevant procedure. An application for an order under the 1975 Act must be made on affidavit ex parte to a master of the Queen's Bench Division (Ord. 70, r.2). If an order so obtained is not contested, the examination is taken before any person nominated by the applicant or before an examiner of the court (Ord. 70, r.4(1)).

157. Evidence (Proceedings in Other Jurisdictions) Act 1975, s.1.
158. Id., s.5 and similarly, Zimbabwe, Witnesses Compulsory Attendance Act (Ch.55) s.3; Ghana, Courts Act 1971(No.372) s.70; Belize, Supreme Court of Judicature Ordinance, s.44; Canada, Evidence Act, S.43 and Hong Kong Evidence Ordinance Ch. 8, s.77B.
159. Report of the Committee of the Judiciary, (1963), H.R. Rep. No. 1052, 88th Cong. 1st sess., p.9.
160. [1978] 1 All E.R. 434 (H.L.).
161. In practice, the section 5 procedure governs the formal taking of evidence in Scotland for use in criminal proceedings before foreign and Commonwealth courts and also the taking of evidence in England and Wales for use in a Commonwealth court.
162. D.L. Jones, "Legislative attempts to protect trading interests", (1980) 6 Commonwealth Law Bulletin 353, p.369.
163. [1978] 1 All E.R. 434, p.467 (H.L.) Viscount Dilhorne, p.459, considered that the intervention of the Department of Justice altered the character of the proceedings.
164. In Re Westinghouse Electric Corp. [1977] 2 All E.R. 703 (C.A.).
165. Id., p.706
166. [1973] Q.B. 148, p.152.
167. Rio Tinto Zinc Corp. v Westinghouse Electric Corp. [1978] 1 All E.R. 434, p.467, per Lord Diplock (H.L.).
168. Evidence (Proceedings in other Jurisdictions) Act 1975, s.5(1)(c).
169. Id., s.2(2).
170. H.M. Advocate, Petitioner 1978 SLT NRD 17.
171. [1964] 1 Q.B. 40 (C.A.).
172. [1964] 2 Q.B. 647 (C.A.) See also Panthalu v Raymond Research Laboratories Ltd. [1966] 2 Q.B. 173 (C.A.).
173. Section 4 extends the powers available to the High Court under s.49 of the Supreme Court of Judicature (Consolidation) Act 1925 and also extends those powers given to the Court of Sessions and High Court of Justices in Northern Ireland under s.49 of the Attendance of Witnesses Act 1954.
174. [1978] 1 All E.R. 434, p.478 (H.L.).
175. The time involved depends on such factors as the legal system in the State of execution, the nature and complexity of the request and the attitude of the officials in the State of execution.
176. For a detailed list of reservations to the Hague Convention, see 7 Martingdale Hubbel Law Directory, (1978), pp. 4384-4387.
177. Fed. R. Civ. P. 28(b) (1966).
178. Fed. R.C. Civ. P. 26(b) (1966). See also Fed. R. Civ. P. 45(b) and (d) which authorise the serving of subpoenas on third parties for the taking of depositions and for production of papers and documents.
179. See for example Burchard v Macfarlane [1891] 2 Q.B. 241 (C.A.) Registrar v W.H. Smith [1956] 1 Q.B. 618 (C.A.); Penn-Texas Corp. v Murat Anstalt (No.2) [1964] 2 Q.B. 647 (C.A.); Panthalu v Raymond Research Laboratories Ltd. [1966] 2 Q.B. 173 (C.A.).

180. [1956] 1 Q.B. 618, (C.A.); Re Radio Corp. of America v Rauland Corp. (1956) 5 D.L.R. 2d. 242.
181. (1967) 1 Lloyd's List L.R. 222.
182. [1977] 3 W.L.R. 430, p.436 (C.A.).
183. [1978] 1 All E.R. 434, p.436, per Lord Wilberforce (H.L.) Lord Fraser, p.496, observed that the letters rogatory were drafted by the legal advisors of Westinghouse with the object of meeting the requirements of the English court and which were then signed by the American judge.
184. Id., pp.441-442 and 450.
185. [1974] A.C. 133 (H.L.).
186. [1980] 3 W.L.R. 1874 (C.A.).
187. [1978] 1 All E.R. 434, pp.441-442 (H.L.).
188. See generally, Halsbury's Laws of England, supra n. 131 Vol. 16, paras. 479-480, Vol 15, paras 420-428. Section 14 of the 1975 Act is extended to criminal proceedings by virtue of s.5 of the 1975 Act.
189. In the United States the Federal Government has an inherent right to grant immunity. United States v Carter 454 F. 2d. (4th Cir.1972). See also U.S.C., s.6002.
190. [1978] 1 All E.R. 434, p.448-449, per Lord Wilberforce (H.L.).
191. [1968] 2 W.L.R. 1479.
192. [1898] 1 Q.B. 761 (C.A.).
193. [1901] A.C. 196, pp.201 and 206. In Bullivant a solicitor was consulted as to how to do an illegal act. See also R.v Cox (1884) 14 Q.B.D. 153
194. [1919] 1 Ch. 320, pp. 336 and 349 (C.A.)
195. The Times, 20 May, 1982.
196. Companies Act 1948 s.175 as amended by Companies Act 1981 s.103.
197. [1968] A.C. 910 (H.L.).
198. [1981] 3 W.L.R. 33 (H.L.).
199. [1978] A.C. 171, (H.L.).
200. [1979] 3. W.L.R. 722 (H.L.) Burmah Oil has been equally successful in seeking disclosure of certain other governmental documents before Whitford J. (28 March 1980, High Court).
201. Financial Times Commercial Law Report, 12 May 1982. This decision has been overturned on appeal. See Air Canada v Secretary of State for Trade, The Times, 25 September 1982 (C.A.).
202. [1980] 3 All E.R. 475.
203. [1981] 2 All E.R. 321 (C.A.).
204. [1981] 1 All E.R. 417 (Cg.D) 435 (C.A.), 452 (H.L.).
205. See Attorney-General v Gough [1963] Q.B. 733; Attorney-General v Mullholland [1963] 2 Q.B. 477 (C.A.). See also McGuiness v Attorney-General of Victoria (1940) 63 C.L.R. 73 (High Ct. Australia).

206. Unreported, Court of Appeal, June 1981.
207. 326 U.S. 31, p. 316 (Sup. Ct. 1945).
208. 468 F. 2d 1326, p. 1340 (2d. Cir. 1972).
209. 100 F. Supp. 504 (S.D.N.Y.1951). See also Zenith Radio Corporation v Matsushita Electric Industria Co. Ltd. 402 F. Supp. 262 (E.D. Pa. 1975) Ferraioli v Cantor 259 F. Supp. 842 (S.D.N.Y. 1966).
210. See for example, Export Administration Act 1979.
211. See Lord Wilberforce's statement in Rio Tinto Zinc Corp. v Westinghouse Electric Corp. [1978] 1 All E.R. 434, p.448 (H.L.): "The policy of Her Majesty's Government has been against the recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies. The courts in such matters should speak with the same voice as the executive."
212. Business Records Protection Act 1947 (Ontario); Business Concerns Records Act 1947 (Québec).
213. Foreign Proceedings (Prohibition of Certain Evidence) Act 1976; Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act 1979 (Australia).
214. Evidence Amendment Act 1980 (New Zealand).
215. Department of Trade Press Notice, Ref. 445, 30 October 1981.
216. The Protection of Trading Interests Act 1980, s.1(3). The Secretary of State may allow limited compliance with a requirement and may take into account a companies consent to the release of the document (s.1(5)). The Secretary may also by order direct that s.1 applies to the measures of the foreign country (s.1(1)), and may require any person carrying on business in the U.K. to notify him of a foreign requirement or prohibition (s.1(2)). Note there is no mandatory reporting requirement.
217. Section 1(3).
218. Section 2(3)(b). This is identical with s.2(4) of the Evidence (Proceedings in Other Jurisdictions) Act 1975, except that the Secretary of State, not the courts, makes the determination of admissibility.
219. United Kingdom Diplomatic Note to the United States, No. 225, p.2 (12 November 1979).
220. Protection of Trading Interests Act 1980,s.1(2).
221. 357 U.S. 197 (Sup. Ct. 1958).
222. J.P.M.D.L. Docket No. 50. Misc. No. 45-70 (D.D.C. 1974).
223. See for example, First National City Bank v IRS 271 F. 2d 616, p.619 (2d Cir. 1959); Application of Chase Manhattan Bank 297 F. 2d 611, p.613 (2d Cir. 1962).
224. 282 F 2d 149, p.155 (2d Cir. 1960).
225. (1979) HKLR 298, Court of Appeal No.86, 1978 (Hong Kong).
226. The judge also pointed out that the court would be deprived of effective control once the documents or copies thereof had left the jurisdiction. The question of control is also a matter of concern for the law enforcement agencies when they transmit information. At this level criminal intelligence may easily be used as political intelligence.
227. [1962] 3 All E.R. 641. (C.A.).
228. "If, therefore, the purpose of the Home Secretary in this case was to surrender the

- applicant as a fugitive criminal to the United States of America, because they had asked for him, then it would be unlawful; but if his purpose was to deport him to his own country because he considered his presence here to be not conducive to the common good, then his action is lawful." *Id.*, p.661, *per* Lord Denning M.R.
229. It has been argued that the ruling in Soble seems inconsistent with the decision in R. v Secretary of State for Home Affairs, ex parte Duke of Chateau Thierry [1917] 1 K.B. 922 (C.A.). In this case it was held that whereas the Secretary of State cannot order the deportation of an alien to a particular State, he can indirectly achieve the same result by selecting the means of departure.
 230. [1949] 1 All E.R. 373.
 231. See for example, Connelly v D.P.P. [1964] A.C. 1254, p.1302 (H.L.); Wong Ping Nam v Ministry of Justice (1972) S.L.T. 220. As to misuse of power by the executive, see R. v Governor of Brixton Prison ex parte Sarno [1916] 2 K.B. 742.
 232. Unreported, Divisional Court, 25 June 1982.
 233. See the classic statement of the law by the United States Supreme Court in Wisconsin v Pelican Insurance Co. 127 U.S. 265: "The rule that the courts of no country execute the law of another applies not only to prosecutions and sentences for crimes... but to all suits in favour of the State for the recovery of pecuniary penalties of any violation of statutes for the protection of its revenue and other municipal laws," which was adopted by the Privy Council in Huntington v Attrill [1893] A.C. 150 (P.C.). The same rule applies to revenue laws and judgments. See Government of India v Taylor [1955] A.C. 491.
 234. [1893] A.C. 150 150, pp. 155-157 (P.C.).
 235. A penal law is defined as a fine or other exaction imposed by and recoverable at the instance of the State for the violation of public order of a criminal character. *Id.*, p. 255.
 236. *Id.*, p. 161 *per* Lord Watson "... a delict may give rise to a purely civil remedy as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must regard his action as a suit in favour of the State." See also Raulin v Fischer [1911] 2 K.B. 99 where it was held that a compensation order rendered in criminal proceedings is a civil judgment enforceable in England provided it is severable from the rest of the criminal judgment.
 237. [1982] 2 W.L.R. 10 (Staughton J.), The Times 27 May 1982 (C.A.).
 238. Lord Denning M.R. Construed s.12 of the 1962 Act in the light of s.251 of the Customs Act 1913 to support his finding that forfeiture took place when the goods were seized. Cf. Gold Star Publications Ltd. v Com. of Police of the Metropolis [1981] 1 W.L.R. 732.
 239. The other judges did not consider whether there was any third category of "public laws".
 240. See however the *obiter dicta* in the Court of Appeal in SA Consortium General Textiles v Sun and Sand Agencies Ltd. [1978] Q.B. 279, pp. 299-300, which suggest that a foreign judgment for multiple damages could be enforced in England.
 241. [1971] 2 Q.B. 478.
 242. [1975] Ch. 273.
 243. See for example, Swiss Penal Code 1937, Articles 3(2) and 5(2) which permit the enforcement of foreign criminal judgments without any requirement of reciprocity.
 244. See for example, the European Agreement on the Supervision of Conditionally Sentenced or Released Offenders 1964 and the European Convention on the Punishment of Road Traffic Offenders 1964.
 245. Article 6 of the Convention excludes enforcement which would be contrary to the

- "fundamental principles of the legal system" of the requested State, where the offence is of a political or military character, and where the offence was brought about or aggravated by considerations of race, religion, nationality or public opinion. Article 3 (1) provides that enforcement may be refused where the criminal act was committed outside the territory of the requesting State.
246. European Parliament, Sessional Documents 1965-1966, Document 54, pp.268-369.
 247. R. v Hutchinson (1677) 3 Keeble 785; R. v Roche (1975) 1 Leach 134; R. v Aughet (1918) 13 Cr. App. R. 101.
 248. Companies Act 1948, s. 188 as amended by Companies Act 1981, s.93.
 249. Treaty signed at Berne, 25 May 1973 with date of entry into force being 23 January 1977. For the background to mutual ratification see B. Rider and H.L. Ffrench, The Regulation of Insider Trading, (1979) MacMillan & Co. Ltd., p.422 See Appendix II.
 250. The Treaty does not apply to civil, commercial or administrative matters but may be invoked where, for example, the United States Department of Justice submits a request regarding investigations carried out by administrative agencies such as the Securities and Exchange Commission provided these investigations may result in criminal proceedings.
 251. Article 4, para. 2(a) requires that the "acts described in the request contain the elements, other than intent or negligence, of an offence which would be punishable under the law in the requested State if committed within jurisdiction". The double criminality principle may be waived if the requested State determines that the offence is of sufficient importance to require its aid. Article 4, para.3. Note the watering down of the requirement of double criminality in The Memorandum of Understanding, 31 August 1982; see Appendix III.
 252. The term "organised criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:
 - "a: at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and
 - b: either:
 - (1) strives to obtain influence in politics or commerce, especially in political bodies or organisations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or
 - (2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under sub-paragraph b (1)."
 - 253 Assistance is only rendered in investigations or proceedings involving violations of tax laws that are committed by higher ranking members of organised crime groups. Article 7, para.2 and Article 2, para. 2.
 - 254 The statistics were supplied by the United States Office of International Assistance in the Department of Justice and the Swiss Federal Office for Police Matters.
 255. Another example is the case of Mark Stanley Rifkin, the computer specialist who caused the fraudulent transfer of \$10.2 million from a bank in California to a Zurich bank and used most of the proceeds to buy Russian diamonds in Geneva which he then smuggled back into the United States. Pursuant to a request under the Treaty, evidence and sworn testimony were taken in Zurich and Geneva in the presence of American attorneys, counsel for defence and American court reporters, who were needed for making the verbatim transcript. The information from Switzerland was instrumental in closing the chain of evidence necessary for Rifkin's conviction.

256. The intermediaries unsuccessfully challenged the disclosure of their identity in the Swiss courts. See BGE 27 February 1980 i.s.Zc.RAP(Sup. Ct.).
257. Signed 31 August 1982, See Appendix III.
258. Note No. 029, British Embassy Berne, 14 July 1981.
259. Law of 20 March 1981. See L. Frei, "International Mutual Assistance in Criminal Matters: The Swiss Federal Act", (1982) 8 Commonwealth Law Bulletin 792.
260. See also Article 26 of the Draft Double Taxation Convention on Income and Capital (1963), OECD, Paris.
261. Taxes Management Act 1970, s.6 and Sch.1 as amended by Finance Act 1975, s.57(2); see also s.6103(1) of the Internal Revenue Code as amended by Tax Reform Act 1976 (U.S.); s.16 of the Income Tax Assessment Act 1977 (Australia).
262. No. 77/799/EEC, 19 December 1977.
263. Finance Act 1978, s.77(2).
264. Id., s.77(3).
265. See also the Tokyo Convention on Offences and certain other Acts committed on board Aircraft, 1963; Montreal Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation; Council of Europe Convention on Terrorism, 1976; Draft Convention on Terrorism and Kidnapping of Persons for the Peace and Security of Mankind 1975; see D.L. Jones, Three International Conventions on Hijacking and Offences on Board Aircraft (1982) Commonwealth Secretariat; A. Evans and J. Murphy (eds.) Legal Aspects of International Terrorism (1978) Lexington Books.
266. U.N. Documents, E/5838/Add.i, July 1976; E/1479/104, May 1979.
267. The Paris Convention is within the World Intellectual Property Organisation.
268. The developed States are supported by private international agencies such as the International Chamber of Commerce and nationally-based bodies, such as the Anti-Counterfeiting Coalition (U.S.).
269. Mr. C. Parkinson, M.P., Secretary of the Department of Trade, Financial Times, 5 June 1981, p.19.
270. Taiwan, reputedly the largest source of counterfeit goods, has introduced new regulations which require exporters to disclose whether their goods carry a trademark and whether they have a letter of authorisation for use of the trademark from the owner.
271. See, for example, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961; Geneva Convention for the Protection of Producers of Phonograms Against the Unauthorised Duplication of their Phonograms, 1971.
272. For example, in 1967 a Special Protocol for Developing Countries was promulgated at the Stockholm Diplomatic Conference. This Protocol would allow a more liberal use of protected works for education and for scientific research in developing countries.
273. A. Bossard, "Theft of Cultural Property", (1974) 276 International Criminal Police Review 58, p.66.
274. See generally, P. Maynard, "The Commission and Centre for Transnational Corporations", (1980) 1 Company Lawyer 226.
275. Report of the Intergovernmental Working Group on Code of Conduct (1978) General Secretariat, United Nations. Doc. No.E/C/10/A.C.2/3, pp. 10-13.
276. Views and Proposals of States on a Code of Conduct (1976) General Secretariat, United Nations, Doc. No.E/C.100/19, p.5.

277. 1959 Convention, Articles 3-6.
278. The Commission was established by a protocol of the Ministers of Justice of Belgium, the Netherlands and Luxembourg on 17 April 1948. Its main task is to harmonise and unify the rules of civil, commercial and criminal law.
279. Belgium ratified it in 1964, Luxembourg in 1965 and the Netherlands in 1967.
280. J. Nepote, "European Police Co-operation in Criminal Matters", (1970) 236 International Criminal Police Review 142, p.146. Mr. Nepote recommends that Interpol should co-ordinate the international movement of investigators, who would be empowered by local magistrates to intervene in another State.
281. See also the EEC Banking Directive which obliges member States to permit the exchange of information between banking supervisory authorities. See also the Banking Act 1979, Ss 19(6) and 20(4).
282. LMM(77)6.
283. The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth, Reports of J.D. McClean and K.W. Patchett, Commonwealth Secretariat: Reports of Working Meetings, Basseterre, St. Kitts, April 1978; Apia, Western Samoa, April 1979; and Nairobi, Kenya, January 1980, Commonwealth Secretariat, and see LMM(80)17.
284. LMM (77)6.
285. See supra at paras. 187-199.
286. Communiqué, para. 16.
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APPLICATION OF THE PRINCIPLES OF DOUBLE CRIMINALITY AND OF
RECIPROCITY AND A REQUIRED MINIMUM STANDARD OF SERIOUSNESS

OF OFFENCES IN CASES WHERE CO-OPERATION IS REQUESTED:

(Extracted from Report No.5 submitted by the General Secretariat of ICPO-Interpol to the 45th General Assembly Session, Accra ICPO-Interpol, 1976, on International Frauds and Commercial Crime.)

(The following definitions were used in the questionnaire addressed to NCBS:

Double criminality:

According to this principle, assistance is only given in cases where the act committed is an offence punishable by the courts in the requesting country and would also be punishable by the courts in the requested country had it been committed there.

Reciprocity:

According to this principle, assistance is only given if the requesting country would grant the same or similar assistance if the positions were reversed

Minimum standard of seriousness of an offence : For example; legal distinction such as "crime" or "indictable offence" etc., a requirement that offences must be liable to a specified minimum sentence.)

The following analysis relates to Part One of Report No. 5 and therefore only to Foreign Exchange and Currency Offences (and closely related economic crimes). None of the responding NCBS made any distinction between the type of assistance requested, with the exception of Finland with regard to the minimum seriousness of the offence.

It should also be noted that this analysis was prepared in 1976 and is thus not entirely accurate today.

N.B. The table is in French alphabetical order.

COUNTRY	Application of the principle of double criminality (cf.definition under 7.2)	Application of the principle of reciprocity (cf.definition under 7.2)	Required minimum standard of seriousness of offences (cf.7.2)
Netherlands Antilles	Yes	No	Yes (the offence should be of sufficient seriousness in Netherlands Antilles legislation).
Bahrain	Yes. However, see Bahrain's reply on police powers (7.3.1); the question on possibilities for co-operation (cf.7.3.2) was considered "not applicable".	Yes, but it is not applied strictly (cf.preceding column).	No (cf. remark in first column).
Bermuda	No	Yes, the Bermuda authorities would expect total co-operation in return.	No
Burundi	No explicit reply, but apparently not.	No explicit reply, but apparently not.	No explicit reply, but apparently not.
Canada	No	No	No
Chile	No	No	No
Finland	Yes, but no account is taken of the value limits which are part of the offence committed.	Yes, but it is not applied very strictly (the requesting country does not have to give exactly the same service in return).	No. However, exercising of coercive powers relies upon certain minimum standards in Finnish legislation.
France	Yes	Yes, depending on the requesting country.	"There must be a criminal offence punishable under French legislation". (It is not clear whether this reply is merely a repetition of the principle of double criminality, or if it has a more far-reaching significance.)

COUNTRY	Application of the principle of double criminality (cf. definition under 7.2)	Application of the principle of reciprocity (cf. definition under 7.2)	Required minimum standard of seriousness of offences (cf. 7.2)
Hong Kong	Yes, provided that the offence has been partly committed in Hong Kong and exists under Hong Kong law.	Yes	No
India	Yes	No	No
Ireland	The service which drafted the reply thinks not.	The service which drafted the reply thinks not.	The service which drafted the reply thinks not.
Japan	No	Yes (applied strictly)	-
Malaysia	No. However, see Malaysia's reply concerning police powers (7.3.1)	Yes (cf. remark in preceding column).	Yes ("on reciprocal basis and to the most extent possible as permitted by the legislation of our country". This is taken to mean that there are minimum requirements of seriousness in relation to Malaysian legislation) cf. remark in column 1.
Nigeria	Yes	Yes	-
Pakistan	Usually, yes (according to the NOB's reply; another service which assisted in replying to the questionnaire stated that this principle is not applied).	There is no strict rule (according to the NOB; another service stated that, in practice, this principle is not applied).	Usually, yes.
Philippines	"The principle is applied only when the offence is likewise punishable by any of our penal laws."	Yes, but it is not strictly applied.	No
Portugal	Yes	No reply given.	No
Singapore	No. However, see Singapore's reply on police powers (7.3.1); the question on the possibilities of co-operation (cf. 7.3.2) was considered "not applicable".	No	-
Sri Lanka	No	No	No
Sweden	Yes	No	No
Venezuela	Yes	Yes (the requesting country must be prepared to render a more or less similar service in exchange wherever possible).	Yes (the offence must be a "delito" punishable by a prison sentence).

**TREATY BETWEEN THE UNITED STATES OF AMERICA
AND THE SWISS CONFEDERATION
ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS**

The President of the United States of America
and
the Swiss Federal Council,

Desiring to conclude a treaty on mutual assistance in criminal matters.

Having appointed for that purpose as their Plenipotentiaries:

The President of the United States of America:

Walter J. Stoessel, Jr.
Assistant Secretary of State for European Affairs

Shelby Cullom Davis
Ambassador Extraordinary and Plenipotentiary
of the United States of America to Switzerland

The Swiss Federal Council:

Dr. Albert Weitnauer
Swiss Ambassador to Great Britain

who, having exchanged their respective full powers, which were found in good and due form, have agreed as follows:

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Chapter I APPLICABILITY

Article 1

Obligation to Furnish Assistance

1. The Contracting Parties undertake to afford each other, in accordance with provisions of this Treaty, mutual assistance in:

- a. investigations or court proceedings in respect of offences the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof;
- b. effecting the return to the requesting State, or a state or canton thereof, of any objects, articles or other property or assets belonging to it and obtained through such offences;
- c. proceedings concerning compensation for damages suffered by a person through unjustified detention as a result of action taken pursuant to this Treaty.

2. For the purposes of this Treaty, an offence in the requesting State is deemed to have been committed if there exists in that State a reasonable suspicion that acts have been committed which constitute the elements of that offence.

3. The competent authorities of the Contracting Parties may agree that assistance as provided by this Treaty will also be granted in certain ancillary administrative proceedings in respect of measures which may be taken against the perpetrator of an offence falling within the purview of this Treaty. Agreements to this effect shall be concluded by exchange of diplomatic notes.

4. Assistance shall include, but not be limited to:

- a. ascertaining the whereabouts and addresses of persons;
- b. taking the testimony or statements of persons;
- c. effecting the production or preservation of judicial and other documents, records, or articles of evidence;
- d. service of judicial and administrative documents;
- and
- e. authentication of documents.

Article 2

Non-Applicability

1. This Treaty shall not apply to:

- a. extradition or arrests of persons accused or convicted of having committed an offence;
- b. execution of judgments in criminal matters;
- c. investigations or proceedings:
 - (1) concerning an offence which the requested State considers a political offence or an offence connected with a political offence;
 - (2) concerning offences in violation of the laws relating to military obligations;
 - (3) concerning acts by a person subject to military law in the requesting State which constitute an offence under military law in that State but which would not constitute an offence in the requested State if committed by a person not subject to military law in the requested State;
 - (4) for the purpose of enforcing cartel or anti-trust laws; or
 - (5) concerning violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations other than the offenses listed in items 26 and 30 of the Schedule to this Treaty (Schedule) and the related offenses in items 34 and 35 of the Schedule.

2. Nevertheless, assistance shall be granted if a request concerns an investigation or proceeding referred to in sub-paragraphs c. (1), (4) and (5) of paragraph 1, if made for the purpose of investigating or prosecuting a person described in paragraph 2 of Article 6 and

- a. in the case of subparagraphs c. (1) and (4), the request relates to an offence committed in furtherance of the purposes of an organized criminal group described in paragraph 3 of Article 6, or
- b. in the case of subparagraph c. (5), any applicable conditions of Article 7 are satisfied.

3. Contributions to social security and governmental health plans, even if levied as taxes, shall not be considered as taxes for the purpose of this Treaty.

4. If the acts described in the request contain all the elements of an offence for the investigation or prosecution of which assistance is required to be or may be granted as well as all the elements of an offence for which such assistance cannot be granted, assistance shall not be granted if under the law of the requested State punishment could be imposed only for the latter offence unless it is listed in the Schedule.

Article 3

Discretionary Assistance

1. Assistance may be refused to the extent that:

- a. the requested State considers that the execution of the request is likely to prejudice its sovereignty, security or similar essential interests;
- b. the request is made for the purpose of prosecuting a person, other than a person described in paragraph 2 of Article 6, for acts on the basis of which he has been acquitted or convicted by a final judgment of a court in the requested State for a substantially similar offence and any sentence has been or is being carried out.

2. Before refusing any request pursuant to paragraph 1, the requested State shall determine whether assistance can be given subject to such conditions as it deems necessary. If it so determines, any conditions so imposed shall be observed in the requesting State.

Article 4^[1]

Compulsory Measures

1. In executing a request, there shall be employed in the requested State only such compulsory measures as are provided in that State for investigations or proceedings in respect of offences committed within its jurisdiction.

2. Such measures shall be employed, even if this is not explicitly mentioned in the request, but only if the acts described in the request contain the elements, other than intent or negligence, of an offence:

- a. which would be punishable under the law in the requested State if committed within its jurisdiction and is listed in the Schedule;
- or
- b. which is described in item 26 of the Schedule.

3. In the case of such an offence not listed in the Schedule, the Central Authority of the requested State shall determine whether the importance of the offence justifies the use of compulsory measures.

4. A decision as to whether the conditions of paragraph 2 have been met shall be made by the requested State only on the basis of its own law. Differences in technical designation and constituent elements added to establish jurisdiction shall be ignored. The Central Authority of the requested State may ignore other differences in constituent elements which do not affect the general character of the offence in that State.

5. In those cases where the conditions of paragraph 2 or 3 have not been met, assistance shall be granted to the extent that it can be furnished without the use of compulsory measures.

Article 5

Limitations on Use of Information

1. Any testimony or statements, documents, records or articles of evidence or other items, or any information contained therein, which were obtained by the requesting State from the requested State pursuant to the Treaty shall not be used for investigative purposes nor be introduced into evidence in the requesting State in any proceeding relating to an offence other than the offence for which assistance has been granted.

2. Nevertheless, the materials described in paragraph 1 may, after the requested State has been so advised and given an opportunity to make its views known as to the applicability of subparagraphs a, b and c of this paragraph, be used in the requesting State for the investigation or prosecution of persons who:

- a. are or were suspects in an investigation or defendants in a proceeding for which assistance was granted and who are suspected or accused of having committed another offence for which assistance is required to be granted;
- b. are suspected or accused of being participants in, or accessories before or after the fact to, an offence for which assistance was granted; or
- c. are described in paragraph 2 of Article 6.

3. Nothing in this Treaty shall be deemed to prohibit governmental authorities in the requesting State from:

- a. using the materials referred to in paragraph 1 in any investigation or proceeding concerning the civil damages connected with an investigation or proceeding for which assistance has been granted; or
- b. using information or knowledge deduced from the materials referred to in paragraph 1 in continuing any criminal investigation or proceeding, provided that:
 - (1) for such investigation or processing assistance may be given;
 - (2) prior to the date of the request for assistance referred to in paragraph 1 inquiries have already been carried out for the purpose of establishing an offence;
and
 - (3) the materials referred to in paragraph 1 are not introduced into evidence.

Chapter II

SPECIAL PROVISIONS CONCERNING ORGANIZED CRIME

Article 6

General Requirements

1. The Contracting Parties agree to assist each other in the fight against organized crime as provided in this Chapter and with all means otherwise available under this Treaty and other provisions of law.

2. This Chapter shall apply only to investigations and proceedings involving a person who, according to the request, is or is reasonably suspected to be:

- a. knowingly involved in the illegal activities of an organized criminal group, described in paragraph 3, and who is:
 - (1) a member of such a group; or
 - (2) an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services;

- or
- (3) a participant in any important activity of such a group; or
- b. a public official who has violated his official responsibilities in order to knowingly accommodate the desires of such a group or its members.

3. For the purposes of this Chapter the term "organized criminal group" refers to an association or group of persons combined together for a substantial or indefinite period for the purposes of obtaining monetary or commercial gains or profits for itself or for others, wholly or in part by illegal means, and of protecting its illegal activities against criminal prosecution and which, in carrying out its purposes, in a methodical and systematic manner:

- a. at least in part of its activities, commits or threatens to commit acts of violence or other acts which are likely to intimidate and are punishable in both States; and
- b. either:
 - (1) strives to obtain influence in politics or commerce, especially in political bodies or organizations, public administrations, the judiciary, in commercial enterprises, employers' associations or trade unions or other employees' associations; or
 - (2) associates itself formally or informally with one or more similar associations or groups, at least one of which engages in the activities described under subparagraph b(1).

Article 7

Extent of Assistance

1. Compulsory measures referred to in Article 4 shall also be employed in the requested State even if the investigation or proceeding in the requesting State concerns acts which would not be punishable under the law in the requested State, or which are not listed in the Schedule, or neither. This paragraph is subject to the limitations of paragraph 2.

2. Assistance under this Chapter shall be rendered in investigations or proceedings involving violations of provisions on taxes on income referred to in Article I of the Convention of May 24, 1951, for the Avoidance of Double Taxation with Respect to Taxes on Income^[1] only if, according to the information furnished by the requesting State:

- a. the person involved in the investigation or proceeding is reasonably suspected by it of belonging to an upper echelon of an organized criminal group or of participating significantly, as a member, affiliate or otherwise, in any important activity of such a group;
- b. the available evidence is in its opinion insufficient, for the purpose of a prosecution which has a reasonable prospect of success, to link such person with the crimes committed by the organized criminal group with which he is connected in the sense of paragraph 2 of Article 6; and
- c. it has been reasonably concluded by it that the requested assistance will substantially facilitate the successful prosecution of such person and should result in his imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group.

3. Paragraphs 1 and 2 apply only if the requesting State reasonably concludes that the securing of the information or evidence is not possible without the co-operation of the authorities in the requested State, or that it would place unreasonable burdens on the requesting State or a state or canton thereof.

Article 8

Applicable Procedure

1. In all cases where this Chapter requires a reasonable suspicion or a reasonable conclusion, or the opinion of the requesting State, that State shall furnish to the requested State information in its possession on the basis of which suspicion, conclusion, or opinion has been arrived at. However, this shall not oblige the requesting State to identify the persons

who have provided such information. Upon application of the requesting State, the Central Authority of the requested State shall treat any information furnished in the request as confidential.

2. The Central Authority of the requested State shall have the right to review the determination of the requesting State as to the applicability of this Chapter. It need not accept such determination where the suspicion, conclusion or opinion underlying such determination has not been made credible.

3. In rendering assistance pursuant to paragraph 2 of Article 7, all courts and authorities in the requested State shall apply such investigative measures as are provided for in its rules of criminal procedure.

4. Provisions in municipal law which impose restrictions on tax authorities concerning the disclosure of information shall not apply to disclosure to all authorities engaged in the execution of a request under paragraph 2 of Article 7. This paragraph shall not limit the applicability of provisions for disclosure otherwise provided by municipal laws in the Contracting States.

Chapter III

OBLIGATIONS OF REQUESTED STATE IN EXECUTING REQUESTS

Article 9

General Provisions for Executing Requests

1. Except as otherwise provided in this Treaty, a request shall be executed in accordance with the usual procedure under the laws applicable for investigations or proceedings in the requested State with respect to offenses committed within its jurisdiction.

2. The requested State may, upon application by the requesting State, consent to apply the procedures applicable in that State for:

- a. investigations or proceedings; and
- b. certification and transmission of documents, records or articles of evidence;

to the extent that such procedures are not incompatible with the laws in the requested State. A search or seizure may only be made in accordance with the law of the place where the request is executed.

3. The appropriate judicial officers and other officials in each of the two States shall, by all legal means within their power, assist in the execution of requests from the other State.

Article 10

Duty to Testify in Requested State

1. A person whose testimony or statement is requested under this Treaty shall be compelled to appear, testify and produce documents, records and articles of evidence in the same manner and to the same extent as in criminal investigations or proceedings in the requested State. Such person may not be so compelled if under the law in either State he has a right to refuse. If any person claims that such a right is applicable in the requesting State, the requested State shall, with respect thereto, rely on a certificate of the Central Authority of the requesting State.

2. The Swiss Central Authority shall, to the extent that a right to refuse to give testimony or produce evidence is not established, provide evidence or information which would disclose facts which a bank is required to keep secret or are manufacturing or business secrets, and which affect a person who, according to the request, appears not to be connected in any way with the offence which is the basis of the request, only under the following conditions:

- a. the request concerns the investigation or prosecution of a serious offence;
- b. the disclosure is of importance for obtaining or proving facts which are of substantial significance for the investigation or proceeding; and

- c. reasonable but unsuccessful efforts have been made in the United States to obtain the evidence or information in other ways.

3. Whenever the Swiss Central Authority determines that facts of the nature referred to in paragraph 2 would have to be disclosed in order to comply with the request, it shall request from the United States information indicating why it believes that paragraph 2 does not prevent such disclosure. Where, in the opinion of the Swiss Central Authority, such belief has not been made credible, it need not accept the determination of the United States.

4. Any acts of a witness or other person, in connection with the execution of a request, which would be punishable if committed against the administration of justice in the requested State shall be prosecuted in that State in accordance with the laws and enforcement policies therein, regardless of the procedure applied in executing the request.

Article 11

Locating Persons

If in the opinion of the requesting State information as to the location of persons who are believed to be within the territory of the requested State is of importance in an investigation or proceeding pending in the requesting State, the requested State shall make every effort to ascertain the whereabouts and addresses of such persons in its territory.

Article 12

Special Procedural Provisions

1. Upon express application of the requesting State that the testimony or statement of a person be under oath or affirmation, the requested State shall comply with such request even in the event no provisions therefor exist in its procedural laws. In that event, the time and form of the oath or affirmation shall be governed by the procedural provisions applicable in the requesting State. Where an oath is incompatible with law, an affirmation may be substituted, even though an oath has been requested, and testimony or a statement so obtained shall be admitted in the requesting State as though given under oath.

2. The presence of the suspect or defendant, his counsel or both, at the execution of a request will be permitted whenever the requesting State so requests.

3. (a) Where the presence of representatives of an authority in the requesting State at the execution of a request is required by its law in order to obtain admissible evidence, the requested State shall permit such presence.

(b) Where the requested State agrees that the complexity of the matter involved or other special factors described in the request for assistance indicate that such presence is likely to substantially facilitate a successful prosecution, it shall also permit such presence.

(c) In other cases the requested State may also permit such presence upon application by the requesting State.

(d) Nevertheless, if such presence would result in providing to the United States facts which in Switzerland a bank is required to keep secret, or facts which are manufacturing or business secrets therein, Switzerland shall permit such presence only where the requirements for disclosure in paragraph 2 of Article 10 have been met.

(e) Switzerland may, furthermore, at any time in the course of the execution of a request, exclude such representatives until it has been determined whether such requirements for disclosure are met.

4. Any person whose presence is permitted under paragraph 2 or 3 shall have, in accordance with the procedures in the requested State, the right to ask questions which are not improper under the laws of either State.

5. If in the requested State testimony or statements are sought in accordance with the procedures in the requesting State, persons giving such testimony or statements shall be entitled to retain counsel who may assist them during the proceeding. Such persons shall be expressly advised at the beginning of the proceeding of their right to counsel. After consent has been given by the Central Authority of the requesting State, counsel may be appointed, if necessary.

6. If the requesting State expressly requests that a verbatim transcript be taken, the executing authority shall make every effort to comply.

Chapter IV

OBLIGATIONS OF REQUESTING STATE

Article 13

Restrictions on Use of Testimony

Any testimony obtained pursuant to this Treaty from a citizen of the requested State, interrogated as a witness and not advised of his right to refuse testimony under paragraph 1 of Article 10, may not be introduced as evidence against such witness in a criminal proceeding in the requesting State unless the prosecution is for an offence against the administration of justice.

Article 14

Exclusion of Sanctions

No citizen of the requested State who has refused to give non-compulsory testimony or information or against whom compulsory measures had to be applied in the requested State pursuant to this Treaty shall be subjected to any legal sanction in the requesting State solely because he has exercised such rights as permitted under this Treaty.

Article 15

Protection of Secrecy

Evidence or information disclosed by the requested State pursuant to paragraph 2 of Article 10 shall, if in the opinion of that State its importance so requires and an application to that effect is made, be kept from public disclosure to the fullest extent compatible with constitutional requirements in the requesting State.

Chapter V

DOCUMENTS, RECORDS AND ARTICLES OF EVIDENCE

Article 16

Court and Investigative Documents

1. Upon request, the requested State shall make available to the requesting State on the same conditions and to the same extent as they would be available to authorities performing comparable functions in the requested State the following documents and articles:

- a. judgments and decisions of courts; and
- b. documents, records, and articles of evidence, including transcripts and official summaries of testimony, contained in the files of a court or an investigative authority, whether or not obtained by grand juries.

2. Items specified in subparagraph b. of paragraph 1 shall be furnished only if they relate solely to a closed case, or to the extent determined by the Central Authority of the requested State in its discretion.

Article 17

Completeness of Documents

All documents and records to be furnished, whether originals or copies thereof or extracts therefrom, shall be complete and in unedited form except to the extent paragraph 1 of Article 3 applies or the documents or records would disclose facts described in paragraph 2 of Article 10 and the requirements of subparagraphs a, b and c are not met. Upon application of the requesting State, the requested State shall make every effort to furnish original documents and records.

Article 18

Business Records

1. If the production of a document, including a book, paper, statement, record, account or writing, or extract therefrom, other than an official document provided for in Article 19, of whatever character and in whatever form is requested, the official executing the request shall, upon specific request of the requesting State, require the production of such document pursuant to a procedural document. The official shall interrogate under oath or affirmation the person producing such document and examine it in order to determine if it is genuine and if it was made as a memorandum or record of an act, transaction, occurrence, or event, if it was made in the regular course of business and if it was the regular course of such business to make such document at the time of the act, transaction, occurrence or event recorded therein or within a reasonable time thereafter.

2. The official shall cause a record of the testimony taken to be prepared and shall annex it to the document.

3. If the official is satisfied as to the matters set forth in paragraph 1, he shall certify as to the procedure followed and his determinations and shall authenticate by his attestation the document, or a copy thereof or extract therefrom, and the record of the testimony taken. Such certification and attestation shall be signed by the official and state his official position. The seal of the authority executing the request shall be affixed.

4. Any person subsequently transmitting the authenticated document shall certify as to the genuineness of the signature and the official position of the attesting person, or, if there are any prior certifications, of the last certifying person, the final certification may be made by:

- a. an official of the Central Authority of the requested State;
- b. a diplomatic or consular official of the requesting State stationed in the requested State; or
- c. a diplomatic or consular official of the requested State stationed in the requesting State.

5. Where a request under this Article pertains to a pending court proceeding, the defendant, upon his application, may be present or represented by counsel or both, and may examine the person producing the document as to its genuineness and admissibility. In the event the defendant elects to be present or represented, a representative of the requesting State or a state or canton thereof may also be present and put such questions to the witness.

6. Any document, copy thereof, entry therein or extract therefrom authenticated in accordance with this Article, and not otherwise inadmissible, shall be admissible as evidence of the act, transaction, occurrence or event in any court in the requesting State without any additional foundation or authentication.

7. In the event that the genuineness of any document authenticated in accordance with this Article is denied by any party to a proceeding, he shall have the burden of establishing to the satisfaction of the court before which the proceeding is pending that such document is not genuine in order for the document to be excluded from evidence on such ground.

Article 19

Official Records

1. Upon request, the requested State shall obtain a copy of an official record, or an entry therein, and shall have it authenticated by the attestation of an authorized person. Such attestation shall be signed by, and state the official position of, the attesting person. The seal of the authority executing the request shall be affixed thereto. The procedures for certification set forth in paragraph 4 of Article 18 shall be followed.

2. In addition to any provision therefor in the municipal law of the requesting State, a copy of any official record in the requested State, or entry therein, shall be admissible in evidence without any additional foundation or authentication if authenticated and certified as provided in paragraph 1 and otherwise admissible.

Article 20

Testimony to Authenticate Documents

1. The Central Authority of the requested State shall have the authority to summon persons to appear in that State before representatives of the requesting State or canton thereof in order to produce documents, records or articles of evidence supplied or to be supplied by the requested State and give testimony with respect thereto, whenever, under the applicable law in the requesting State, that its necessary for their admissibility in evidence in a criminal proceeding and such State makes a request to that effect.

2. The Central Authority of the requested State shall have the right to designate a representative to be present at the proceeding under paragraph 1. He shall be entitled to object to questions which either:

- a. are incompatible with the law and practices in the requested State; or
- b. go beyond the scope of paragraph 1.

Article 21

Rights in Articles of Evidence

If the requested State, a state or canton thereof, or a third party claims title or other rights in documents, records or articles of evidence, the production of which was requested or effected, such rights shall be governed by the law of the place where they have been acquired. An obligation for production or surrender under this Treaty shall take precedence over the rights referred to in the preceding sentence. These rights, however, remain otherwise unaffected.

Chapter VI

SERVICE FOR REQUESTING STATE AND RELATED PROVISIONS

Article 22

Service of Documents

1. The competent authority in the requested State shall effect service of any procedural document, including a court judgment, decision or similar document, which is transmitted to it for this purpose by the requesting State. Unless service in a particular form is requested, it may be effected by registered mail. The requested State shall, upon application, effect personal service or, if consistent with the law in the requested State, service in any other form.

2. The requested State may refuse to effect service of legal process on a person, other than a national of the requesting State, calling for his appearance as a witness in that State if the person to be served is a defendant in the criminal proceeding to which the request relates.

3. A request must be received by the Central Authority of the requested State not later than 30 days before the date set for any appearance. This time limit must be taken into consideration when setting the date for the appearance and forwarding the request. This period may be shortened by the Central Authority of the requested State in very urgent cases.

4. Proof of service shall be made by a receipt dated and signed by the person served or by a declaration specifying the form and date of service and signed by the person effecting it.

Article 23

Personal Appearance

1. When the personal appearance of a person, other than a defendant in the criminal proceeding to which the request relates, is considered especially necessary in the requesting State, such State shall so indicate in its request for service and shall state the subject matter of the interrogation. It will also indicate the kind and amount of allowances and expenses payable.

2. The executing authority shall invite the person served to appear before the appropriate authority in the requesting State and ask whether he agrees to the appearance. The requested State shall promptly notify the requesting State of the answer.

3. If requested by the requesting State, the requested State may grant an advance payment to the person agreeing to appear. This shall be recorded on the document calling for his appearance and taken into consideration by the requesting State when making payment.

Article 24

Effect of Service

1. A person, other than a national of the requesting State, who has been served with legal process calling for his appearance in the requesting State, pursuant to Article 22, shall not be subjected to any civil or criminal forfeiture, other legal sanction or measure of restraint because of his failure to comply therewith, even if the document contains a notice or penalty.

2. The effect in the proceeding to which any procedural document served pursuant to Article 22 relates, arising from a refusal to accept it or comply therewith, shall be governed by the law in the requesting State.

3. Service of a procedural document pursuant to Article 22 on a person, other than a national of the requesting State, does not confer jurisdiction in the requesting State.

Article 25

Compelling Testimony in Requesting State

1. A person appearing before an authority in the requesting State pursuant to a legal process served under this Treaty may not be compelled to give testimony, make a statement or produce a document, record or article of evidence if under the law in either State he has a right to refuse, or if paragraph 2 below is applicable. Such a right shall be deemed to exist in the requested State to the extent that it could be invoked there if the acts which are the subject of the investigation or proceeding had been committed within its jurisdiction.

2. Such a person appearing before an authority in the United States may only be compelled to give testimony, make a statement or produce a document, record or article of evidence which would disclose facts described in paragraph 2 of Article 10 to the extent that the requirements of subparagraphs a, b and c thereof are met.

3. If any person claims that a right to refuse, pursuant to paragraph 1, exists in the requested State, or invokes the restrictions of paragraph 2, the requesting State shall in that regard rely on a certificate of the Central Authority of the requested State except that, after due consideration of the certificate, the requesting State may make its own determination as to the applicability of subparagraphs a, b and c of paragraph 2 of Article 10.

Article 26

Transfer of Arrested Persons

1. A request pursuant to Article 22 may also be made if a person held in custody by an authority in the requested State is needed as a witness or for purposes of confrontation before an authority in the requesting State.

2. The person in custody shall be made available to the requesting State if:

- a. he consents;
- b. no substantial extension of his custody is anticipated; and
- c. the Central Authority of the requested State determines that there are no other important reasons against the transfer.

3. Execution of the request may be postponed for as long as the presence of the person is necessary for a criminal investigation or proceeding in the requested State.

4. The requesting State shall have authority, and be obligated, to keep the person in custody unless the requested State authorizes his release. The requesting State shall return the person to the custody of the requested State as soon as circumstances permit or as otherwise agreed. That person, however, shall have the right to use such remedies and recourses as are provided by the law in the requesting State to assure that his custody or return is consistent with this Article and the constitution of that State.

5. The requesting State shall not decline to return a person transferred solely because such person is a national of that State.

Article 27

Safe Conduct

1. A person appearing before an authority in the requesting State pursuant to legal process served under this Treaty shall not be prosecuted or, except as provided in paragraph 4 of Article 26, be detained or subjected to any other restriction of his personal liberty in that State with respect to any act or conviction which preceded his departure from the requested State.

2. The restrictions of paragraph 1 shall not apply as to a person of whatever nationality appearing for the purpose of answering a criminal charge with respect to any act or conviction which is mentioned in the document calling for his appearance, or a lesser included offence.

3. The safe conduct provided in this Article shall cease if ten days after the person appearing has been officially notified that his appearance is no longer required he has not used the opportunity to leave the requesting State or, after having left it, has returned.

Chapter VII
GENERAL PROCEDURES

Article 28

Central Authority

1. Requests for assistance shall be handled by a Central Authority. For the United States, the Central Authority shall be the Attorney General or his designee. For Switzerland, the Central Authority shall be the Division of Police of the Federal Department of Justice and Police in Bern.
2. Such requests which are approved by the Central Authority of the requesting State shall be made by that Authority on behalf of federal, state or cantonal courts or authorities which by law have been authorised to investigate or prosecute offences.
3. The Central Authorities of the two States may communicate with each other directly for the purpose of carrying out the provisions of this Treaty.

Article 29

Content of Requests

1. A request for assistance shall indicate the name of the authority conducting the investigation or proceeding to which the request relates and insofar as possible shall also indicate:
 - a. the subject matter and nature of the investigation or proceeding and, except in cases of requests for service, a description of the essential acts alleged or sought to be ascertained;
 - b. the principal need for the evidence or information sought; and
 - c. the full name, place and date of birth, address and any other information which may aid in the identification of the person or persons who are at the time of the request the subject of the investigation or proceeding.
2. Such requests, to the extent necessary and insofar as possible, shall include:
 - a. information described under subparagraph c of paragraph 1 concerning any witness or other person who is affected by the request;
 - b. a description of the particular procedure to be followed;
 - c. a statement as to whether sworn or affirmed testimony or statements are required;
 - d. a description of the information, statement or testimony sought;
 - e. a description of the documents, records or articles of evidence to be produced or preserved as well as a description of the appropriate person to be asked to produce them and the form in which they should be reproduced and authenticated; and
 - f. information as to the allowances and expenses to which a person appearing in the requesting State will be entitled.

Article 30

Language

1. Requests for assistance and all accompanying documents shall be accompanied by a translation into French in the case of a request to Switzerland, and into English in the case of a request to the United States. The Swiss Central Authority may, whenever necessary, request a translation into German or Italian instead of French.
2. The translation of all transcripts, statements, or documents made, or documents or records obtained, in executing the request shall be incumbent upon the requesting State.

Article 31

Execution of Requests

1. If, in the opinion of the Central Authority of the requested State; a request does not comply with the provisions of this Treaty, it shall immediately so advise the Central Authority of the requesting State, giving the reasons therefore. The Central Authority of the requested State may take such preliminary action as it may deem advisable.
2. If the request complies with the Treaty, the Central Authority of the requested State shall transmit the request for execution to the federal, state or cantonal court or authority having jurisdiction or selected by the Central Authority as appropriate. The court or authority to which a request is transmitted shall have all the jurisdiction, authority and power in executing the request which it has in investigations or proceedings with respect to an offence committed within its jurisdiction. In the case of a request by Switzerland, this paragraph shall authorize the use of grand juries to compel the attendance and testimony of witnesses and the production of documents, records and articles of evidence.
3. The court or authority to which a request is transmitted pursuant to paragraph 2 shall, when necessary, issue a procedural document in accordance with its own procedural law to require the attendance and statement or testimony of persons, or the production or preservation of documents, records or articles of evidence.
4. With the consent of the Central Authority of the requesting State, execution of a request may be entrusted to an appropriate private party, if circumstances so require.
5. A request shall be executed as promptly as circumstances permit.

Article 32

Return of Completed Requests

1. Upon completion of a request, the executing authority shall return the original request together with all information and evidence obtained, indicating place and time of execution, to the Central Authority of the requested State. The latter shall forward it to the Central Authority of the requesting State.
2. The delivery of documents, records or articles of evidence may be postponed if they are needed in an official action pending in the requested State and, in case of documents or records, copies have been offered to the requesting State.

Article 33

Inability to Comply

The requested State shall promptly inform the requesting State with a brief statement of the reasons when a request cannot be fully complied with because:

- a. of the limitations of this Treaty;
- b. after diligent search, the person whose testimony or statement is sought or who is to be served cannot be located or is believed to be dead;
- c. after diligent search, the evidence cannot be located; or
- d. of other physical impediments.

Article 34

Costs of Assistance

1. The following expenses incurred by an authority in the requested State in carrying out a request shall, upon application, be paid or reimbursed by the requesting State:

travel expenses; fees of experts; costs of stenographic reporting by other than salaried government employees; costs of interpreters; costs of translation; and fees of private counsel appointed with the approval of the requesting State for a person giving testimony or for a defendant.

2. No reimbursement shall be claimed for any other expenses.
3. All expenses incurred in relation to a request pursuant to Article 26 shall be borne by the requesting State.
4. No bond, guarantee, or other security for the expected costs shall be required.

Article 35

Return of Articles of Evidence

Any original documents, records or articles of evidence, delivered in execution of a request, shall be returned by the requesting State as soon as possible, unless the requested State declares that return will not be required. However, an authority in the requesting State shall be entitled to retain articles for disposition in accordance with its law if such articles belong to persons in that State and if no title or other rights are claimed in such articles by a person in the requested State, or if any claims with respect to such rights have been secured.

Chapter VIII

NOTICE AND REVIEW OF DETERMINATIONS

Article 36

Notice

Upon receipt of a request for assistance, the requested State shall notify:

- a. any person from whom a statement or testimony or documents, records, or articles of evidence are sought;
- b. any suspect or defendant in a criminal investigation or proceeding in the requesting State who resides in the requested State if the municipal law in the requesting State generally or for admissibility of evidence so requires, and that State so requests; and
- c. any defendant in a criminal proceeding in the requesting State, where the law in the requested State requires such notice.

Article 37

Review of Determinations

1. The existence of restrictions in this Treaty shall not give rise to a right on the part of any person to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests under this Treaty, except with respect to paragraph 2 of Article 9; paragraph 1 of Article 10; Article 13; paragraph 7 of Article 18; paragraph 1 of Article 25; and Articles 26 and 27.

2. The right to and procedures for appeal in Switzerland against decisions of Swiss authorities in connection with requests under this Treaty shall be regulated in accordance with this Treaty by domestic legislation.

3. In the case of any claim that a State, either as the requesting State or the requested State, has failed to comply with obligations imposed by this Treaty and as to such claim a remedy is not provided by paragraph 1 or 2, the claimant may inform the Central Authority of the other State. Where such claim is deemed by that other State to require explanation,

an inquiry shall be put to the first-mentioned State; if necessary, the matter shall be resolved under Article 39.

Chapter IX

FINAL PROVISIONS

Article 38

Effect on Other Treaties and Municipal Laws

1. Whenever the procedure provided by this Treaty would facilitate assistance in criminal matters between the Contracting Parties provided under any other convention or under the law in the requested State, the procedure provided by this Treaty shall be used to furnish such assistance. Assistance and procedures provided by this Treaty shall be without prejudice to, and shall not prevent or restrict, any available under any other international convention or arrangement or under the municipal laws in the Contracting States
2. This Treaty shall not prevent the Contracting Parties from conducting investigations and proceedings in criminal matters in accordance with their respective municipal laws.
3. The provisions of this Treaty shall take precedence over any inconsistent provisions of the municipal laws in the Contracting States.
4. The furnishing of information for use in cases concerning taxes which come under the Convention of May 24, 1951, for the Avoidance of Double Taxation with Respect to Taxes on Income, shall be governed exclusively by the provisions thereof, except for investigations or proceedings described in Chapter II of this Treaty to the extent that the conditions in paragraph 2 of the Article 7 are satisfied.

Article 39

Consultation and Arbitration

1. When it appears advisable, representatives of the Central Authorities may exchange views in writing or meet together for an oral exchange of opinions on the interpretation, application or operation of this Treaty generally or as to a specific case.
2. The Central Authorities shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Treaty. Any dispute between the Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily resolved by the Central Authorities or through diplomatic negotiation between the Contracting Parties, shall, unless they agree to settlement by some other means, be submitted, upon request of either Contracting party, to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator who shall be a national of that State and these two arbitrators shall nominate a chairman who shall be a national and resident of a third State.
3. If either contracting Party fails to appoint its arbitrator within three months from the date of the request for the submission of the dispute to arbitration, he shall be appointed, at the request of either Party, by the President of the International Court of Justice.
4. If both arbitrators cannot agree upon the choice of a chairman within two months following their appointment, he shall be appointed, at the request of either Contracting Party, by the President of the International Court of Justice.
5. If, in the cases specified under paragraphs 3 and 4, the President of the International Court of Justice is prevented from acting or is a national of one of the Parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the Parties, the appointments shall be made by the next senior Judge of the Court who is not a national of either Party.

6. Unless the Contracting Parties decide otherwise, the tribunal shall determine its own procedure.
7. The decisions of the tribunal shall be binding on the Contracting Parties.

Article 40

Definition of Terms

1. In this Treaty:

- a. the terms "requesting State" and "requested State" shall be deemed to mean the United States of America or the Swiss Confederation, as the context requires;
- b. the term "state" or "states" shall be deemed to mean any one or more of the states of the United States of America, its territories and possessions, the District of Columbia and the Commonwealth of Puerto Rico, as the context requires;
- c. the term "canton" or "cantons" shall be deemed to mean any one or more of the cantons of the Swiss Confederation;
- d. in any place where the word "in" precedes "requesting State" or "requested State", the phrase is used to refer to all of the territory under the jurisdiction of the United States including its states as defined in subparagraph b, and subdivisions thereof, or to the territory of Switzerland, including its cantons, as, and to the extent, the context requires; and
- e. references to law or procedure in the requesting State or law or procedure to be used in executing requests, are, respectively, intended to refer to the law or procedure which is applicable to the investigation or proceeding being conducted or which would ordinarily be used in comparable investigations or proceedings by the authority executing the request.

2. Where a provision of this Treaty requires the use of a seal by an authority, other than the Central Authority, that authority may employ a hand stamp in lieu thereof, if that authority customarily uses such a stamp in connection with its own matters of like importance. The imprint of such stamp shall be treated as a seal for the purposes of this Treaty and the admissibility of evidence.

3. The expression "articles of evidence" shall not be construed to exclude items which may not be admissible in evidence.

4. Provisions in this Treaty as to admissibility of evidence shall not affect the principle of free consideration of evidence insofar as the courts of Switzerland are concerned.

5. References to assistance required to be, or which may be, furnished pursuant to this Treaty shall be deemed to include assistance of a compulsory as well as noncompulsory nature.

6. References to a "request" or "request for assistance" shall be deemed to include any attachments and supplements thereto.

7. References to "acts" in connection with offences shall be deemed to include omissions.

8. The term "defendant" shall, unless the context otherwise indicates, be deemed to include a suspect who is a subject of an investigation.

9. The term "counsel" shall be deemed to mean counsel admitted in either State.

10. The term "antitrust laws", as applied to laws in the United States, refers to those provisions compiled in Chapter 1, Title 15, United States Code, and Chapter 2 of the same Title up to but not including Section 77a, et seq.

Article 41

Entry into Force and Termination

1. This Treaty shall be ratified and the instruments of ratification shall be exchanged at Washington as soon as possible.
2. This Treaty shall enter into force 180 days after the date of the exchange of the instruments of ratification^[1] and apply with respect to acts committed before or after entry into force of this Treaty.
3. This Treaty may be terminated by either Contracting Party at any time after five years from entry into force, provided that at least six months prior notice of termination has been given in writing.

IN WITNESS WHEREOF the Plenipotentiaries have signed this Treaty.

DONE at Bern, in duplicate, in the English and German languages, the two texts being equally authoritative, this 25th of May, 1973.

For the President of the
United States of America:

For the Swiss Federal Council:

[2]

[4]

[3]

[SEAL]

SCHEDULE

OFFENCES FOR WHICH COMPULSORY MEASURES ARE AVAILABLE

1. Murder.
2. Voluntary manslaughter.
3. Involuntary manslaughter.
4. Malicious wounding; inflicting grievous bodily harm intentionally or through gross negligence.
5. Threat to commit murder; threat to inflict grievous bodily harm.
6. Unlawful throwing or application of any corrosive or injurious substances upon the person of another.
7. Kidnapping; false imprisonment or other unlawful deprivation of the freedom of an individual.
8. Wilful nonsupport or wilful abandonment of a minor or other dependent person when the life of that minor or other dependent person is or is likely to be injured or endangered.
9. Rape; indecent assault.
10. Unlawful sexual acts with or upon children under the age of sixteen years.

11. Illegal abortion.
12. Traffic in women and children.
13. Bigamy.
14. Robbery.
15. Larceny; burglary; house-breaking or shop-breaking.
16. Embezzlement; misapplication or misuse of funds.
17. Extortion; blackmail.
18. Receiving or transporting money, securities or other property, knowing the same to have been embezzled, stolen or fraudulently obtained.
19. Fraud, including:
 - a. obtaining property, services, money or securities by false pretenses or by defrauding by means of deceit, falsehood or any fraudulent means;
 - b. fraud against the requesting State, its states or cantons or municipalities thereof;
 - c. fraud or breach of trust committed by any person;
 - d. use of the mails or other means of communication with intent to defraud or deceive, as punishable under the laws of the requesting State.
20. Fraudulent bankruptcy.
21. False business declarations regarding companies and co-operative associations, including speculation, unfaithful management, suppression of documents.
22. Bribery, including soliciting, offering and accepting.
23. Forgery and counterfeiting, including:
 - a. the counterfeiting or forgery of public or private securities, obligations, instructions to make payment, invoices, instruments of credit or other instruments;
 - b. the counterfeiting or alteration of coin or money;
 - c. the counterfeiting or forgery of public seals, stamps or marks;
 - d. the fraudulent use of the foregoing counterfeited or forged articles;
 - e. knowingly and without lawful authority, making or having in possession any instrument, instrumentality, tool or machine adapted or intended for the counterfeiting of money, whether coin or paper.
24. Knowingly and wilfully making, directly or through another, a false, fictitious or fraudulent statement or representation in a matter within the jurisdiction of any department or agency in the requesting State, and relating to an offence mentioned in this Schedule or otherwise falling under this Treaty.
25. Perjury, subornation of perjury and other false statements under oath.
26. Offences against the laws relating to bookmaking, lotteries and gambling when conducted as a business.
27. Arson.
28. Wilful and unlawful destruction or obstruction of a railroad, aircraft, vessel or other means of transportation or any malicious act done with intent to endanger the safety of any person travelling upon a railroad, or in any aircraft, vessel or other means of transportation.
29. Piracy; mutiny or revolt on board an aircraft or vessel against the authority of the captain or commander of such aircraft or vessel; any seizure or exercise of control, by force or violence or threat of force or violence, of an aircraft or vessel.

30. Offences against laws (whether in the form of tax laws or other laws) prohibiting, restricting or controlling the traffic in, importation or exportation, possession, concealment, manufacture, production or use of:
 - a. narcotic drugs, cannabis sativa-L, psychotropic drugs, cocaine and its derivatives;
 - b. poisonous chemicals and substances injurious to health;
 - c. firearms, other weapons, explosive and incendiary devices;When violation of such laws causes the violator to be liable to criminal prosecution and imprisonment.
31. Unlawful obstruction of court proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by the influencing, bribing, impeding, threatening, or injuring of any officer of the court, juror, witness, or duly authorized criminal investigator.
32. Unlawful abuse of official authority which results in deprivation of the life, liberty or property of any person.
33. Unlawful injury, intimidation or interference with voting or candidacy for public office, jury service, government employment, or the receipt or enjoyment of benefits provided by government agencies.
34. Attempts to commit, conspiracy to commit, or participation in, any of the offences enumerated in the preceding paragraphs of this Schedule; accessory after the fact to the commission of any of the offences enumerated in this Schedule.
35. Any offence of which one of the above listed offences is a substantial element, even if, for purposes of jurisdiction of the United States Government, elements such as transporting, transportation, the use of the mails or interstate facilities are also included.

APPENDIX III

THE GOVERNMENT OF THE
UNITED STATES OF AMERICA

THE GOVERNMENT OF
SWITZERLAND

MEMORANDUM OF UNDERSTANDING

I. Introduction

1. This MOU is a statement of intent setting forth the understandings reached by the delegations of Switzerland and the United States acting on behalf of their respective governments ("the parties") to establish mutually acceptable means for improving international law enforcement co-operation in the field of insider trading. These understandings continue a long tradition of law enforcement co-operation between Switzerland and the United States and were reached in the course of consultations between representatives of Switzerland and the United States in Bern on March 1 and 2, 1982, and in Washington, D.C. on August 30 and 31, 1982. The Swiss delegation was headed by Minister Jean Zwahlen, head of the Economic and Financial Section of the Federal Department of Foreign Affairs, and included other representatives of the said department, Lutz Krauskopf, Deputy Chief of Division, and Lionel Frei, Chief of Section, in the Federal Department of Justice and Police, and representatives of the Federal Banking Commission and the Swiss National Bank. The delegation of the United States included John M. Fedders, Director of the Division of Enforcement of the Securities and Exchange Commission ("SEC"), Edward F. Greene, General Counsel of the SEC, other representatives of the SEC, Roger M. Olsen, Deputy Assistant Attorney General, Criminal Division, Department of Justice, John R. Crook, Assistant Legal Adviser for Economic and Business Affairs, Department of State, and other representatives of the Department of State and the Department of Justice.

2. The consultations included a discussion of concerns in both countries with respect to recent cases involving persons who used Swiss banks as intermediaries to effect securities transactions in the United States, at a time when such persons may have possessed material

non-public information concerning the securities involved. Trading while in possession of material non-public information (insider trading) confers an unfair advantage upon persons who engage in such trading and impairs the integrity of United States capital markets). Such conduct is a violation of the United States securities laws and insofar as it is not yet per se punishable under Swiss law is considered dishonorable in Switzerland as well.

3. The parties noted that, when it appears that a securities transaction has been made by persons while in possession of material non-public information, the SEC is responsible for conducting an investigation of the matter. This requires that the SEC be able to learn the identity of the person on whose behalf the transaction was effected and other relevant information. However, Swiss law prohibits banks in principle from disclosing information with respect to a customer utilizing its services.

4. The parties concluded that the conduct of persons who utilize Swiss banks to effect securities transactions in the United States, in order to take advantage of material non-public information, is detrimental to the interests of both nations.

5. On the basis of the foregoing consultations, the parties reaffirmed the two countries' interest in mutual assistance in law enforcement matters in accordance with mutually acceptable procedures and in conformity with international and national law, in particular assistance with respect to transactions effected by persons in possession of material non-public information.

6. During the consultations the parties engaged in an exchange of opinions pursuant to Article 39, paragraph 1 of the Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, which became effective on January 23, 1977 (the "1977 Treaty"). Section II of this Memorandum of Understanding memorializes the exchange of opinions and related understandings that the parties have reached.

7. The parties also entered into certain understandings with respect to a private Agreement Among Members of the Swiss Bankers' Association, which is discussed in Section III of this Memorandum of Understanding and is attached hereto.

II. Exchange of Opinions Regarding the Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters

1. The parties note the importance of the 1977 Treaty which provides for co-operation between law enforcement authorities in connection with investigations or court proceedings involving criminal offences, including fraud. Such co-operation may include assistance in locating witnesses, obtaining statements and testimony of witnesses, production and authentication of judicial or business records and service of judicial or administrative documents.

2. The 1977 Treaty has been used on numerous occasions by the law enforcement authorities of both nations. The parties understand that the 1977 Treaty provides an important means of obtaining information needed to enforce the criminal or penal laws of each nation and should be used to the extent feasible.

3. The parties hereby exchange opinions, pursuant to Article 39, paragraph 1, of the 1977 Treaty concerning the interpretation, application or operation of that Treaty:

- a. Article 1, paragraph 1 of the 1977 Treaty provides that the Contracting Parties undertake to afford each other, in accordance with provisions of the Treaty, mutual assistance in "investigations or court proceedings in respect of offences the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting State or a state or canton thereof." This means, for example, that an investigation by the SEC should be considered an investigation for which assistance could be furnished (if the other requirements of the Treaty are met) as long as the investigation relates to conduct which might be dealt with by the criminal courts.
- b. The 1977 Treaty requires that a particular offence be a crime under the laws of each nation in order for compulsory assistance to be required under the Treaty. The parties understand that transactions effected by persons in possession of material non-public information could be an offence under Articles 148 (fraud), 159 (unfaithful management) or 162 (violation of business secrets) of the Swiss

Penal Code. As a result, the parties understand that it will often be possible for compulsory measures to be ordered under the Treaty in order to assist the SEC in obtaining information from the banks that executed the securities transactions in the United States that are the subject of the request for assistance.

4. Paragraph 3 of Article I of the 1977 Treaty provides that, "The competent authorities of the Contracting Parties may agree that assistance as provided by this Treaty will also be granted in certain ancillary administrative proceedings in respect of measures which may be taken against the perpetrator of an offence falling within the purview of this Treaty." The laws of both parties provide for administrative and judicial proceedings in which sanctions and remedies are available other than prison sentences and fines imposed in criminal prosecutions. The parties have agreed in principle to an exchange of diplomatic notes to facilitate the application of the 1977 Treaty to such ancillary administrative proceedings in cases of offences covered by the Treaty and relating to trading by persons in possession of material non-public information. Moreover, the parties undertake to consider whether comparable diplomatic notes should be exchanged with respect to other offences relating to securities transactions covered by the Treaty.

III. The Private Agreement Among Members of the Swiss Bankers' Association

1. The parties recognize that there may be securities transactions effected in the United States by Swiss banks acting on behalf of persons who possess material non-public information, for which compulsory measures would not be available under the 1977 Treaty. Such assistance could not be ordered if available information did not indicate the existence of an offence under the Swiss Penal Code. As the Swiss Federal Council will submit to the Parliament a Bill on the misuse of inside information, this lacuna could be filled. For cases in which the Treaty is not applicable, or in which it is not possible to gather evidence by employing compulsory process, pending the enactment of such legislation, the parties discussed a proposed private Agreement under the aegis of the Swiss Bankers' Association, which would permit participating banks to disclose the identity of a customer and certain other relevant information, under certain specified circumstances, in response to a request made by the Department of Justice on behalf of the SEC and processed through the Federal Office for Police Matters. It would also contain certain safeguards regarding protection of customers and the sovereignty of Switzerland.

2. The said "Agreement with regard to the handling of requests for information from the SEC on the subject of misuse of inside information" which is annexed to the present memorandum will be submitted for signature by the Swiss Bankers' Association to those of the banks located in Switzerland which may trade in the United States securities markets. This agreement will also govern the relationship between the signatory banks and the clients placing orders with the signatory banks for execution in the United States securities markets.

3. As regards specific points of the private Agreement, the parties came to the following understanding:

- The private Agreement establishes certain criteria for volume and price changes in the period preceding an Announcement which, if met, shall satisfy the Commission of Enquiry that the SEC has reasonable grounds to request assistance under the terms of the private Agreement and this Memorandum of Understanding. The parties understand that these thresholds are set at high levels because they are intended to define the circumstances under which the Commission of Enquiry "shall" be satisfied that the SEC has reasonable grounds to make the request. In all other cases in which the criteria are not met, the parties understand that the Commission of Enquiry will be required to review the information submitted by the SEC to decide whether it is reasonably satisfied that the SEC has reasonable grounds to make a request. Accordingly, the parties understand that a failure by the SEC to meet the threshold criteria specified in the private Agreement shall not result in any presumption that the SEC does not have reasonable grounds to make the request for assistance under the terms of the private Agreement and this Memorandum of Understanding.

- The parties understand that the failure of a bank customer to provide information which may demonstrate that the transaction in question was not made in violation of the United States securities laws, as provided for by the private Agreement, shall not result in any presumption of guilt.

- The parties understand that information obtained through the mechanism established by this memorandum and the private Agreement will be used or introduced as evidence only in administrative or judicial proceedings brought by the SEC or Department of Justice relating to trading by persons in possession of material non-public information, and may not be used or introduced as evidence in any other proceeding.

- The parties understand that information obtained through the mechanism established by this memorandum and private Agreement shall be kept to the fullest extent compatible with constitutional or legal requirements from disclosure to any other administrative body in the United States or to the public, except to the extent necessary for administrative or judicial purposes of the specific case. Each party understands that the other will use its best efforts to assert legal rights to prevent disclosure of such information other than as authorized by this memorandum or the private Agreement.

- If the Commission of Enquiry arrives at the conclusion that a client is not an insider as defined by the private Agreement, the SEC will judge this opinion as one made in good faith, use moderation and take into account the existence of this memorandum and the private Agreement when considering alternative measures.

- The parties understand that there may be instances in which the Federal Office for Police Matters may determine that a report submitted by a bank pursuant to the terms of the private Agreement may not be transmitted to the SEC without considerable harm either to the essential interests of Switzerland or to third persons who appear to have no relationship to the offence which gave rise to the request for assistance. In such cases, it is understood that the Federal Office for Police Matters will use its best efforts to adapt the report so that useful information may be provided to the SEC without causing such harm to the interests of third persons or to Switzerland. In the same spirit, it is understood that the SEC will judge this opinion as one made in good faith and use moderation when considering alternative measures.

IV. Further Consultations

1. In order to continue and improve international law enforcement co-operation in a manner consistent with the interests of both nations, the parties understand that the SEC and the Federal Office for Police Matters will undertake further contacts or consultations in the future when the need to do so is recognized mutually.

2. There will be contacts or consultations between the parties concerning the following matters:

a. The parties understand that the SEC will exercise its best efforts to inform appropriate Swiss authorities when an investigation has been initiated with respect to transactions effected by a Swiss bank. Further communications will occur, as appropriate, as an investigation proceeds in order to assure that the interests of both nations are protected. Such contacts or consultations may be related to requests for assistance on behalf of the SEC under the 1977 Treaty or the private Agreement. The parties understand that the Government of Switzerland will use its best efforts to assure that the information obtained in such communications will not be disclosed to any person except in connection with a request for assistance by the SEC or an investigation or enforcement action conducted by Swiss authorities, and to handle such information with appropriate care to prevent it from becoming known to the bank customer or customers involved.

b. At the termination of the private Agreement, the parties will consult regarding experience under the private Agreement and the 1977 Treaty as well as the effect of such termination on this memorandum.

c. The parties agree that any questions or disputes between them with respect to the interpretation or application of this Memorandum of Understanding, the exchange of opinions included herein pursuant to Article 39, paragraph 1, of the 1977 Treaty or the operation of the private Agreement shall be settled by means of consultations.

V. Other

1. Notwithstanding any other provision herein, the parties agree that this Memorandum does not modify or supersede any laws or regulations in force in the United States or Switzerland.

2. The parties agree that they do not intend to confer any right on any customer of a bank which is a signatory of the private Agreement to judicial review in the courts of the United States with respect to any decision to disclose information to United States' authorities under the terms of the private Agreement.

3. The parties understand that the Swiss Bankers' Association will use its best efforts promptly to obtain the signatures of the banks concerned and to keep the SEC informed through the Federal Office for Police Matters of the banks which are signatories to the private Agreement.

IN WITNESS WHEREOF, the respective representatives, duly authorized for this purpose, have signed this Memorandum of Understanding.

Done at Washington, D.C., in duplicate this 31st day of August, 1982.

SIGNATURES

On behalf of the Government of
the United States of America

On behalf of the
Government of Switzerland

John S.R. Shad
Chairman
Securities and Exchange
Commission

Jean Zwahlen, Minister
Chief of the Financial
and Economic Section,
Federal Department of
Foreign Affairs

COMMERCIAL CRIME AND ITS EFFECT ON DEVELOPING COMMONWEALTH COUNTRIES

Memorandum by the GOVERNMENT OF ZAMBIA

World economic recession is a fact of life. Its causes and effects on the developed nations are daily reported through the media and there is little point in reiterating them. What may not be so apparent are its deep rooted effects on developing Commonwealth countries. The recession has hit such countries at a time in their development when they can ill afford the loss of momentum in their economic growth. For example, there is a double effect each time the price of oil is increased. Obviously, more hard currency will be required for actual payment of the increase whilst manufacturing countries must correspondingly increase the price of their goods to their consumers - the developing nations.

1. In some Commonwealth countries severe regional and domestic problems have enhanced the downward trend in their economic viability consequent of world recession. In our region, one has only to recognise the effects of freedom wars, refugees, droughts, slumps in commodity prices, etc. to understand the magnitude of the problem. It is not always apparent, however, that dire shortage of hard currency leaves in its wake a fertile ground on which commercial crime will thrive.

2. Where economic instability develops, a general lack of confidence follows in the business and commercial communities, resulting in organised efforts by criminal elements to remove from the affected country convertible assets to countries of stronger economy. In order to do so, the occurrence, particularly in Africa, of forged and counterfeit instruments is steadily increasing. The business world in these communities are not always conversant with actual currency notes, bank drafts, travellers' cheques etc., usually in high denominations, and in hard currency. Businessmen have normally dealt with reputable banking houses and confirming houses and do not therefore come in contact with the actual hard currencies. The manufacturer of the forged instrument is therefore not intending to defraud banks etc. His object is satisfied when the unsuspecting businessman has accepted the forged instrument. The businessman will not normally report the deception to the authorities because of his own involvement in the transaction, having first agreed to deal illegally in hard currency.

3. For similar reasons businessmen are tempted to engage the services of dubious confirming houses or indeed suppliers where re-invoicing of goods can be undertaken, causing an additional outflow in hard currency. The re-invoicing usually has the effect of undervaluing export commodities or overvaluing imports, the price differences being credited to the account of the businessman. There is also the instance of manufactured goods being supplied to developing nations which are inferior for any number of reasons (refurbished, second-hand, obsolete, inferior quality etc.). Such goods are being priced as new and would seem acceptable on face value but, once again, the device is used to drain off hard currency.

4. When a developing country is in the throes of an economic crisis and internationally known and respected lending houses come to the rescue there generally follows on the dubious loan offers and credit facility entrepreneurs offering attractive loans and credit. These usually amount to advance fee confidence tricksters or simply 'finder's fee' seekers. Africa, in particular, has been beset by such characters.

5. I have not attempted to provide an exhaustive list of the type of commercial crime affecting developing countries. There are obviously many more categories of commercial crime of a domestic nature which are common to us all. My emphasis has been on the type of commercial crime which has as its vehicle international trading and banking.

6. Now I come to the most serious effect of an economic collapse in a developing country. Where there is abject poverty as a result of any or all of the causes already mentioned there will follow an escalation in the domestic crime rate. Criminologists will agree that persons with non-criminal backgrounds or tendencies will revert to unorthodox means, including crime, in order to survive. As a result of meeting his daily needs by theft an otherwise law abiding subject will develop a criminal mind. Naturally the criminal will not wish to be caught and ultimately violent crime ensues. A country which has a growing crime or security problem earns the reputation of instability, providing the cause once again for the outflow of hard currency (thereby completing the vicious circle).

7. From our observations already stated I have briefly tried to show the causes and effects of an unfavourable economic situation brought about not necessarily by poor Government or lack of control but rather by circumstances beyond human control.

8. As far as commercial crime is concerned, we, as Commonwealth Members, ought to put our minds to the question of prevention. Prevention is much more desirable than detection and prosecution.

9. The likelihood of acceptable evidence for Court proceedings becoming available in prosecuting the confidence tricksters, advance fee fraudsters, counterfeiters and the utterers of forged instruments is almost nil. Banking institutions, for instance, in the United Kingdom (as the natural centre of most Commonwealth business) are not keen to send witnesses to Court overseas. Indeed, in most cases evidence is just not made available.

10. Exchange Control offences are viewed throughout the world in much the same way as income tax violations. They are domestic regulations and as such are not looked upon as international crime. Yet, as already described, to allow the uncontrolled outflow of hard currency from a country which just cannot provide a free economy is disastrous to that country. It is not obviously recognisable that Exchange Control offences, in the ultimate, are in many cases much more serious and damaging to a country than the more easily identifiable crimes of robbery, theft, etc. The earlier we recognise this fact and act the better.

11. Countries enjoying a free economy can afford the luxury of delay in justice and ultimate retribution to the offenders. In the developing world, however, the situation is much more immediate. I feel that we must always be ahead of the criminal in his attempts at exploitation and in this regard mutual trust and understanding between Commonwealth law enforcement agencies is essential.

12. It is our proposal, therefore, that in order to further the preventative role, the office of the Commonwealth Fraud Liaison Service provided through the Commonwealth Secretariat is not only continued but reinforced. We are all aware that the office of the Commonwealth Fraud Office has provided an invaluable intelligence service to developing Commonwealth countries and in a number of cases has helped to prevent large scale frauds taking place. I emphasise that it is not practical in most circumstances to contemplate Court proceedings. We must rely on mutual trust and confidence in the prevention of the type of commercial crime previously described.

13. The Commonwealth Fraud Liaison Service currently facilitates co-operation and communication between Commonwealth law enforcement agencies. It also liaises with outside agencies appropriate to the type of information or communication required. We must augment this service so as to provide all the intelligence necessary at an appropriate centre to combat the escalation in economic offences. In this regard there is an urgent need not only to continue with the Service but to do all that we can to enhance its vital role.

14. It may be argued that the International Criminal Police Organisation (Interpol) already provides this service. Very often the use of Interpol services has been effective but subscribers to Interpol do not have in common, as we do, law, language, Parliaments and, in most cases, administrations all based on common ground. It is for this very reason that a mutual trust and understanding already exists within the Commonwealth in all other areas. We are merely proposing that the same understanding and co-operation is extended in the eternal fight against crime. We refer in particular to the type of crime already mentioned which affects developing countries much more than developed countries.

15. May we in conclusion once more urge, that consideration be given to enlarging and strengthening the Commonwealth Fraud Office so that particular commercial crime areas and criminals who operate on an international basis may be "targeted" for concerted Commonwealth Action. Let us not think domestically on this issue. Let us think internationally as crime knows no border.

**THE TRANSFER OF CONVICTED OFFENDERS
FROM AND TO COMMONWEALTH JURISDICTIONS**

Memorandum by the Commonwealth Secretariat
and a Report by Mr. A.M.F. WEBB, C.M.G.,
Q.C., J.P.

As requested by Commonwealth Law Ministers at their 1980 Meeting in Barbados, the Commonwealth Secretariat has continued its work concerning the international transfer of convicted offenders.

2. Mr. Anthony Webb, the consultant who prepared the paper on the subject considered by the Barbados Meeting, has represented the Commonwealth Secretariat as an observer at various meetings organised by the Council of Europe and played an active part in the formulation of the European Convention on the Transfer of Convicted Persons of 1982.

3. His report, annexed hereto, draws attention to the possibilities this Convention presents, both for accession by Commonwealth countries and for use as a model for alternative bilateral or regional arrangements.

ANNEX TO LMM(83)32

**THE TRANSFER OF CONVICTED OFFENDERS
FROM AND TO COMMONWEALTH JURISDICTIONS**

A Report by Mr. A.M.F. WEBB, C.M.G., Q.C., J.P.

Introductory

At the Meeting of Law Ministers held in Barbados in April/May 1980 Ministers considered a memorandum by the Secretariat and my paper on the Transfer of Convicted Offenders from and to Commonwealth Jurisdictions (LMM(80)5) and certain observations upon that paper: 1980 Meeting, Memorandum, pp. 91, 119, 189, 345 and 375; Minutes pp. 53-60. The Communique issued at the end of that Meeting summarised the sense of Ministers' discussion of this matter and indicated what action might be taken to give effect to the concept of transferring convicted offenders:

"Transfer of Convicted Offenders

12. Having reviewed aspects of various Commonwealth Schemes presently in force, Ministers considered whether it might be appropriate to develop Commonwealth arrangements under which, in appropriate cases, a prisoner might be transferred from a country in which he has been convicted, so that he could serve his sentence in his home country. The Meeting saw a number of positive advantages in the concept, and felt that the rehabilitation of an offender who had been convicted of an offence while abroad might be promoted if he were to serve his sentence in a place where he was more likely to be subject to the influence of his family and friends.

13. Ministers endorsed in principle the suggestion that such a Scheme should be developed and have as its basis the consent of the countries involved and, in particular, that of the prisoner himself.

14. There were some amendments which would need to be made to the proposed arrangements, and the Meeting agreed that the process of consultation should continue both through the Commonwealth Secretary-General and on a regional basis. It also welcomed the generous offer of Canada to contribute the benefit of her considerable experience in the matter."

2. I reported on recent developments in Europe on this matter in the Commonwealth Law Bulletin for October 1981 at (1981) 7 C.L.B. 1530. For convenience I very briefly summarise that report in the following paragraphs and I bring it up-to-date, specifically by annexing to this paper the European convention on the Transfer of Sentenced Persons and of the Explanatory Report relating thereto: Appendix A and B respectively. The Introduction to the Report, and the statement of General Considerations which follows that Introduction, set forth the background to the Convention and the principles upon which it is drafted.

European convention on the transfer of sentenced persons

3. This Convention has now been approved by the European Committee on Crime Problems and by the Committee of Ministers and it is open for signature by Member States of the Council of Europe.

4. The genesis of this Convention was the failure of the earlier (1970) European Convention on the International Validity of Criminal Judgments, which provided (amongst other things) for the transfer of convicted offenders, to achieve that purpose. The 1970 Convention contained very detailed provisions, and specifically excepted various offences, because it was drafted on the premise that if a particular prisoner satisfied all the criteria, then his transfer was automatic, whatever might be his views or those of either of the States concerned, that in which he had been convicted and sentenced and that to which he was transferred to serve that sentence. Consequently the problems posed by the practical difficulties which the presence of foreigners in prison create for prison administrations were not resolved by the 1970 Convention, which was ratified by only five of the 21 members of the Council of Europe. In 1978 the European Committee on Crime Problems was instructed by the European Ministers of Justice to look at the matter again, with a view to proposing a more practical solution; the result of that reconsideration is the new Convention.

5. This Convention was drafted by a Select Committee of Experts, and representatives of Canada, the United States of America and the Commonwealth Secretariat were invited to attend as observers, because of the experience which those countries and Commonwealth countries have gained in actually transferring prisoners. The observers contributed to the deliberations of the Select Committee by reason of this practical experience, and they were able also to help, from time to time, to persuade the Committee to adopt policies and language in the drafting of the Convention and of the recommendations as to the treatment of foreign prisoners, which the Committee is also charged to formulate (see paragraph 11 below), which may enable the former to be accepted by Commonwealth countries if they so desire, and the latter then to be implemented so far as may be practicable.

6. The new convention departs radically from the principles upon which the 1970 Convention was framed; it adopts the Canadian and American approach, in particular by requiring the consent of each of the three parties concerned: the prisoner, the government of the country in which he was convicted and sentenced and that of the country to which it is proposed to transfer him. No obligation is on governments to agree to any transfer; neither are they obliged to give any reason for their decision, nor is there to be any pressure on a prisoner to agree to be transferred.

7. Another, and significant, difference between the 1970 Convention and the present one is that the latter provides, by Article 19, that States not members of the Council of Europe may accede to it, so that it has potential application not only between other (and in particular Commonwealth) countries and European countries, but also between Commonwealth countries and countries neither Commonwealth nor European. Some members of the Commonwealth may not wish to enter into the possibly wide-ranging (in a territorial sense) arrangements as this Convention may

entail. However its text may at least serve as a model for more local arrangements. Article 22.2 may be relevant in this context.

8. A State not a member of the Council of Europe may, however, only accede to the Convention at the invitation of the Council of Ministers of the Council of Europe; and such an invitation can only be extended if two-thirds of the members of the Committee and all the countries being then member States of the Council of Europe and contracting parties concur. A member of the Commonwealth (not being also a member of the Council of Europe) which may be interested in acceding to the Convention should first communicate this interest, through the normal diplomatic channels, to the Secretary-General of the Council of Europe, who will intimate in due course whether or not a formal request should be made.

Ancillary matters

9. The Select Committee is considering a draft text of a notice for the information of foreign prisoners of the substance of the Convention, so as to facilitate compliance with the obligation imposed by Article 4.1 to furnish information about the Convention to a person to whom it may apply. This text, when agreed, will be the subject of a separate recommendation suggesting that each State, when ratifying the Convention, should deposit an authoritative translation into its official languages, incorporating such modifications as it considers necessary (for example, to reflect any important reservations or declarations by that State of which its nationals should be aware). A copy of each State's version of the standard text would then be sent to each of the other contracting States, for them to reproduce for use in its prisons. This procedure would obviate the necessity for every contracting State to have to arrange its own translations of the text into the language of every other contracting State.

10. The select Committee is also contemplating the text of a leaflet giving a foreign prisoner information about the help which the consular authorities of his country might be able to afford him. The Vienna Convention on Consular Relations provides that consular authorities are, at the request of a prisoner, to be informed of his detention. Possible ways in which a consular authority might be able to assist are -

- (a) visits to the prisoner;
- (b) information, in particular about the possibility of repatriation;
- (c) assistance with problems, including obtaining the services of a lawyer; and
- (d) supply of literature.

This leaflet would mention not only this Convention on the Transfer of Sentenced Persons, but also all the Conventions available to Member States and dealing with foreigners in trouble with the authorities. If the Committee approves such a leaflet, Commonwealth Secretariat will, in due course, be able to circulate copies to Commonwealth Governments, who can then, if they so wish, adapt it for use as they see fit.

Standard Minimum Rules

11. In addition to drafting the Convention, the Select Committee is charged also with making recommendations for standard minimum rules for the treatment of foreign prisoners. The European Council of Ministers approved, in 1973, such rules for prisoners generally, and the Governments of Member States have been recommended to be guided in their internal legislation and practice by the principles set out in those recommendations. The Select Committee is still considering what amplification of these rules may be needed to cover the particular circumstances of foreign prisoners, and it is hoped that it will complete its deliberations on this part of its remit in 1983. The Council of Europe cannot, of course, make even a recommendation to the Government of a non-Member State; the Council can only express the hope that the Government of a non-Member State which accedes to the Convention will conform, so far as may be practicable, to any such rules.

12. The responses received from a number of Commonwealth countries to an inquiry addressed by the Secretariat, whether any particular difficulties were actually being experienced in dealing with foreign prisoners, suggest that these are few; the one problem which seems to arise is that of language. In most cases it appears that foreigners in prison in Commonwealth countries come mainly from neighbouring countries, in which many of the circumstances of life are broadly similar.

APPENDIX A

CONVENTION ON THE TRANSFER
OF SENTENCED PERSONS

The member States of the Council of Europe and the other signatory States hereto,

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members;

Desirous of further developing international co-operation in the field of criminal law;

Considering that such co-operation should further the ends of justice and the social rehabilitation of sentenced persons;

Considering that these objectives require that foreigners who are deprived of their liberty as a result of their commission of a criminal offence should be given the opportunity to serve their sentences within their own society; and

Considering that this aim can best be achieved by having them transferred to their own countries,

Have agreed as follows:

Article 1

Definitions

For the purposes of this Convention:

- (a) "sentence" means: any punishment or measure involving deprivation of liberty ordered by a court for a limited or unlimited period of time on account of a criminal offence;
- (b) "judgment" means: a decision or order of a court imposing a sentence;
- (c) "sentencing State" means: the State in which the sentence was imposed on the person who may be, or has been, transferred;
- (d) "administering State" means: the State to which the sentenced person may be, or has been, transferred in order to serve his sentence.

Article 2

General principles

1. The Contracting States undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention.

2. A person sentenced in a Contracting State may be transferred to another Contracting State, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him. To that end, he may express his interest to the sentencing State or to the administering State in being transferred under this Convention.

3. Transfer may be requested by either the sentencing State or the administering State.

Article 3

Conditions of transfer

1. A sentenced person may be transferred under this Convention only on the following conditions:

- (a) if that person is a national of the administering State;
- (b) if the judgment is final;
- (c) if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;
- (d) if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;
- (e) if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory; and
- (f) if the sentencing and administering States agree to the transfer.

2. In exceptional cases, Contracting States may agree to a transfer even if the time to be served by the sentenced person is less than that specified in paragraph 1(c).

3. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it intends to exclude the application of one of the procedures provided in Article 9(1) (a) and (b) in its relations with other Contracting States.

4. Any Contracting State may, at any time, by a declaration addressed to the Secretary General of the Council of Europe, define, as far as it is concerned, the term "national" within the meaning of this Convention.

Article 4

Obligation to furnish information

1. Any sentenced person to whom this Convention may apply shall be informed by the sentencing State of the substance of this Convention.

2. If the sentenced person has expressed an interest to the sentencing State in being transferred under this Convention, that State shall so inform the administering State as soon as practicable after the judgment becomes final.

3. The information shall include:

- (a) the name, date and place of birth of the sentenced person;
- (b) his address, if any, in the administering State;

- (c) a statement of the facts upon which the sentence was based;
 - (d) the nature, duration and date of commencement of the sentence.
4. If the sentenced person has expressed his interest to the administering State, the sentencing State shall, on request, communicate to that State the information referred to in paragraph 3 above.
5. The sentenced person shall be informed, in writing, of any action taken by the sentencing State or the administering State under the preceding paragraphs, as well as of any decision taken by either State on a request for transfer.

Article 5

Requests and replies

1. Requests for transfer and replies shall be made in writing.
2. Requests shall be addressed by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State. Replies shall be communicated through the same channels.
3. Any Contracting State may, by a declaration addressed to the Secretary General of the Council of Europe, indicate that it will use other channels of communication.
4. The requested State shall promptly inform the requesting State of its decision whether or not to agree to the requested transfer.

Article 6

Supporting documents

1. The administering State, if requested by the sentencing State, shall furnish it with:
 - (a) a document or statement indicating that the sentenced person is a national of that State;
 - (b) a copy of the relevant law of the administering State which provides that the acts or omissions on account of which the sentence has been imposed in the sentencing State constitute a criminal offence according to the law of the administering State, or would constitute a criminal offence if committed on its territory;
 - (c) a statement containing the information mentioned in Article 9(2).
2. If transfer is requested, the sentencing State shall provide the following documents to the administering State, unless either State has already indicated that it will not agree to the transfer:
 - (a) a certified copy of the judgment and the law on which it is based;
 - (b) a statement indicating how much of the sentence has already been served, including information on any pre-trial detention, remission, and any other factor relevant to the enforcement of the sentence;
 - (c) a declaration containing the consent to the transfer as referred to in Article 3(1) (d); and
 - (d) whenever appropriate, any medical or social reports on the sentenced person, information about his treatment in the sentencing State, and any recommendation for his further treatment in the administering State.
3. Either State may ask to be provided with any of the documents or statements referred to in paragraphs 1 or 2 above before making a request for transfer or taking a decision on whether or not to agree to the transfer.

Article 7

Consent and its verification

1. The sentencing State shall ensure that the person required to give consent to the transfer in accordance with Article 3(1) (d) does so voluntarily and with full knowledge of the legal consequences thereof. The procedure for giving such consent shall be governed by the law of the sentencing State.
2. The sentencing State shall afford an opportunity to the administering State to verify, through a consul or other official agreed upon with the administering State, that the consent is given in accordance with the conditions set out in paragraph 1 above.

Article 8

Effect of transfer for sentencing State

1. The taking into charge of the sentenced person by the authorities of the administering State shall have the effect of suspending the enforcement of the sentence in the sentencing State.
2. The sentencing State may no longer enforce the sentence if the administering State considers enforcement of the sentence to have been completed.

Article 9

Effect of transfer for administering State

1. The competent authorities of the administering State shall:
 - (a) continue the enforcement of the sentence immediately through a court or administrative order, under the conditions set out in Article 10; or
 - (b) convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11.
2. The administering State, if requested, shall inform the sentencing State before the transfer of the sentenced person as to which of these procedures it will follow.
3. The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions.
4. Any Contracting State which, according to its national law, cannot avail itself of one of the procedures referred to in paragraph 1 to enforce measures imposed in another Contracting State on sentenced persons who for reasons of mental condition have been held not criminally responsible for the commission of the offence, and which is prepared to receive such persons for further treatment may, by way of a declaration addressed to the Secretary General of the Council of Europe, indicate the procedures it will follow in such cases.

Article 10

Continued enforcement

1. In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.
2. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court

or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.

Article 11

Conversion of sentence

1. In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority:

- (a) shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State;
- (b) may not convert a sanction involving deprivation of liberty to a pecuniary sanction;
- (c) shall deduct the full period of deprivation of liberty served by the sentenced person; and
- (d) shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed.

2. If the conversion procedure takes place after the transfer of the sentenced person, the administering State shall keep that person in custody or otherwise ensure his presence in the administering State pending the outcome of that procedure.

Article 12

Pardon, amnesty, commutation

Each State may grant pardon, amnesty or commutation of the sentence in accordance with its Constitution or other laws.

Article 13

Review of judgment

The sentencing State alone shall have the right to decide on any application for review of the judgment.

Article 14

Termination of enforcement

The administering State shall terminate enforcement of the sentence as soon as it is informed by the sentencing State of any decision or measure as a result of which the sentence ceases to be enforceable.

Article 15

Information on enforcement

The administering State shall provide information to the sentencing State concerning the enforcement of the sentence:

- (a) when it considers enforcement of the sentence to have been completed;
- (b) if the sentenced person has escaped from custody before enforcement of the sentence has been completed; or
- (c) if the sentencing State requests a special report.

Article 16

Transit

1. A Contracting State shall, in accordance with its law, grant a request for transit of a sentenced person through its territory if such a request is made by another Contracting State and the State has agreed with another Contracting State or with a third State to the transfer of that person to or from its territory.
2. A Contracting State may refuse to grant transit:
 - (a) if the sentenced person is one of its nationals, or
 - (b) if the offence for which the sentence was imposed is not an offence under its own law.
3. Requests for transit and replies shall be communicated through the channels referred to in the provisions of Article 5(2) and (3).
4. A Contracting State may grant a request for transit of a sentenced person through its territory made by a third State if that State has agreed with another Contracting State to the transfer to or from its territory.
5. The Contracting State requested to grant transit may hold the sentenced person in custody only for such time as transit through its territory requires.
6. The Contracting State requested to grant transit may be asked to give an assurance that the sentenced person will not be prosecuted, or, except as provided in the preceding paragraph, detained, or otherwise subjected to any restriction on his liberty in the territory of the transit State for any offence committed or sentence imposed prior to his departure from the territory of the sentencing State.
7. No request for transit shall be required if transport is by air over the territory of a Contracting State and no landing there is scheduled. However, each Contracting State may, by a declaration addressed to the Secretary General of the Council of Europe at the time of signature or of deposit of its instrument of ratification, acceptance, approval or accession, require that it be notified of any such transit over its territory.

Article 17

Languages and costs

1. Information under Article 4, paragraphs 2 to 4, shall be furnished in the language of the Contracting State to which it is addressed or in one of the official languages of the Council of Europe.
2. Subject to paragraph 3 below, no translation of requests for transfer or of supporting documents shall be required.
3. Any Contracting State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, require that requests for transfer and supporting documents be accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language in addition to the official language or languages of the Council of Europe.

4. Except as provided in Article 6(2) (a), documents transmitted in application of this Convention need not be certified.

5. Any costs incurred in the application of this Convention shall be borne by the administering State, except costs incurred exclusively in the territory of the sentencing State.

Article 18

Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force on the first day of the month following the expiration of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 1.

3. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 19

Accession by non-member States

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Contracting Parties, may invite any State not a member of the Council and not mentioned in Article 18(1) to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 20

Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 21

Temporal application

This Convention shall be applicable to the enforcement of sentences imposed either before or after its entry into force.

Article 22

Relations to other Conventions and Agreements

1. This Convention does not affect the rights and undertakings derived from extradition treaties and other treaties on international co-operation in criminal matters providing for the transfer of detained persons for purposes of confrontation or testimony.

2. If two or more Contracting States have already concluded an agreement or treaty on the transfer of sentenced persons or otherwise have established their relations in this matter, or should they in future do so, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention.

3. The present Convention does not affect the right of States Party to the European Convention to the International Validity of Criminal Judgments to conclude bilateral or multilateral agreements with one another on matters dealt with in that Convention in order to supplement its provisions or facilitate the application of the principles embodied in it.

4. If a request for transfer falls within the scope of both the present Convention and the European Convention on the International Validity of Criminal Judgments or another agreement or treaty on the transfer of sentenced persons, the requesting State shall, when making the request, indicate on the basis of which instrument it is made.

Article 23

Friendly settlement

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of its application.

Article 24

Denunciation

1. Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

3. The present Convention shall, however, continue to apply to the enforcement of sentences of persons who have been transferred in conformity with the provisions of the Convention before the date on which such a denunciation takes effect.

Article 25

Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the non-member States which have participated in the elaboration of this Convention and any State which has acceded to this Convention of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance, approval or accession;
- (c) any date of entry into force of this Convention in accordance with Articles 18(2) and (3), 19(2) and 20(2) and (3);
- (d) any other act, declaration, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at, the, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention, and to any State invited to accede to it.

ANNEX B

EXPLANATORY REPORT on the Convention on the Transfer of Sentenced Persons

Introduction

1. At the eleventh conference (Copenhagen, 21 - 22 June 1978), the European Ministers of Justice discussed the problems posed by prisoners of foreign nationality, including the question of providing procedures for their transfer so that they may serve their sentence in their home country. The discussion resulted in the adoption of Resolution No.1 by which the Committee of Ministers of the Council of Europe is invited to ask the European Committee on Crime Problems (CDPC), *inter alia*, "to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of prisoners which could be used between member States or by member States in their relations with non-member States".

2. Following this initiative, the creation of a Select Committee of Experts on Foreign Nationals in Prison was proposed by the CDPC at its 28th plenary session in March 1979 and authorised by the Committee of Ministers at the 306th meeting of their Deputies in June 1979.

3. The Committee's principal tasks were to study the problems relating to the treatment of foreigners in prison and to consider the possibility of drawing up a model agreement providing for a simple procedure for the transfer of foreign prisoners. With regard to the latter aspect, the CDPC (at its 29th plenary session

in March 1980) authorised the Select Committee, at its own request, to prepare a multilateral Convention rather than a model agreement, provided it would not conflict with the provisions of existing European Conventions.

4. The Select Committee was composed of experts from 15 Council of Europe member States (Austria, Belgium, Denmark, France, Federal Republic of Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom). Canada and the United States of America as well as the Commonwealth Secretariat and the International Penal and Penitentiary Foundation were represented by observers. Mr. J. J. Tulkens (Netherlands) was elected Chairman of the Select Committee. The Secretariat was provided by the Directorate of Legal Affairs of the Council of Europe.

5. The draft for a Convention on the Transfer of Sentenced Persons was prepared during the Select Committee's first five meetings, held from 3 to 5 October 1979, 4 to 6 March 1980, 7 to 10 October 1980, 1 to 4 June 1981 and 1 to 4 December 1981 (enlarged meeting to which experts from all member States were invited). In addition, a drafting group met from 7 to 9 October 1980 (during the Select Committee's third meeting) and from 24 to 26 November 1980.

6. The draft Convention was finalised by the CDPC at its 31st plenary session in May 1982 and forwarded to the Committee of Ministers.

7. At the ... meeting of their Deputies in 1982, the Committee of Ministers approved the text of the Convention and decided to open it to the signature of member States.

General considerations

8. The purpose of the Convention is to facilitate the transfer of foreign prisoners to their home countries by providing a procedure which is simple as well as expeditious. In that respect it is intended to complement the European Convention on the International Validity of Criminal Judgments of 28 May 1977 which, although allowing for the transfer of prisoners, presents two major shortcomings: it has so far been ratified by only a small number of member States, and the procedure it provides is not conducive to being applied in a way such as to ensure the rapid transfer of foreign prisoners.

With a view to overcoming the last-mentioned difficulty, due to the inevitably administrative complexities of an instrument as comprehensive and detailed as the European Convention on the International Validity of Criminal Judgments, the Convention on the Transfer of Sentenced Persons seeks to provide a simple, speedy and flexible mechanism for the repatriation of prisoners.

9. In facilitating the transfer of foreign prisoners, the Convention takes account of modern trends in crime and penal policy. In Europe, improved means of transport and communication have led to a greater mobility of persons and, in consequence, to increased internationalisation of crime. As penal policy has come to lay greater emphasis upon the social rehabilitation offenders, it may be of paramount importance that the sanction imposed on the offender is enforced in his home country rather than in the State where the offence was committed and the judgment rendered. This policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner. The repatriation of sentenced persons may therefore be in the best interest of the prisoners as well as of the governments concerned.

10. The Convention distinguishes itself from the European Convention on the International Validity of Criminal Judgments in four respects:

- With a view to facilitating the rapid transfer of foreign prisoners, it provides a simplified procedure which, in its practical application, is likely to be less cumbersome than that laid down in the European Convention on the International Validity of Criminal Judgments.

- A transfer may be requested not only by the State in which the sentence was imposed ("sentencing State"), but also by the State of which the sentenced person is a national ("administering State"), thus enabling the latter to seek the repatriation of its own nationals.
- The transfer is subject to the sentenced person's consent.
- The Convention confines itself to providing the procedural framework for transfers. It does not contain an obligation on Contracting States to comply with a request for transfer; for that reason, it was not necessary to list any grounds for refusal, nor to require the requested State to give reasons for its refusal to agree to a requested transfer.

11. Unlike the other Conventions on international co-operation in criminal matters prepared within the framework of the Council of Europe, the Convention on the Transfer of Sentenced Persons does not carry the word "European" in its title. This reflects the draftsmen's opinion that the instrument should be open for accession also by like-minded democratic States outside Europe. Two such States - Canada and the United States of America - were, in fact, represented on the Select Committee by observers and actively associated with the elaboration of the text.

Commentaries on the articles of the Convention

Article 1 - Definitions

12. Article 1 defines four terms which are basic to the transfer mechanism which the Convention provides.

13. The definition of "sentence" (a) makes clear that the Convention applies only to a punishment or measure which involves deprivation of liberty, and only to the extent that it does so, regardless of whether the person concerned is already serving his sentence or not.

14. It follows from the definition of "judgment" (b) that the Convention applies only to sentences imposed by a court of law.

15. The two States involved in the transfer of a sentenced person are defined as "sentencing State" and "administering State" (c and d).

Article 2 - General principles

16. Paragraph 1 contains the general principle which governs the application of the Convention. Its wording is inspired in Article 1(1) of the European Convention on Mutual Assistance in Criminal Matters. The reference to "the widest measure of co-operation in respect of the transfer of sentenced persons" is intended to emphasise the Convention's underlying philosophy: that is desirable to enforce sentences in the home country of the person concerned.

17. Paragraph 2 refers the sentencing State to the possibility, afforded by the Convention, of having the sentenced persons transferred to another Contracting State for the purpose of enforcing the sentence. That other State, i.e. the "administering State", is - by virtue of Article 3(1) (a) - the State of which the sentenced person is a national.

Although the sentenced person may not formally apply for his transfer (see paragraph 3, he may express his interest in being transferred under the Convention, and he may do so by addressing himself to either the sentencing State or the administering State.

18. According to paragraph 3, transfers may be requested by either the sentencing State or the administering State. This provision signifies an important departure from the rule of the European Convention on the International Validity of Criminal Judgments that only the sentencing State is entitled to make the request. It acknowledges the interest which the prisoner's home country may have in his repatriation for reasons of cultural, religious, family and other social ties.

Article 3 - Conditions for transfer

19. The first paragraph of Article 3 enumerates six conditions which must be fulfilled if a transfer is to be effected under the terms of the Convention.

20. The first condition (a) is that the person to be transferred is a national of the administering State. In an effort to render the application of the Convention as easy as possible the reference to the sentenced person's nationality was preferred to including in the Convention other notions which, in their practical application, might give rise to problems of interpretation as, for instance, the terms "ordinarily resident in the other State" and "the State of origin" used in Article 5 of the European Convention on the International Validity of Criminal Judgments.

It is not necessary that the person concerned is a national of only the administering State. Contracting States may decide to apply the Convention, when appropriate, in cases of double or multiple nationality even when the other nationality (or one of the other nationalities) is that of the sentencing State. It is to be noted, however, that even where all the conditions for transfer are satisfied, the requested State remains free to agree or not to agree to a requested transfer. A sentencing State is therefore free to refuse a requested transfer if it concerns one of its own nationals.

Paragraph 1(a) is to be read in conjunction with paragraph 4 which grants Contracting States the possibility to define, by means of a declaration, the term "national".

This possibility, corresponding with that provided in Article 6(1) (b) of the European Convention on Extradition, is to be interpreted in a wide sense: the provision is intended to enable Contracting States to extend the application of the Convention to persons other than "nationals" within the strict meaning of their nationality legislation as, for instance, stateless persons or citizens of other States who have established roots in the country through permanent residence.

21. The second condition (b) is that the judgment must be final and enforceable, for instance because all available remedies have been exhausted, or because the time-limit for lodging a remedy has expired without the parties having availed themselves of it. This does not preclude the possibility of a later review of the judgment in the light of fresh evidence, as provided for under Article 13.

22. The third condition (c) concerns the length of the sentence still to be served. For the Convention to be applicable the sentence must be of a duration of at least six months at the time of receipt of the request for transfer, or be indeterminate.

Two considerations have led to the inclusion of this condition: the first is that the Convention is conceived as an instrument to further the offender's social rehabilitation, an objective which can usefully be pursued only where the length of the sentence still to be served is sufficiently long. The second reason is that of the system's cost-effectiveness; the transfer of a prisoner is costly, and the considerable expenses incurred by the States concerned must therefore be proportionate to the purpose to be achieved, which excludes recourse to a transfer where the person concerned has only a short sentence to serve.

In exceptional cases, however, Contracting States may - in application of paragraph 2 - agree to a transfer even though the time to be served is less than that specified, as the general rule, in paragraph 1(c). The introduction of this element of flexibility was deemed useful to cover cases where the aforementioned two considerations do not fully apply, for instance where the prospects of rehabilitation are favourable despite a sentence of less than six months or where the transfer can be effected expeditiously and at low cost, e.g. between neighbouring States.

23. The fourth condition (d) is that the transfer must be consented to by the person concerned. This requirement which is not contained in the European Convention on the International Validity of Criminal Judgments constitutes one of the basic elements of the transfer mechanism set up by the Convention. It is rooted in the Convention's primary purpose to facilitate the rehabilitation of offenders: transferring a prisoner without his consent would be counter-productive in terms of rehabilitation.

This provision is to be read in conjunction with Article 7 which contains rules on the way in which consent is to be given and on the possibility for the administering State to verify that consent has been given in accordance with the conditions laid down in that Article.

Consent is to be given by the sentenced person's legal representative in cases where one of the two States considers it necessary in view of the age or of the physical or mental condition of the sentenced person. The reference to the sentenced person's "legal representative" is not meant to imply that the representative must be legally qualified; it includes any person duly authorised in law to represent the sentenced person, e.g. a parent or someone specially authorised by the competent authority.

24. The fifth condition (e) is intended to ensure compliance with the principle of dual criminal liability.

The condition is fulfilled if the act which gave rise to the judgment in the sentencing State would have been punishable if committed in the administering State and if the person who performed that act could, under the law of the administering State, have had a sanction imposed on him.

For the condition of dual criminal liability to be fulfilled it is not necessary that the criminal offence be precisely the same under both the law of the administering State and the law of the sentencing State. There may be differences in the wording and legal classification. The basic idea is that the essential constituent elements of the offence should be comparable under the law of both States.

25. The sixth condition (f) confirms the Convention's basic principle that a transfer requires the agreement of the two States concerned.

26. Paragraph 3 is to be seen in connection with Article 9 which grants the administering State a choice between two enforcement procedures: it may either continue enforcement or convert the sentence. If requested, it must inform the sentencing State as to which of these two procedures it will follow (Article 9, paragraph 2). The general rule is therefore that the administering State may choose between the two enforcement procedures in each individual case.

If, however, a Contracting State wishes to exclude, in a general way, the application of one of the two procedures, it can do so under the provisions of paragraph 3: by way of a declaration, it may indicate that it intends to exclude the application of either the "continued enforcement procedure" or the declaration made under procedure" in its relations with other Contracting States. As paragraph 3 applies to the "relations with other Contracting States" it enables the State making such a declaration to exclude one of the two enforcement procedures not only where it is in the position of the administering State but also where it is the sentencing State; in the latter case the declaration would have the effect of making that State's agreement to a requested transfer dependent on the administering State not applying the excluded procedure.

Article 4 - Obligation to furnish information

27. Article 4 concerns the transmission of various elements of information to be furnished during the course of the transfer proceedings to the sentenced person, the administering State, and the sentencing State. The provision applies to three different phases of the procedure: paragraph 1 concerns information by the sentencing State to the sentenced person on the substance of the Convention; paragraph 2 to 4 refer to information between the two States concerned after the sentenced person has expressed an interest in being transferred; paragraph 5 concerns information to be given to the sentenced person on the action or decision taken with regard to a possible transfer.

28. According to paragraph 1, any sentenced person who may be eligible for transfer under the Convention shall be informed, by the sentencing State, of the Convention's substance. This is to make the sentenced person aware of the possibilities for transfer offered by the Convention and the legal consequences which a transfer to his home country would have. The information will enable him

to decide whether he wishes to express an interest in being transferred. It is to be noted, however, that the sentenced person cannot himself make the formal request for transfer; it follows from Article 2(3) that transfer may be requested only by the sentencing or the administering State.

The information to be given to the sentenced person must be in a language he understands.

29. Paragraphs 2 and 3 apply where the sentenced person has expressed an interest to the sentencing State in being transferred under the Convention. In that event, the sentencing State informs the State of which the sentenced person is a national that he has expressed an interest in being transferred. This information has to be provided as soon as practicable after the judgment becomes final and enforceable, and it must include the elements enumerated in paragraph 3.

30. The principal purpose of conveying this information to the authorities (including the consular authorities) of the person's home country is to enable that State to decide whether it wants to request a transfer, the assumption being that normally the sentenced person's home country will take the initiative to have its own national repatriated.

31. If the sentenced person has expressed his interest in a transfer not to the sentencing State, but to the State of which he is national, paragraph 4 applies: in that case the sentencing State provides the information referred to in paragraph 3 only upon the express request of the State of which the person is a national.

32. By virtue of paragraph 5, the sentenced person who has expressed an interest in being transferred must be kept informed, in writing, of the follow-up action taken in his case. He must, for instance, be told whether the information referred to in paragraph 3 has been sent to his home country, whether a request for transfer has been made and by which State, and whether a decision has been taken on the request.

Article 5 - Requests and replies

33. This Article specifies the form and the channels of transmission to be used for requests for transfer and replies thereto.

34. Requests and replies must be made in writing (paragraph 1). They must, in principle, be transmitted between the respective Ministries of Justice (paragraph 2), but Contracting States may declare that they will use other ways of transmission as, for instance, the diplomatic channel (paragraph 3).

35. In line with the Convention's aim to provide a procedure for the speedy transfer of sentenced persons, paragraph 4 requires the requested State promptly to inform the requesting State whether it agrees to the requested transfer.

Article 6 - Supporting documents

36. Article 6 states which supporting documents must be provided, on request, by the administering State to the sentencing State (paragraph 1), and by the sentencing State to the administering State (paragraph 2). These documents must be provided before the transfer is effected. As regards the documents to be provided by the sentencing State, they may be sent to the administering State either together with the request for transfer or afterwards; they need not be sent if either State has already indicated that it will not agree to the transfer.

37. In addition, paragraph 3 provides that either of the two States may request any of the documents or statements referred to in paragraph 1 or 2 before making a request for transfer or taking a decision on whether or not to agree to the requested transfer. This provision is intended to avoid setting the transfer procedure in motion when there are doubts as to whether all the conditions for transfer are satisfied. The sentencing State may, for instance, wish to ascertain beforehand - i.e. before making a request for transfer or before agreeing to a requested transfer - whether the sentenced person is a national of the

administering State, or the administering State may wish to ascertain beforehand that the sentenced person consented to his transfer.

Article 7 - Consent and its verification

38. The sentenced person's consent to his transfer is one of the basic elements of the transfer mechanism established by the Convention. It was therefore deemed necessary to impose an obligation on the sentencing State to ensure that the consent is given voluntarily and with full knowledge of the legal consequences which the transfer would entail for the person concerned, and to give the administering State an opportunity to verify that consent has been given in accordance with these conditions.

39. Under paragraph 2, the administering State is entitled to that verification either through a Consul or through another official on which the two States agree.

40. As the Convention is based on the principle, that enforcement in the administering State requires the sentenced person's prior consent, it was not considered necessary to lay down a rule of speciality to the effect that the person transferred under the Convention with a view to enforcement of a sentence may not be proceeded against or sentenced or detained for an offence other than that relating to the enforcement for which the transfer has been effected. Other Conventions which provide for this rule of speciality, as for instance, the European Convention on Extradition in its Article 14 or the European Convention on the International Validity of Criminal Judgments in its Article 9, do not require the consent of the person concerned, so that in those cases the rule of speciality is a necessary safeguard for him.

The absence of a speciality rule should be included in the information on the substance of the Convention which is to be given to sentenced persons under Article 4(1).

Article 8 - Effects of transfer for sentencing State

41. This Article safeguards the application of the principle of ne bis in idem in respect of the enforcement of the sentence after a transfer has been effected.

42. To avoid that the sentenced person serves a sentence for the same acts or omissions more than once, Article 8 provides that enforcement in the sentencing State is suspended at the moment when the authorities of the administering State take the sentenced person into charge (paragraph 1), and that the sentencing State may no longer enforce the sentence once the administering State considers enforcement to have been completed (paragraph 2).

Article 9 - Effect of transfer for administering State

43. This Article concerns the enforcement of the sentence in the administering State. It states the general principles which govern enforcement; the details of the different enforcement procedures are regulated in Articles 10 and 11.

44. According to paragraph 1, the administering State may chose between two ways of enforcing the sentence: it may either continue the enforcement immediately or through a court or administrative order (Article 10), or convert the sentence, through a judicial or administrative procedure, into a decision which substitutes a sanction prescribed by its own law for the sanction imposed in the sentencing State (Article 11). It is to be noted, however, that in accordance with Article 3(3) Contracting States have the possibility to exclude, in a general way, the application of one of these two procedures.

45. If requested, the administering State must inform the sentencing State as to which of these two procedures it intends to apply (paragraph 2). This obligation has been imposed on the administering State because the information may have a bearing on the sentencing State's decision on whether or not to agree to a requested transfer.

46. The basic difference between the "continued enforcement" procedure under Article 10 and the "conversion of sentence" procedure under Article 11 - commonly called "exequatur" - is that in the first case the administering State continues to enforce the sanction imposed in the sentencing State (possibly adapted by virtue of Article 10, paragraph 2), whereas in the second case, the sanction is converted into a sanction of the administering State, with the result that the sentence enforced is no longer directly based on the sanction imposed in the sentencing State.

47. In both cases, enforcement is governed by the law of the administering State (paragraph 3). The reference to the law of the administering State is to be interpreted in a wide sense; it includes, for instance, the rules relating to eligibility for conditional release. To make this clear, paragraph 3 states that the administering State alone shall be competent to take all appropriate decisions.

48. Paragraph 4 refers to cases where neither of the two procedures can be applied in the administering State because the enforcement concerns measures imposed on a person who for reasons of mental condition has been held not criminally responsible for the commission of the offence. The provision allows the administering State, if it is prepared to receive such a person for further treatment, to indicate, by way of a declaration addressed to the Secretary General of the Council of Europe, the procedures which it will follow in such cases.

Article 10 - Continued enforcement

49. Where the administering State opts for the "continued enforcement" procedure, it is bound by the legal nature as well as the duration of the sentence as determined by the sentencing State (paragraph 1): the first condition ("legal nature") refers to the kind of penalty imposed where the law of the sentencing State provides for a diversity of penalties involving deprivation of liberty, such as penal servitude, imprisonment or detention. The second condition ("duration") means that the sentence to be served in the administering State, subject to any later decision of that State on, for example, conditional release or remission, corresponds to the amount of the original sentence, taking into account the time served and any remission earned in the sentencing State up to the date of transfer.

50. If the two States concerned have different penal systems with regard to the division of penalties or the minimum and maximum lengths of sentence, it might be necessary for the administering State to adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. Paragraph 2 allows that adaptation within certain limits: the adapted punishment or measure must, as far as possible, correspond with that imposed by the sentence to be enforced; it must not aggravate, by its nature or duration, the sanction imposed in the sentencing State; and it must not exceed the maximum prescribed by the law of the administering State. In other words: the administering State may adapt the sanction to the nearest equivalent available under its own law, provided that this does not result in more severe punishment or longer detention. As opposed to the conversion procedure under Article 11 under which the administering State substitutes a sanction for that imposed in the sentencing State, the procedure under Article 10(2) enables the administering State merely to adapt the sanction to an equivalent sanction prescribed by its own law in order to make the sentence enforceable. The administering State thus continues to enforce the sentence imposed in the sentencing State, but it does so in accordance with the requirements of its own penal system.

Article 11 - Conversion of sentence

51. Article 11 concerns the conversion of the sentence to be enforced, i.e. the judicial or administrative procedure by which a sanction prescribed by the law of the administering State is substituted for the sanction imposed in the sentencing State, a procedure which is commonly called "exequatur". The provision should be read in conjunction with Article 9(1) (b). It is essential for the smooth and efficient functioning of the Convention in cases where, with regard to the classification of penalties or the length of the custodial sentence applicable for a

similar offence, the penal system of the administering State differs from that of the sentencing State.

52. The Article does not regulate the procedure to be followed. According to paragraph 1, the conversion of the sentence is governed by the law of the administering State.

53. However, as regards the extent of the conversion and the criteria applicable to it, paragraph 1 states four conditions to be observed by the competent authority of the administering State.

54. Firstly, the authority is bound by the findings as to the facts insofar as they appear - explicitly or implicitly - from the judgment pronounced in the sentencing State (a). It has therefore no freedom differently to evaluate the facts on which the judgment is based; this applies to "objective" facts relating to the commission of the act and its results, as well as to "subjective" facts relating, for instance, to premeditation and intent on the part of the convicted person. The reason for this condition is that the substitution by a sanction of a different nature or duration does not imply any modification of the judgment; it merely serves to obtain an enforceable sentence in the administering State.

55. Secondly, a sanction involving deprivation of liberty may not be converted into a pecuniary sanction (b). This provision reflects the fact that the Convention applies only to the transfer of sentenced persons, "sentence" being defined in Article 1(a) as a punishment or measure involving deprivation of liberty. However, it does not prevent conversion to a non-custodial sanction other than a pecuniary one.

56. Thirdly, any period of deprivation of liberty already served by the sentenced person must be deducted from the sentence as converted by the administering State (c). This provision applies to any part of the sentence already served in the sentencing State as well as any provisional detention served during remand in custody prior to conviction, or any detention served during transit.

57. Fourthly, the penal position of the sentenced person must not be aggravated (d). This prohibition refers not only to the length of the sentence, which must not exceed that imposed in the sentencing State, but also to the kind of sanction to be enforced: it must not be harsher than that imposed in the sentencing State. If, for instance, under the law of the administering State the offence carries a more severe form of deprivation of liberty than that which the judgment imposed (e.g. penal servitude or forced labour instead of imprisonment), the administering State is precluded from enforcing this harsher kind of sanction. In addition, paragraph 1(d) provides in respect of the length of the sentence to be enforced that the authority which converts that sentence is not bound by any minimum which its own law may provide for the same offence, i.e. that it is allowed not to respect that minimum with the result that it can enforce the sanction imposed in the sentencing State even if it is less than the minimum laid down in its own law.

58. As the conversion procedure may take some time, paragraph 2 requires the administering State, if the procedure takes place after the transfer of the sentenced person, to keep that person in custody or otherwise ensure his presence in the administering State, pending the outcome of that procedure.

Article 12 - Pardon, amnesty, commutation

59. Whereas Article 9(3) makes the administering State solely responsible for the enforcement of the sentence, including any decisions related to it (e.g. the decision to suspend the sentence), pardon, amnesty or commutation of the sentence may be granted by either the sentencing or the administering State, in accordance with its Constitution or other laws.

Article 13 - Review of judgment

60. This Article provides that the sentencing State alone has the right to take decisions on applications for review of the judgment. The exclusive competence of

the sentencing State to review the judgment is justified by the fact that, technically speaking, review proceedings are not part of enforcement so that Article 9(3) does not apply. The object of an application for review is to obtain the re-examination of the final sentence in the light of any new elements of fact. As the sentencing State alone is competent to re-examine the materiality of facts, it follows necessarily that only that State has jurisdiction to examine such an application, especially as it is better placed to obtain new evidence on the point at issue.

61. The term "review" within the meaning of Article 13 covers also proceedings which in some States may result in a new examination of the legal aspects of the case, after the judgment has become final.

62. The sentencing State's competence to decide on any application for review should not be interpreted as discharging the administering State from the duty to enable the sentenced person to seek a review of the judgment. Both States must, in fact, take all appropriate steps to guarantee the effective exercise of the sentenced person's right to apply for a review.

Article 14 - Termination of enforcement

63. Article 14 concerns the termination of enforcement by the administering State in cases where the sentence ceases to be enforceable as a result of any decision or measure taken by the sentencing State (e.g. the decisions referred to in Articles 12 and 13). In such cases, the administering State must terminate enforcement as soon as it is informed by the sentencing State of any such decision or measure.

Article 15 - Information on enforcement

64. This Article provides for the administering State to inform the sentencing State on the State of the enforcement: (a) when it considers enforcement of the sentence to have been completed (e.g. sentence served, remission, conditional release, pardon, amnesty, commutation); (b) if the sentenced person has escaped from custody before completion of the sentence; and (c) whenever the sentencing State requests a special report.

65. It is to be noted that the information to be supplied by virtue of Article 15(a) may be provided either for each individual case or by means of periodical - e.g. annual - reports covering, for a given period, all cases in which completion of sentence has occurred.

Article 16 - Transit

66. This Article has been drafted on the lines of Article 21 of the European Convention on Extradition and Article 13 of the European Convention on the International Validity of Criminal Judgments. It lays down rules governing the transit of persons passing from the sentencing State to the administering State through the territory of another Contracting State.

67. Paragraph 1 imposes an obligation on Contracting States to grant requests for transit, in accordance with their national law, but this obligation is subject to a double condition: the request for transit must be made by another Contracting State, and that State must have agreed with another Contracting State or with a third State to the transfer of the sentenced person. The latter condition means that the obligation to grant transit becomes effective only when the sentencing and the administering State have agreed on the transfer of the sentenced person.

68. It is to be noted that the obligation to grant transit applies only where the request emanates from the Contracting State. If it is made by a third State, paragraph 4 applies. It contains an option, not an obligation: a request for transit may be granted if the requesting third State has agreed with another Contracting State to the transfer of the sentenced person.

69. Paragraph 1 does not exclude the transit of a national of the State of transit, but paragraph 2(a) entitles a Contracting State to refuse transit if the person

concerned is one of its own nationals. This applies also where transit is to be effected by air and the State concerned has made the declaration under paragraph 7.

Paragraph 2(b) entitles a Contracting State to refuse to grant transit if the offence for which the sentence was imposed is not an offence under its own law.

70. As regards the channels of communication for requests for transit and replies, paragraph 3 makes the provisions of Article 5, paragraphs 2 and 3, applicable: in principle, requests and replies must pass through the Ministries of Justice of the two States concerned, but Contracting States may declare that they will use other ways of transmission.

71. Paragraph 5 provides for the State of transit to hold the sentenced person in custody only for such time as transit through its territory requires.

72. Paragraph 6 concerns the sentenced person's immunity from arrest and prosecution in the State of transit. It provides that the State requested to grant transit may be asked to give an assurance to the effect that the sentenced person will enjoy immunity in respect of any offence committed or sentence imposed prior to his departure from the territory of the sentencing State, with the exception of custody which the transit State may impose in application of paragraph 5. There is, however, no obligation on the State of transit to give such an assurance.

73. Paragraph 7 deals with transit by air where no landing in the territory of the State of transit is scheduled. In such cases no request for transit is required. Contrary to the provisions of Article 21 (4)(a) of the European Convention on Extradition which require notification of the transit State in such cases, paragraph 6 of Article 16 leaves it to each Contracting State to decide, by means of a declaration, whether it wishes to require such notification.

Article 17 - Languages and costs

74. This Article deals with the questions of language (paragraphs 1 to 3), certification (paragraph 4), and costs (paragraph 5).

75. With regard to the languages to be used for the purposes of applying the Convention, Article 17 distinguishes between the information exchanged between the two States concerned in accordance with Article 4, paragraphs 2 to 4, which must be furnished in the language of the recipient State or in one of the official languages of the Council of Europe (paragraph 1), and requests for transfer and supporting documents for which it is stated that no translation is required (paragraph 2), unless the State concerned has declared that it requires requests for transfer and supporting documents to be accompanied by a translation (paragraph 3).

76. Paragraph 4 provides that with the exception of the copy of the judgment imposing the sentence - referred to in Article 6 (2)(a) - supporting documents transmitted in application of the Convention need not be certified.

77. As concerns costs, paragraph 5 provides that they shall be borne by the administering State, with the exception of those costs which are incurred exclusively in the territory of the sentencing State. By precluding Contracting States from claiming refund from each other of any expenses incurred during the transfer procedure, the provision intends to facilitate the practical application of the Convention.

The administering State, however, is not prevented from seeking to recover all or part of the cost of transfer from the sentenced person.

Articles 18 to 25 - Final clauses

78. With the exception of Articles 18 and 19, the provisions contained in Articles 18 to 25 are, for the most part, based on the "Model Final Clauses for Conventions and Agreements concluded within the Council of Europe" which were approved by

the Committee of Ministers of the Council of Europe at the 315th meeting of their Deputies in February 1980. Most of these Articles do not therefore call for specific comments, but the following points, relating to Articles 18, 19, 21, 22 and 23, require some explanation.

79. Articles 18 and 19 have been drafted on the precedent established in Articles 19 and 20 of the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979 which allow for signature, before the Convention's entry into force, not only by the member States of the Council of Europe, but also by non-member States which have participated in the elaboration of the Convention. These provisions are intended to enable the maximum number of interested States, not necessarily members of the Council of Europe, to become Contracting Parties as soon as possible. As similar considerations apply in the case of the Convention on the Transfer of Sentenced Persons, Article 18 provides that it is open for signature by the member States of the Council of Europe as well as by non-member States which have participated in its elaboration. The provision is intended to apply to two non-member States, Canada and the United States of America, which were represented on the Select Committee by observers and actively associated with the elaboration of the Convention. They may sign the Convention, just as the member States of the Council of Europe, before its entry into force. According to Article 18(2), the Convention enters into force when three member States have expressed their consent to be bound by it. Other non-Member States may, by virtue of Article 19, be invited by the Committee of Ministers to accede to the Convention, but only after its entry into force and after consultation of the Contracting Parties.

80. Article 21 ensures the Convention's full temporal application. It enables Contracting States to avail themselves of the transfer mechanism with regard to any enforcement which falls within the Convention's scope of application and which is to be effected after its entry into force, regardless of whether the sentence to be enforced has been imposed before or after that date.

81. Article 22 intends to ensure the smooth co-existence of the Convention with other treaties - multilateral or bilateral - providing for the transfer of detained persons.

Paragraph 1 concerns extradition treaties and other treaties providing for the transfer of detained persons for purposes of confrontation or testimony. Paragraph 2 safeguards the continued application of agreements, treaties or relations relating to the transfer of sentenced persons, including uniform legislation as it exists, for instance, within the Nordic co-operation. Paragraph 3 concerns complementary agreements concluded in application of Article 64(2) of the European Convention on the International Validity of Criminal Judgments. Paragraph 4 applies where a request for transfer falls within the scope of both the present Convention and the European Convention on the International Validity of Criminal Judgments or any other instrument on the transfer of sentenced persons. In such a case, the requesting State must indicate on the basis of which instrument it makes the request. Such indication is binding on the requested State.

82. Article 23 which makes the European Committee on Crime Problems of the Council of Europe the guardian over the application of the Convention follows the precedents established in other European Conventions in the penal field, namely in Article 28 of the European Convention on the Punishment of Road Traffic Offences, in Article 65 of the European Convention on the International Validity of Criminal Judgments, in Article 44 of the European Convention on the Transfer of Proceedings in Criminal Matters, in Article 7 of the Additional Protocol to the European Convention on Extradition, in Article 10 of the Second Additional Protocol to the European Convention on Extradition, in Article 10 of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, and in Article 9 of the European Convention on the Suppression of Terrorism. The reporting requirement which Article 23 lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Convention so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention which might prove necessary.

THE CANADIAN EXPERIENCE IN THE INTERNATIONAL TRANSFER OF CONVICTED OFFENDERS

Memorandum by
THE GOVERNMENT OF CANADA

At the last Meeting of Law Ministers in 1980, Canada reported that it had two treaties in force for the transfer of convicted offenders, with the United States and with Mexico. At that time, the procedure was running smoothly, but some difficulties have been encountered since.

2. Canada now has a treaty with Peru, which came into force on 23 July 1980 and one with Bolivia, which is not yet in force. So far, only two Canadian offenders have been returned to Canada under the treaty with Peru. These treaties follow very closely the text of the treaties with the United States and Mexico, and consequently we have no reason to anticipate any difficulties in their implementation.

3. Of greatest interest to this gathering will be Canada's progress in a treaty with Thailand - the success of which demonstrates that it is possible to reach such an accord with a country whose perception of the purpose of criminal punishment is markedly different from ours - and our progress as participants in the development of the Council of Europe Convention for the Transfer of Offenders. The very fact that the Council of Europe member States have been able to work out a multilateral convention in this area augurs well for a Commonwealth scheme, where, by virtue of our common heritage, the differences among our judicial systems are less pronounced than among the European States.

4. All our treaties, including those not yet in force, embody a number of principles which may be stated succinctly:

- (i) The offender and both States must all consent to the transfer. There are no restrictions on the grounds for withholding consent.
- (ii) Dual criminality: An offender will be transferred only where the offence for which he has been sentenced is of a nature which would be punishable under the laws of the receiving State as well. Certain offences, such as military offences, may not be within the scope of the treaty, but such excluded offences are kept to a minimum.
- (iii) The offender must be a national of the receiving State. Either State may, however, refuse a proposed transfer if it considers that the offender is more closely connected with the sentencing State and his rehabilitation and reintegration into society would not best be served by the transfer. In our treaty with Mexico it is provided that an offender may not be transferred if he is domiciliary of the sentencing State - a person who has resided in that State for at least five years with an intent to remain permanently therein. (Presumably the test applies to the period before conviction and sentencing. After sentencing it is unlikely that the intention to reside in the sentencing State permanently could be ascribed to a prisoner in the sentencing State.)
- (iv) Bar against double jeopardy: In Canada's case its Transfer of Offenders Act deems that the foreign conviction and sentence were imposed by a court of competent jurisdiction in Canada, and so the offender cannot be tried again in Canada for the same offence.
- (v) The sentence continues to be served in the receiving State, with credit given for any portion of it served or any remission of sentence awarded in the sentencing State. Only sentences of imprisonment, probation or other deprivation of liberty are enforced. If a fine has been levied upon the offender, it is up to the sentencing State to collect the fine before the transfer.

- (vi) Enforcement of the sentence after transfer is looked after by the receiving State, but the offender cannot be kept under sentence in the receiving State beyond the point where his sentence would otherwise have expired in the sentencing State. The law and procedures for parole of the receiving State apply.
- (vii) The sentence must not be under appeal at the same time of transfer; however, any judicial variation of the sentence made by the sentencing State after transfer has taken place will be given effect by the receiving State. An appeal of the conviction or sentence may not be entertained by the courts of the receiving State.
- (viii) Either State may grant a pardon or amnesty following transfer, and the offender will be given the benefit in the receiving State.

5. Responsibility for the costs involved has been worked out by a relatively simple formula. From the time that the receiving State takes custody of the offender, it is responsible for the costs of transportation and continued incarceration. If the countries wish, the sentencing State may surrender custody of the offender at the embassy of the receiving State in the territory of the sentencing State.

6. The only major difficulties which Canada has experienced in the case of Canadian offenders brought back home has been in the enforcement of sentences, more particularly, the eligibility for parole. As originally enacted, Canada's Transfer of Offenders Act provided that an offender transferred to Canada serving a sentence for the Canadian equivalent of first or second degree murder would not be eligible for parole until he had served 15 or 10 years of his sentence respectively. This created a problem for Canada in the case of a Canadian citizen who was transferred from Mexico serving a sentence for murder for which he had received only eight years. The legislation was promptly amended, with retroactive effect, to restrict the special parole provisions to sentences of life imprisonment.

7. In the United States the criminal law jurisdiction is shared by the Federal and many State authorities, and the variety of the types of sentences which must be dealt with following transfer to Canada has led to special problems.

8. In some States, an offender may be sentenced to a definite and indefinite term of imprisonment; for example, to a term of five to 20 years. Generally, the significance of such a sentence is that the offender will be eligible for parole after five years, and 20 years is the maximum duration of his sentence should he fail absolutely to earn any time off for good behaviour or work done in the prison.

9. Upon transfer to Canada, a number of offenders have complained that they understood that the definite portion of their sentence was the full sentence which was required to be served in Canada and the indefinite portion should be ignored. Others, apparently less convinced that such a plea would be well received, complained that they understood that only the minimum portion was required to be served before parole eligibility in Canada. Investigation of these complaints failed to satisfy the Canadian authorities that offenders had truly been misled, but in order to forestall any further complaints, Canada has adopted a policy of presenting all applications for transfer to the legal advisors of the Canadian Parole Board in order that the applicant for transfer may be advised, before arrangements are made final, just how long a sentence he will be required to serve and when he will be eligible for parole of temporary absence in Canada.

10. In some instances time spent in confinement before sentencing will count as part of the sentence imposed (although this is not the normal rule in Canada) and the legal advisors will determine this in advance of the transfer as well.

11. Canada has negotiated a treaty with Thailand which was just signed earlier this year and is expected to be ratified shortly - just as soon as the Thai Government is able to bring into force domestic legislation to implement the arrangement. This treaty includes a number of novel features without which, we have been told, the treaty would have been unacceptable to the Thai people. The treaty does not apply in respect of a Canadian citizen who has committed an offence against the Head of State of Thailand or his family or who has committed an offence against laws protecting national art treasures. These offences are so sensitive to the Thai people, that,

notwithstanding the absolute right each country has to veto an application for transfer, failure to exclude these specific offences from the treaty would render it unpalatable.

12. As well, the Thais insisted that no offender will be transferred until he has served a minimum period of time in the sentencing State, as its law may provide. We have been informed, and indeed the text of the treaty was agreed to, on the footing that legislation in Thailand will require that a prisoner serve the lesser of one-third of his sentence of four years in Thailand before transfer. Again, Thai notions of denunciation required that such a provision be expressly included in the treaty.

13. The Council of Europe Convention on the transfer of sentenced persons is radically different in its scope. It includes the fundamental principles outlined earlier, but in all other respects its operation is left virtually wide open. For example, so long as the dual criminality rule is met, there are no restrictions on offences coming within the ambit of the Convention. There is provision stating that the Convention does not apply where an offender has less than six months to be served on his sentence - and another provision permitting contracting States to waive this rule. The Convention is restricted to apply to "nationals" of the receiving State, but each State may define who, so far as it is concerned, is a national. Responsibility for enforcement of the sentence shifts to the receiving State as soon as it takes the offender in its charge, and from that point it is responsible for all costs involved.

14. Because of the differences in the laws of the participating States, the Council of Europe Convention provides for two modes of enforcement of the sentence in the receiving State. The receiving State may opt for continued enforcement of the sentence imposed, with minor adaptations which do not alter substantially the nature of the sentence. Or, under the convention of sentence mode, the receiving State may re-sentence the offender, being bound by the findings of fact of the court of the sentencing State. In neither case may the receiving State aggravate the offender's sentence, and he must be given credit for time already served in the sentencing State.

15. So far as matters not covered by the Convention are concerned, individual contracting States are permitted on a bilateral basis, to make their own arrangements, and where such contracting States have already concluded a treaty or otherwise have established their relations in the matter, they are entitled to apply those other arrangements in lieu of the Convention.

16. In view of Canada's substantial participation in the development of the Council of Europe Convention, we have been accorded a special status and may ratify the Convention immediately upon its coming into force. Other countries which are not members of the Council of Europe may be invited by the Council of Europe to ratify the Treaty, providing those States which have, at the relevant time, already ratified the Treaty agree to their being included.

17. To conclude, Canada is ready to enter into negotiations with Commonwealth countries for the transfer of offenders, on either a bilateral basis or by way of a multilateral treaty. As well, we remain prepared to assist our Commonwealth neighbours with arrangements which they may be considering with countries not represented at this meeting in whatever way we can.

**COSTS FOR SUCCESSFUL DEFENDANTS IN CRIMINAL CASES
AND COMPENSATION FOR WRONGFUL IMPRISONMENT**

Memorandum by
THE COMMONWEALTH SECRETARIAT

This paper draws on material available at the Commonwealth Secretariat in January 1983 and on information supplied by a cross-section of Commonwealth jurisdictions.

2. The question of compensation for acquitted persons falls into two quite separate categories: compensation for those who incur costs in successfully defending criminal charges, and those who are imprisoned but are subsequently found (whether on appeal or subsequently) to have been wrongfully convicted. To some degree the criteria applied in redressing grievances can overlap, and in each instance the remedy provided is generally the tort of malicious prosecution.

A. Costs for Successful Defendants

3. The normal rule in Commonwealth jurisdictions is that it is the prerogative of the State not to pay costs. As was said by the first Chief Justice of the High Court of Australia, Sir Samuel Griffiths in Affleck v. The King (1906) 12 ALR 112,119:

"There is no doubt that at common law the Crown is, by its prerogative, exempt from the payment of costs in any judicial proceeding, or that this right cannot be taken away except by Statute".

4. The position may differ in courts of summary jurisdiction, where the State as such may not be the prosecutor [see Hamdorf v. Riddle (1971) SASR 398].

5. The question of costs for successful defendants only assumes relevance to the extent that a defendant is not the recipient of legal aid.

(i) Australia

6. The position in Australia varies from State to State, and the material available suggests that there is a considerable lack of uniformity throughout Australia in the respective State and Territory legislation on this topic and that the principles behind the enactment of the United Kingdom's Costs in Criminal Cases Act have been adopted by only New South Wales and Tasmania. Why this should be so is not clear as there is a general dearth of legal literature on the topic, both in Australian law journals and textbooks on costs and the criminal law.

7. The first Act enacted in Australia to deal specifically with the granting of costs to successful defendants in criminal cases was the costs in Criminal Cases Act 1967 of New South Wales. This provides, inter alia

S.2. The Court or Judge or Justice or Justices in any proceedings relating to any offence, whether punishable summarily or upon indictment, may -

- (a) where a defendant, after a hearing on the merits, is acquitted or discharged as to the information then under inquiry; or
- (b) where, on appeal, the conviction of the defendant is quashed and
 - (i) he is discharged as to the indictment upon which he was convicted; or
 - (ii) the information or complaint upon which he was convicted is dismissed,

grant to that defendant a certificate under this Act, specifying the matters referred to in section three of this Act and relating to those proceedings.

S.3. (1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Justice or Justices granting the certificate -

- (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
 - (b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings, was reasonable in the circumstances.
- (2) A certificate granted under this Act by a Justice or by Justices shall specify the amount of costs that he or they would have adjudged to be paid if he or they had made an order for costs against the informant, prosecutor or complainant, as the case may be.
4. (1) In this section "Under Secretary" means the Secretary of the Department of the Attorney General and of Justice.
- (2) Any person to whom a certificate has been granted pursuant to this Act may, upon production of the certificate to the Under Secretary, make application to him for payment from the Consolidated Revenue Fund of the costs incurred by that person in the proceedings to which the certificate relates...

8. In his speech at the second reading of the Bill, the then-Minister of Justice said that the measure "represented a middle course" between two extremes. "It departs from the old English conception that costs in criminal trials should only be awarded in exceptional cases. On the other hand it establishes criteria which, when applied judicially, permit courts to make orders in appropriate cases without any innuendo arising from the making, or the refusal to make such orders that would be critical either of the prosecutor or the accused. In summary matters, costs may, by existing provisions of the Justices Act, be awarded against the informant. Where it would not seem appropriate to make such an order, the magistrate, under this Bill, may grant his certificate leading to the successful defendant being paid by the Treasurer the costs which would have been ordered to be paid by the informant had the court seen fit. More important, where examining justices determine not to commit the accused for trial on the grounds that the evidence is not sufficient to put him upon his trial, and for example are of the opinion that the charge was not made in good faith, the Bill permits them to order the prosecutor to pay costs incurred in or about the defence. Again it will be noted that the Treasurer may pay such costs where the court grants a certificate rather than order costs against the informant. The criteria to which I have referred, will be relevant to the court in reaching its decision whether a certificate is to be granted, are simply applied. The two questions to be answered in the negative by the court before granting a certificate are first, does it appear that the prosecutor would not have been acting reasonably in initiating the proceedings had he been in possession of all the facts established in the course of the trial: and second, and equally important, did the defendant do or fail to do anything which resulted in or contributed to the proceedings' being commenced or continued. These two tests are applied in England where costs in Criminal Cases Act of 1908 permits the costs of the prosecution and expenses of witnesses for the prosecution or for the defence to be paid from local funds."

9. In an editorial (28 April 1967) the Australian Law Journal observed :

"The Costs in Criminal Cases Act does not seek to pay the costs of their defence to all persons who are acquitted. The decision not to do so may be quite justifiable but once taken it is difficult to find any basis for reimbursement which will entirely eliminate the danger that a refusal of costs may be interpreted as casting a doubt on a jury's finding in favour of innocence. The Act itself certainly does not ask the court to consider guilt or innocence. Rather, it has regard to the reasonableness of the institution of proceedings. Clause 2 provides that the court, judge, justice or justices in any proceedings relating to any offence, may grant a certificate where a defendant, after a hearing on the merits is acquitted or discharged, or where, on appeal, the conviction is quashed and the defendant discharged on the information or complaint dismissed. But the certificate must specify the matters referred to in s.3. By virtue of this section the court etc. must specify that, in its opinion, if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings and that any act or omission of the defendant that might have contributed to the institution or continuation of the proceedings was reasonable in the circumstances. The class of cases in which a certificate may be granted is thus a rather narrow one. The mere granting of a certificate, moreover, does not ensure payment of costs. The Treasurer must also consider that, in the circumstances, a payment is justified and he is also to have a discretion as to the amount of the costs which are to be paid. The certificate itself is not to contain any specification of the amount of costs except that, under s.3(2), one granted by a magistrate (or justices) shall specify the amount that would be adjudged to be paid if an order was being made for costs against the informant,

prosecutor or complainant. The Under Secretary is to furnish a statement to the Treasurer in which he is to state the amount specified under s.3(2), or what in his opinion are the reasonable costs, and also to specify any amounts that the applicant has received or could have received independently of the Act, by reason of incurring the costs. Then, where the Treasurer considers that "in the circumstances of the case the making of payment to the applicant is justified, the Treasurer may pay to the applicant his costs or such part thereof as the Treasurer may determine." Speaking on this discretion, on the introduction of the Bill for the Act, the Minister of Justice said that the Treasurer might decide, for example, that payment is unjustified where a person acquitted on one charge is subsequently convicted on another charge arising from the same circumstances. The discretion reserved to the Treasurer thus goes far beyond the mere questions of what costs were reasonably incurred and of what alternative means of covering them could be, or could have been, explored. It seems unfortunate that such a broad discretion is being given to the Treasury and it at least seems desirable that its exercise to refuse reasonable costs, where a certificate has been granted, should be confined to the most exceptional circumstances."

10. In Tasmania, a special Act was passed, the Criminal Proceedings (Special Defence Costs) Act 1976, in order to discharge an undertaking given by the prosecution to meet certain costs and expenses incurred in an abortive criminal trial. A fortnight later a further Act, Costs in Criminal Cases Act 1976, was enacted to make provision generally for the payment of costs in criminal cases to successful defendants. The Act provides inter alia:

S.4.(1) Subject to this Act, where a person having been charged with an offence is discharged from the proceedings in respect thereof, that is to say, where

- (a) he is acquitted of the offence;
- (b) the complaint charging him with the offence is dismissed or withdrawn;
or
- (c) he is discharged upon an indictment for the offence.

the court having the conduct of the proceedings may, upon the application of the defendant, order that he be paid in respect of his defence such costs as it thinks just and reasonable.

(2) The court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular to the following:

- (a) Whether the proceedings were brought and continued in good faith;
- (b) Whether proper steps were taken to investigate any matter coming to, or within, the knowledge of any person responsible for bringing or continuing the proceedings;
- (c) Whether the investigation into the offence was conducted in a reasonable and proper manner;
- (d) Whether the evidence as a whole would support a finding of guilt but the defendant is discharged from the proceedings on a technical point;
- (e) Whether the defendant is discharged from the proceedings because he established (either by the evidence of the witnesses called by him or by cross examination of witnesses for the prosecution or otherwise) that he was not guilty.

(3) No defendant shall be granted costs by reason only of the fact that he is acquitted of an offence, the complaint charging him with an offence is dismissed or withdrawn, or he is discharged upon indictment.

(4) No defendant shall be refused costs by reason only of the fact that the proceedings were properly brought and continued.

(5) No defendant shall be refused costs by reason only of the fact that in the investigation of the offence with which he had been charged he remained silent or refused to assist in respect thereof.

11. There appears to be no overview of the current legal position for this area of the law throughout Australia. It is, however, possible to say that a successful defendant in criminal proceedings is likely to be awarded costs in cases of summary offences but with the

exception of Tasmania and New South Wales not necessarily in all cases of indictable offences. It should, however, be remembered that the general availability of legal aid in cases of criminal offences is now such that the absence in Australia of statutory enactments similar to the United Kingdom's Costs in Criminal Cases Act may not be quite such a handicap as might be thought at first glance.

12. As noted, courts of summary jurisdiction are generally given a discretion to make an order for costs in favour of successful complainants or defendants. In such provisions there is usually nothing to indicate that any different principles are to be applied in awarding costs against unsuccessful parties depending upon whether they are complainants or defendants, or depending upon whether (being complainants) they happen to be police officers or not. However, there appears to be a practice whereby costs are awarded against unsuccessful defendants almost as a matter of course, whereas costs are awarded against unsuccessful complainants who happen to be police officers only in unusual circumstances, such as where the police have acted unreasonably in laying or proceeding with the complaint. Such a practice was rejected by the Full Court of South Australia as "offending against the conception of evenhanded justice" (Hamdorf v. Riddle, (1971) S A S R 398). An example of the legislation is Victoria's Justices Act 1958, which provides:

S.105. The power of a magistrates' court to award costs and the award of costs by any such court shall be subject to the following provisions:

- (1)
- (2) Where the court dismisses the information or complaint, or makes any order in favour of the defendant it may in its discretion in and by its order of dismissal or other order award and order that the informant or the complainant respectively shall pay to the defendant such costs as to such court seem just and reasonable;
- (3) The sums allowed for costs shall in all cases be specified in the conviction or order or order of dismissal;
- (4) Any sum adjudged awarded or ordered to be paid whether to an informant or complainant or to a defendant for costs including any such sum for costs alone may be raised and levied by distress under the provisions of this Act and in the case of costs adjudged awarded or ordered on a conviction for a fine may be raised and levied by a separate warrant of distress;
- (5) When any case is adjourned the court may in its discretion order that the costs of and occasioned by the adjournment be paid by any party to any other part;

(ii) Barbados

13. Magistrates' courts are empowered to award costs by s.120 of the Magistrate's Jurisdiction and Procedure Act, Cap. 116. This is severely circumscribed as it is limited to costs other than legal costs (note s.120(11)). It is further restricted by s.120(3) where the prosecution is brought by public authorities.

14. Section 120 provides as follows:

S.120. Subject to the provisions of any other enactment to the contrary, on the trial of an information or hearing of a complaint, a magistrate shall have power in his discretion to make such order as to costs -

- (a) on convicting the accused or making the order for which the complaint is made, to be paid by the accused or defendant to the informant or complainant;
- (b) on dismissing the information or complaint, to be paid by the informant or complainant to the accused or defendant, as he thinks reasonable.

(2) Notwithstanding subsection (1), where the complaint is for an order for the periodic payment of money or for the revocation, revival or variation of such an order or for the enforcement of such an order, the magistrate may, whatever adjudication he makes, order either party to pay the whole or any part of the costs of the other.

(3) No costs shall be awarded against a constable, public officer or officer in the service or employment of the Interim Commissioner for Local Government prosecuting any information or complaint is dismissed and the magistrate is of opinion that the information or complaint was frivolous or vexatious.

(4) Where a magistrate has dismissed any information or complaint and is of opinion that the information or complaint was frivolous or vexatious, he may also with the consent of the accused or defendant, order the informant or complainant to pay to the accused or defendant a reasonable sum, not exceeding one hundred dollars, as compensation for the trouble and expense to which the accused or defendant may have been put, by reason of such information or complaint, in addition to his costs.

(5) The consent of the accused or defendant to any such order for compensation shall be a bar to any subsequent civil proceedings for false imprisonment or malicious prosecution by him against the informant or complainant.

(6) Where a magistrate has convicted an accused or made an order against a defendant, he may, in addition to the sentence or penalty, if any, imposed on such accused or defendant and to any costs ordered under subsection (1) or (2) and subject to subsections (7) and (8), order the accused or defendant to pay to the informant or complainant or any other person such compensation, not exceeding one thousand dollars, as to the magistrate may seem just and reasonable.

(7) The magistrate shall not award compensation in respect of damages for injury or loss suffered by the informant or complainant as a result of the offence or matter upon which the information or complaint was founded unless the informant or complainant or such other person consents.

(8) The award of any such compensation mentioned in subsection (7) shall release the accused or defendant from all other civil proceedings for the same cause.

(9) The amount of any costs or compensation ordered to be paid under subsection (6) shall be specified in the conviction, order or order of dismissal, as the case may be.

(10) Any order for payment of costs made against an accused or a defendant may include costs of and attendant upon his apprehension.

(11) No order for payment of costs made under this section shall include any fees to attorney-at-law.

(12) Subject to subsection (13), any sum of money awarded for costs or compensation under this section shall be enforceable as a sum adjudged to be paid by conviction or order.

(13) Any costs or compensation awarded on a complaint for an affiliation or maintenance order or for the enforcement, variation, revocation, discharge or revival of such an order, against the person liable to make payments under the order shall be enforceable as a sum ordered to be paid by an affiliation order or a maintenance order, as the case may be.

15. The High Court has a general discretion to grant costs in all cases heard by it.

(iii) Canada

16. The question is under active review in a number of Canadian jurisdictions.

17. In 1973, the Law Reform Commission of Canada in a Study Paper recommended a Federal scheme for the compensation for the acquitted accused. The Law Reform Commission will be reviewing the matter in the future, but probably not before they have completed their work on the Criminal Law Review. In 1974, the Law Reform Commission of British Columbia recommended legislation permitting an award of costs to a successful defendant in cases prosecuted under Provincial statutes. No action has been taken on this recommendation. The Law Reform Commission of Saskatchewan is studying the question, but has not yet reported. The Canadian Bar Association has undertaken a study of the question arising out of discussions on the issue at the 1982 Annual Meeting. The Government of Ontario is also examining the question.

18. The review in Ontario arises out of a prosecution in which in 1982, after a hearing of fifty sitting days (probably the longest preliminary inquiry in the history of Canada) a finding of no case to answer was made and a defendant discharged. Press reports estimate legal costs at £75,000.

19. The range of options tentatively identified by one Canadian researcher are as follows:

- (a) the formalising of an ex gratia scheme, with a panel of High Court judges advising Cabinet (as recommended by the Ontario Royal Commission on Civil Rights);
- (b) conferment of judicial discretion (viz: Barbados);
- (c) conferment of judicial discretion with guidelines (viz: UK ; New South Wales; Tasmania).
- (d) establishment of an independent tribunal along the lines of the Criminal Injuries Compensation Board (suggested in a Working Paper of the Law Reform Commission of Canada);
- (e) retrospective waiving of guidelines on legal aid to enable a successful defendant, who was not legally aided, to be granted such aid (suggested by the Law Reform Commission of British Columbia);
- (f) creation of a new sort of "improper prosecution" so as to downgrade the requirements of establishing malicious prosecution.

(iv) Jamaica

20. In common with most Commonwealth jurisdictions, there is no provision for costs as such in Jamaican law. Such compensation can only be obtained through an action for malicious prosecution.

(v) Kenya

21. The general position in Kenya is that unless an acquitted person succeeds in bringing an action for malicious prosecution, there is no power for the court to award costs against the prosecution. The Criminal Procedure Code does, however, provide by s.171 for costs to be awarded against a person who is convicted. They may only be awarded in favour of a person who is acquitted of charges brought by private prosecutor, provided that

- (a) such costs shall not exceed one thousand shillings in the case of an acquittal or discharge by the High Court or five hundred shillings in the case of an acquittal or discharge by a subordinate court;
- (b) no such order shall be made if the judge or magistrate considers that the private prosecutor had reasonable grounds for making his complaint.

(vi) New Zealand

22. The statutory basis for awards of sums of money "towards the costs" of acquitted defendants is to be found in the Costs in Criminal Cases Act 1967, s.5 of (which applies to all courts exercising jurisdiction in criminal cases) provides:-

S.5 Costs of successful defendant - (1) Where any defendant is acquitted of an offence or where the information charging him with an offence is dismissed or withdrawn, whether upon the merits or otherwise, or where he is discharged under section 179 of the Summary Proceedings Act 1957 the Court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the cost of his defence.

(2) Without limiting or affecting the Court's discretion under subsection (1) of this section, it is hereby declared that the Court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to -

- (a) Whether the prosecution acted in good faith in bringing and continuing the proceedings;
- (b) Whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence;

- (c) Whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:
 - (d) Whether generally the investigation into the offence was conducted in a reasonable and proper manner:
 - (e) Whether the evidence as a whole would support a finding of guilt but the information was dismissed on a technical point:
 - (f) Whether the information was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:
 - (g) Whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.
- (3) There shall be no presumption for or against the granting of costs in any case.
- (4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or discharged or that any information charging him with an offence has been dismissed or withdrawn.
- (5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.
23. The costs of a convicted defendant may also be contributed to, s.6 providing:
- S.6 Costs of convicted defendant - Where any defendant is convicted but the Court is of the opinion that the prosecution involved a difficult or important point of law and that in the special circumstances of the case it is proper that he should receive costs in respect of the arguing of that point of law, the Court may, subject to any regulations made under this Act, order that he be paid such sum as it considers just and reasonable towards those costs.
24. Costs on appeal are provided for in s.8:
- S.8 Costs on appeals - (1) Where any appeal is made pursuant to any provision of the Summary Proceedings Act 1957 or the Crimes Act 1961 the Court which determines the appeal may, subject to any regulations made under this Act, make such order as to costs as it thinks fit.
- (2) No defendant or convicted defendant shall be granted costs under this section by reason only of the fact that his appeal has been successful.
- (3) No defendant or convicted defendant shall be refused costs under this section by reason only of the fact that the appeal was reasonably brought and continued by another party to the proceedings.
- (4) No Magistrate or Justice who states a case in accordance with Part IV of the Summary Proceedings Act 1957 and no Judge who states a case shall be liable to costs by reason of the appeal against the determination.
- (5) if the Court which determines an appeal is of opinion that the appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, order that the whole or any part of the costs of any party to the proceedings in disputing the frivolous or vexatious matter shall be paid by the party who raised the frivolous or vexatious matter.
- (6) If the Court which determines an appeal is of opinion that the appeal involves a difficult or important point of law it may order that the costs of any party to the proceedings shall be paid by any other party to the proceedings irrespective of the result of the appeal.
25. Regulations may be made prescribing the heads of costs that may be ordered and the maximum scales of costs (s.13). The court may exceed any maximum scale "having regard to the special difficulty, complexity, or importance of the case."
26. However, the Secretariat has been informed by another country that the total costs

awarded between 1968 and 1972 averaged only \$1,000 per annum (i.e. about £450). As against this, in 1980 the High Court handled 2,550 indictments or informants involving 989 distinct persons, and in 1979 the Magistrates' Courts handled 295,612 cases. It appears that costs are seldom awarded, and that where they are, only modest sums are ordered.

(vii) Nigeria

27. Section 32 of the Constitution of the Federal Republic of Nigeria 1979 guarantees the right to personal liberty and, among other things, deals with arrest, detention and bail of persons arrested by the police or charged before the Courts. The Criminal Procedure Act (Cap. 43 of the Laws of the Federation - applicable to the Southern States) and the Criminal Procedure Code (Cap. 89 of the Laws of Northern Nigeria -applicable in all Northern States) have complementary provisions.

28. Specifically, section 299 of the Criminal Procedure Act (Cap.43) enjoins the Court in giving its decision at the conclusion of a trial, in addition to either discharging or convicting the accused, also to make such other order as to it may seem just. In addition to the foregoing, the following ancillary orders, (inter alia) may be made in favour of the victim of an offence or against the convicted accused, as the case may be:

(a) On Acquittal: Costs against a private Prosecutor

Section 258 provides that where an accused person is acquitted or discharged in a prosecution originally instituted on a summons or warrant issued by the court on the complaint of a private prosecutor, not being a person prosecuting on behalf of the State or any public officer prosecuting in his official capacity, the court may order the private prosecutor to pay to the accused such reasonable costs as it considers proper unless the court is of the view that the private prosecutor had reasonable grounds for starting the prosecution. This provision is subject to any other provision in any written law relating to the procedure to be followed in awarding of costs.

(b) Compensation to the accused for false and vexatious charge

Section 256 provides that if the court discharges or acquits any accused person and the judge or magistrate is of the opinion that the accusation against him was false and either frivolous or vexatious, the judge or magistrate may for reasons to be recorded, order compensation of a specified amount, not more than N20 to be paid to the accused person by the complainant.

29. The accused may refuse to accept the compensation under (b) but where he accepts it, the accused is precluded from any civil action in respect of the same injury.

30. The Northern Nigeria Criminal Procedure Code contains provisions corresponding to the foregoing.

31. Mention should also be made of the novel provisions of subsection (6) of section 32 of the Constitution which reads:

"Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person; in this connection, "appropriate authority or person" means an authority or person specified by law."

(viii) United Kingdom

32. The material available suggests that in the Commonwealth the UK is the jurisdiction in which a successful defendant is most likely to have all or part of the costs he has incurred reimbursed.

33. The power to award costs in criminal proceedings depends on statute and is governed mainly by the Costs in Criminal Cases Act 1973, under which the court may order payment of costs out of central funds to the prosecutor and to a successful defendant and payment of costs by one party to the other. Costs out of "central funds" should normally be awarded to a successful defendant unless there are positive reasons for making a different order. An order may be made notwithstanding that the defendant has been granted legal aid. "Central funds" simply means money provided by Parliament.

34. In a Practice Note [1973] 2 All ER 592, the then Lord Chief Justice, Lord Widgery, stated

"Although the award of costs must always remain a matter for the court's discretion, in the light of the circumstances of the particular case, it should be accepted as normal practice that when the court has power to award costs out of central funds it should do so in favour of a successful defendant, unless there are positive reasons for making a different order. Examples of such reasons are:

- (a) Where the prosecution has acted spitefully or without reasonable cause. Here the defendant's costs should be paid by the prosecutor.
- (b) Where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it really is. In such circumstances the defendant can properly be left to pay his own costs.
- (c) Where there is ample evidence to support a verdict of guilty but the defendant is entitled to an acquittal on account of some procedural irregularity. Here again, the defendant can properly be left to pay his own costs.
- (d) Where the defendant is acquitted on one charge but convicted on another. Here the court should make whatever order seems just having regard to the relative importance of the two charges, and to the defendant's conduct generally."

35. As has been observed by a number of writers, a decision by the court in exercise of such a discretion can involve an interpretation of a "not guilty" verdict, either as amounting to "not proven" or as being technical in nature and therefore undeserved. It can therefore place a gloss on the verdict, casting doubt on the verdict and thereby undermine the presumption of innocence (see, e.g. (1967) 40 Australian Law Journal (at page 411)).

36. Where a court has exercised its discretion in favour of making an award of costs out of central funds there is no further discretion to limit the amount awarded. Any provision of the Costs in Criminal Cases Act 1973 enabling any sum to be paid out of central funds, however, has effect subject to regulations prescribing rates or scales of payments of any costs so payable and the conditions under which such costs may be allowed.

37. Where costs are ordered to be paid out of central funds costs may be allowed as follows in respect of:

- (1) a witness for attending to give professional evidence, an allowance not exceeding the prescribed maximum and, where appropriate, a night allowance not exceeding such maximum;
- (2) an expert witness for attending to give expert evidence and for work in connection with its preparation, an expert witness allowance of such amount as the court considers reasonable;
- (3) a seaman who misses his ship for the purpose of attending to give evidence, an allowance in respect of loss of wages and maintenance;
- (4) a witness other than those named under heads (1) to (3) who attends to give evidence, a subsistence allowance in accordance with the prescribed scale and, where appropriate, a loss allowance not exceeding the prescribed maximum;
- (5) a witness who travels to or from court by public conveyance or private motor vehicle, a travelling allowance as prescribed;
- (6) a person employed as an interpreter, such allowance as the court may consider reasonable;
- (7) any prosecutor, defendant or appellant, or party to proceedings before a Divisional Court of the Queen's Bench Division, the same travelling and subsistence allowances as if he attended to give evidence other than professional or expert evidence.
- (8) any other person who in the opinion of the court necessarily attends for the purpose of the case otherwise than to give evidence, the same allowances as if he had attended to give evidence other than professional or expert evidence;
- (9) a written report made by a registered medical practitioner in pursuance of a request by the court, a medical report allowance in accordance with the prescribed scale.

B. Compensation for Persons Wrongfully Convicted

(ix) General

38. We are not aware of any Commonwealth jurisdiction which has a statutory scheme providing for compensation for persons who have been wrongfully convicted. It has, however, been suggested that in Nigeria such a person might seek redress under the Fundamental Rights provisions of the 1979 Constitution.

39. A number of Commonwealth countries are, however, party to the UN International Covenant on Civil and Political Rights, Article 6 of which provides:

"When a person has by final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is approved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

40. It has been suggested that this Article imposes upon a signatory an obligation to provide a statutory basis for such compensation as has been done in a number of European countries (cf. Compensation for Wrongful Imprisonment, JUSTICE, 1982).

41. Instead, Commonwealth jurisdictions have up till now dealt with the matter on an ex gratia basis, although a Royal Commission in New Zealand in 1980 was asked to suggest appropriate compensation, "if any", for a person convicted of two murders and subsequently granted a free pardon after serving eight years' imprisonment. Its recommendation of approximately NZ\$1,87,450.35 (£450,000), and which also embraced members of the person's immediate family, was accepted by the Government.

42. In 1982, a Report by JUSTICE (the British Section of the International Commission of Jurists) published a report entitled Compensation for Wrongful Imprisonment. It cites the following extract from a letter from the Home Secretary as being "the clearest statement of the position" in a case in which the Home Secretary has not intervened:

"The law makes no provision for ... payments to persons acquitted in the ordinary process of law, whether at trial or an appeal. If someone thinks he has grounds for compensation his legal remedy is to pursue the matter in the civil courts, by way of a claim for damages. In exceptional circumstances, however, the Home Secretary may authorise an ex gratia payment from public funds, but this will not normally be done unless the circumstances are compelling and there has been default by a public authority."

43. The JUSTICE Report recommends the establishing of an Imprisonment Compensation Board to deal with such cases, with the following guidelines:

- (a) After the Board has accepted a claim as falling within its jurisdiction and being worthy of consideration it may refuse or reduce compensation if it considers that:
 - (i) a conviction has been quashed on grounds that the Board regard as being mere technicality;
 - (ii) it would be inappropriate in view of the imprisoned person's conduct in respect of the matters which led to the criminal proceedings;
 - (iii) the applicant has failed to give reasonable assistance to the Board in its efforts to assess compensation.
- (b) In respect of paragraphs (a)(i) and (a)(ii) above the Board will normally only consider evidence which was advanced at the trial or at the hearing of the appeal, except that it may consider and take into account matters which have come to light in the course of a subsequent investigation.
- (c) Where the applicant's claim is accepted as coming within the provision of the Scheme the Board will grant compensation for:-
 - (i) expense reasonably incurred in securing the quashing of the imprisoned person's conviction;

- (ii) loss of earnings by the imprisoned person or any dependant person where such loss is a direct consequence of the imprisonment;
- (iii) any other expenses or loss which are reasonably incurred upon imprisonment either by the imprisoned person or any dependant person;
- (iv) pain suffering and loss of reputation suffered by the imprisoned person or by the imprisoned person's dependants.

The Board will reduce any award by the amount of any other compensation or damages already received by the claimant.

- (d) Compensation will not be paid if the assessment is less than £250.
- (e) A person compensated by the Board will be required to undertake that any damages, settlement or compensation he may subsequently receive in respect of his wrongful imprisonment will be repaid to the Board up to the amount awarded by the Board.

THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Memorandum by
THE COMMONWEALTH SECRETARIAT

The Hague Convention on the Civil Aspects of International Child Abduction, discussed and supported in its draft form at the 1980 Meeting of Commonwealth Law Ministers in Barbados, was agreed at The Hague on 25 October 1980.

2. As of writing, seven countries have signed the Convention, namely -

Belgium, Canada, France, Greece, Portugal, Switzerland and the United States of America.

3. Of these, France ratified the Convention on 16 September 1982. In Canada, a number of Provinces have enacted legislation, or have it pending, to approve ratification of the Convention, including British Columbia, Manitoba, Nova Scotia, Ontario and Québec, and ratification on their behalf by the Federal Government is expected shortly. Ratification procedures are in hand in both the United States, Switzerland and Belgium.

4. Although not yet in force, the Convention has already been cited as persuasive in court proceedings in the United States.

5. Bilateral arrangements made by France with several North African countries have been modelled on the Scheme of the Convention.

6. The final Convention is set out below.

7. The Commonwealth Secretariat has published an "accession kit" on the Convention, prepared in association with Mr. John M. Eekelaar. This includes a draft model Bill for its implementation.

FINAL ACT OF THE FOURTEENTH SESSION

The undersigned, Delegates of the Governments of Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Yugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela, and the Representatives of the Governments of Brazil, the Holy See, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as Observer, convened at The Hague on the 6th October 1980, at the invitation of the Government of the Netherlands, in the Fourteenth Session of The Hague Conference on Private International Law.

Following the deliberations laid down in the records of the meetings, have decided to submit to their Governments the following draft Conventions [inter alia] -

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State

of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

CHAPTER I : Scope of the Convention

Article 1

The objects of the present Convention are -

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention -

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II : Central Authorities

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one

Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

- (a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- (c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- (d) to exchange, where desirable, information relating to the social background of the child;
- (e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- (f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- (g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- (i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

CHAPTER III : Return of Children

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

- (a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- (b) where available, the date of birth of the child;
- (c) the grounds on which the applicant's claim for return of the child is based;
- (d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

- (e) an authenticated copy of any relevant decision or agreement;
- (f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

(g) any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning

of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

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.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Article 20

The return of the child under the provisions of Article 12 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.

CHAPTER IV : Rights of Access

Article 21

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V : General Provisions

Article 22

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

Article 23

No legalization or similar formality may be required in the context of this Convention.

Article 24

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.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

Article 25

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

Article 26

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

Article 27

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the

application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

Article 28

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

Article 29

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

Article 30

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

Article 31

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -

(a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;

(b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 32

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 33

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article 34

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between Parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

Article 35

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States. Where a declaration has been

made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

Article 36

Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.

CHAPTER VI : Final Clauses

Article 37

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 38

Any other State may accede to the Convention. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such a declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

Article 39

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State. Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 40

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

Article 41

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

Article 42

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands. The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

Article 43

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force

1. for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;
2. for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

Article 44

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43, even for States which subsequently have ratified, accepted, approved it or acceded to it. If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 45

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following

1. the signatures and ratifications, acceptances and approvals referred to in Article 37;
2. the accessions referred to in Article 38;
3. the date on which the Convention enters into force in accordance with Article 43;
4. the extensions referred to in Article 39;
5. the declarations referred to in Articles 38 and 40;
6. the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;
7. the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the [25th day of October 1980]*, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.

Recommendation concerning the draft Convention on the Civil Aspects of International Child Abduction-

The Fourteenth Session,

Recommends to the States Parties to the Convention on the Civil Aspects of International Child Abduction that the following model form be used in making applications for the return of wrongfully removed or retained children-

Request for return

Hague Convention of on the Civil Aspects of International Child Abduction

REQUESTING CENTRAL AUTHORITY OR APPLICANT	REQUESTED AUTHORITY

Concerns the following child:..... who will attain the age of 16 on 19.....

NOTE: The following particulars should be completed insofar as possible.

I - IDENTITY OF THE CHILD AND ITS PARENTS

1 Child

name and first names	.....
date and place of birth	.....
habitual residence before removal or retention	.....
passport or identity card No. if any	.....
description and photo, if possible (see annexes)	.....

2 Parents

2.1 Mother:	name and first names	.....
	date and place of birth	.....
	nationality	.....
	occupation	.....
	habitual residence	.....
	passport or identity card No, if any	.....

2.1 Father:	name and first names	.....
	date and place of birth	.....
	nationality	.....
	occupation	.....
	habitual residence	.....
	passport or identity card No, if any	.....

2.3	Date and place of marriage	

* The Convention was signed immediately after the signature of the Final Act.

II - REQUESTING INDIVIDUAL OR INSTITUTION (who actually exercised custody before the removal or retention)

- 3 name and first names
 nationality of individual applicant
 occupation of individual applicant
 address
 passport or identity card No, if any
 relation to the child
 name and address of legal adviser, if any

III - PLACE WHERE THE CHILD IS THOUGHT TO BE

- 4.1 Information concerning the person alleged to have removed or retained the child
 name and first names
 date and place of birth, if known
 nationality, if known
 occupation
 last known address
 passport or identity card No, if any
 description and photo, if possible (see annexes).....

- 4.2 Address of the child

- 4.3 Other persons who might be able to supply additional information relating to the whereabouts of the child
.....
.....
.....

IV - TIME, PLACE, DATE AND CIRCUMSTANCES OF THE WRONGFUL REMOVAL OR RETENTION

.....
.....
.....
.....
.....

V - FACTUAL OR LEGAL GROUNDS JUSTIFYING THE REQUEST

.....
.....
.....
.....
.....

VI - CIVIL PROCEEDINGS IN PROGRESS

.....
.....
.....
.....
.....

VII - CHILD IS TO BE RETURNED TO:

- a. name and first names
 date and place of birth
 address
 telephone number

b. proposed arrangements for return of the child
.....
.....

VIII - OTHER REMARKS

.....
.....
.....
.....
.....

·IX - LIST OF DOCUMENTS ATTACHED*

.....
.....
.....
.....

Date
Place
Signature and/or stamp of the requesting Central Authority or
applicant
.....

*e.g. Certified copy of relevant decision or agreement concerning custody or access; certificate or affidavit as to the applicable law; information relating to the social background of the child; authorization empowering the Central Authority to act on behalf of applicant.

REVIEW OF COMMONWEALTH EXTRADITION ARRANGEMENTS

Memorandum by the Commonwealth Secretariat and a Report prepared by the HON. TAN BOON TEIK, Attorney-General of Singapore, as Chairman of the Meeting to Review Commonwealth Extradition Arrangements held at Marlborough House, 22-26 November 1982

Annexed is a Report prepared by the Hon. Tan Boon Teik, Attorney-General of Singapore, who chaired a Meeting of representatives of Commonwealth Governments to review Commonwealth extradition arrangements. The Meeting was held at Marlborough House from 22 to 26 November 1982.

2. As the original Commonwealth Scheme for the Rendition of Fugitive Offenders was agreed at a Meeting of Commonwealth Law Ministers in 1966 and as the Review was requested by Law Ministers at Barbados in 1980, it was considered appropriate for the amendments recommended by the 1982 Meeting to be considered for adoption by this forum.

3. The Meeting examined Commonwealth extradition arrangements very closely over the course of a week and was assisted by two consultants, Professor Ivan Shearer and Dr. Torsten Stein. It was attended by representatives of 36 Commonwealth jurisdictions. The arrangements have therefore been carefully scrutinised and the agreed amendments represent a consensus achieved after considerable discussion and careful drafting.

4. While it is, of course, for Ministers to decide how they will wish to handle the relevant Agenda item, the Secretariat proposes that the question be addressed in the first instance by Senior Officials when they meet on the eve of the Colombo Meeting.

5. Accompanying the Report, for the information of Ministers, is a copy of the uncorrected Draft Summary Record of the November Meeting. Once delegations from that Meeting have responded to the Draft, the final Report will be printed. We would emphasise that it was prepared by the Secretariat and has not yet been the subject of comment by delegates. [Note : The Report has since been published separately.]

6. Papers submitted in advance of the November Meeting have been fully circulated to governments. A number of papers were also made available during the Meeting. These were circulated to all delegates. Additional copies are available from the Secretariat. The papers in question were country papers by the governments of Dominica, Guyana, Hong Kong, Jamaica, Kenya, Papua New Guinea, St. Vincent and the Grenadines, Seychelles, Uganda and Zimbabwe, a paper by Dr. Torsten Stein on the European experience with extradition, and a paper by ICPO-INTERPOL.

REVIEW OF COMMONWEALTH EXTRADITION ARRANGEMENTS

A Report prepared by the HON. TAN BOOK TEIK
Attorney-General of Singapore, as Chairman of the
Meeting to Review Commonwealth Extradition
Arrangements held at Marlborough House, 22-26
November 1982

Summary

A Meeting was held at Marlborough House from 22-26 November 1982 to review in detail the operation of the 1966 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders. The Meeting, attended by representatives of thirty six Commonwealth jurisdictions, agreed with the view expressed by Law Ministers at the Barbados Meeting in 1980 that the Scheme had worked well during the past fourteen years, and also agreed, in broad terms, with the view expressed at that same Meeting that certain aspects of the Scheme might be improved.

2. The general approach of the Meeting, and a summary of its main recommendations, are contained in the Communiqué, annexed to this Report as Appendix A.

3. The meeting adopted a number of specific recommendations for the amendment of the 1966 Scheme. The Scheme as amended (with the proposed additions shown as underlined) is annexed to this Report as Appendix B.

4. Law Ministers are invited to receive this Report and to consider its recommendations.

5. The general and specific recommendations, together with an explanatory commentary, are set out in the body of this Report, as follows:

	<u>Paras</u>
(a) Reciprocity of Designations	12 - 17
(b) Provisional warrants of arrest - INTERPOL notices	18 - 20
(c) Scope of returnable offences, including fiscal offences	21 - 25
(d) Right of review of committal proceedings by, or on behalf of, requesting governments	26 - 28
(e) Circumstances precluding return	29 - 31
(f) Specifications of the offence in the laws of the requesting and requested States (the "double criminality rule")	32 - 35
(g) Prosecution, or re-extradition, after return for additional offences (the speciality rule)	36 - 42
(h) The death penalty	43 - 45
(i) Return by consent	46 - 48
(j) Political offences and terrorism	49 - 54

Introductory

6. In 1966, the Commonwealth Scheme Relating to the Rendition of Fugitive Offenders was agreed at a Meeting of Commonwealth Law Ministers held in London. In 1979, its operation was discussed in a paper prepared by Professor I.A. Shearer, which was circulated to Governments. The paper was revised in the light of preliminary views expressed by some Governments, and formed the basis for discussion at the 1980 Meeting of Commonwealth Law Ministers at Barbados. Professor Shearer then further refined the paper into a Consultative Document, taking into account views expressed in Barbados, and made specific

proposals for the amendment of the 1966 Scheme for consideration at the Meeting of delegates held at Marlborough House on 22-26 November 1982.

7. Before reporting on the 1982 proposals, it might be helpful briefly to trace the history, and to discuss the status, of the Scheme. The draft Scheme which was placed before the 1966 London Meeting stemmed from a memorandum circulated by the British Government in May 1964, which recognised that the Imperial Fugitive Offenders Act, 1881, was outmoded in view of the constitutional changes which had occurred since it was enacted. Although as the Commonwealth evolved, practice under the Act had assumed more the character of a particular law of extradition, it did not include some of the rules normally adopted in general international law to safeguard the interests of a fugitive. The response to the 1964 memorandum indicated agreement that further discussions would be helpful. At these discussions, which took place in Canberra in the following year, it was decided that a draft Scheme should be produced for consideration at a future meeting. This meeting was held in London in 1966.

8. The understanding that acceptance of the Scheme would signify no more than that Commonwealth governments had agreed upon general principles which they would follow in the course of drafting their own legislation, was reflected in the relevant paragraphs of the Communiqué issued at the conclusion of the London Meeting, which were in the following terms:

"The Meeting considered that Commonwealth extradition arrangements should be used upon reciprocity and substantially uniform legislation incorporating certain features commonly found in extradition treaties, e.g. a list of returnable offences, the establishment of a prima facie case before return, and restrictions on the return of political offenders."

"The Meeting accordingly formulated a Scheme setting out principles which could form the basis of legislation within the Commonwealth and recommended that effect should be given to the Scheme in each Commonwealth country."

9. Since 1966, many Commonwealth jurisdictions have enacted legislation implementing the Scheme. Several have drawn upon certain international conventions when drawing up, or amending, their relevant statutes. Others, while not adopting the Scheme as such by their legislation, have in force statutes which partially comply with it. Others, still, are on the point of introducing legislation on the topic.

10. It was felt that, some fourteen years after the introduction of the Scheme, it would be useful to review its provisions to see whether subsequent experience and developments suggested it should be modified. The Commonwealth Secretariat therefore commissioned Professor Shearer to prepare a Discussion Paper for this purpose. 1980 Meeting of Commonwealth Law Ministers in Barbados considered and commended, Professor Shearer's paper. It recognised that the matter was of great importance, and Ministers were concerned to ensure that Commonwealth arrangements in this field worked fairly, effectively, and efficiently.

11. In their Barbados Communiqué of 1980, Law Ministers expressed the view that a number of matters called for attention, and they invited the Commonwealth Secretariat to prepare proposals for amendments to the Scheme so that these might be agreed either before, or at, the next Commonwealth Law Ministers' Meeting. This was done for the Secretariat by Professor Shearer whose Consultative Document was considered by delegates at the special Meeting to Review Commonwealth Extradition Arrangements, held in London on 22-26 November 1982.

12. Written comments or submissions were made on Professor Shearer's Discussion Paper prior to the Barbados Meeting by the Governments of Australia, Barbados, Jamaica, Lesotho, Nauru, Sri Lanka, and Uganda. Papers were also submitted before, or at, the 1982 Review Meeting, by Barbados, Cyprus, Dominica, Fiji, Ghana, Guyana, Hong Kong, Jamaica, Kenya, Malaysia, Papua New Guinea, St. Vincent and the Grenadines, Seychelles, Sri Lanka, Trinidad and Tobago, Uganda and Zimbabwe.

13. At the invitation of the Commonwealth Secretariat, in view of the proposal concerning the recognition of the role of the International Criminal Police Organisation in extradition, a representative of ICPO-INTERPOL was present at the Meeting. In view also of the experience of the Member States of the Council of Europe in the operation of the European Extradition Convention, 1957, some of the features of which had been incorporated in the 1966 Commonwealth Scheme, Dr. Torsten Stein of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, was invited by the Secretariat

to present a paper and attend the Meeting as an additional consultant.

14. The Meeting unanimously elected the Attorney-General of Singapore, the Hon. Tan Boon Teik, as its Chairman.

15. The following agenda was adopted by the meeting:

- (a) Whether, and in what form, reciprocity of designations should be required under the Commonwealth Extradition Scheme
- (b) INTERPOL 'Red Notices'
- (c) Returnable offences
- (d) Appeals by requesting governments against discharge of fugitives
- (e) Circumstances precluding return
- (f) The double criminality rule
- (g) Prosecution for additional offences after return
- (h) The death penalty
- (i) Return by consent
- (j) Political offences and terrorism
- (k) Costs
- (l) Legal aid
- (m) Any other specific items

16. No further specific proposals were put forward under item (m), but Kenya gave notice that it wished to raise, for general discussion, the question of the prima facie case as a requirement for committal in extradition cases.

Reciprocity of Designations

17. The 1966 Scheme was designed to replace the Imperial Fugitive Offenders Act, 1881. The 1881 Act applied by paramount force to all the British dominions, and was continued in most Commonwealth countries after independence as part of the received body of statute law. There was thus no question of selective application of that Act between the different parts of the Commonwealth, except that under Part II of the Act of 1881 provision was made for simplified extradition procedures as between certain neighbouring territories designated by Order in Council. This latter facility was preserved in an appropriately modified form in Clause 16(a) of the 1966 Scheme.

18. The 1966 Law Ministers' Meeting considered but rejected the suggestion that the Commonwealth Extradition Scheme should be formalised in a multilateral convention. That Meeting instead agreed with the British proposal that the Scheme should take the form of an agreed set of recommendations for legislative implementation by each government. As Mr. Dick Taverne, QC, put the point on behalf of the British Government, it had not so far been the practice for Commonwealth agreements to take the form of treaties or formal conventions, which would require registration with the United Nations. It was hoped that the Meeting would agree to make firm recommendations to Governments to enact legislation on the principles of the Scheme, which were designated to operate by way of reciprocity. It was suggested by Jamaica at the 1982 Meeting that the time might have arrived for Commonwealth arrangements to be embodied in a multilateral treaty, and that this would also assist in overcoming problems with designations. The suggestion, however, was not supported by other delegates.

19. Reciprocity was reflected in the 1966 Scheme in two ways. First, in Clause 1 it was stated that "the general provisions set out in this Scheme will govern the return of a person from one part of the Commonwealth, in which he is found, to another part thereof, in which he is accused of an offence." In the Communiqué dated 4 May 1966, it was stated that "the Meeting accordingly formulated a Scheme setting out principles which could form the basis of legislation within the Commonwealth and recommended that effect should be

given to the Scheme in each Commonwealth country." Secondly, it was recognised that not all Commonwealth countries would be able to move immediately to the passage of the recommended legislation. Hence, Clause 16 of the Scheme provided that "nothing in this Scheme shall prevent...(b) the application of the Scheme with modifications by any part of the Commonwealth in relation to any other part which has not brought clauses 1 to 15 fully into effect."

20. Nothing in the 1966 Scheme suggested any intention that the Scheme, as a whole, be selectively applied, as though by a system of interlocking bilateral arrangements. In practice, however, this has become the case for some Commonwealth countries, which have designated only certain other Commonwealth countries under their legislation, omitting others which have adopted the 1966 Scheme, or to which the legislation could be applied with the modifications envisaged by Clause 16(b). In part this disappointment of the hope that the Scheme would achieve universal application throughout the Commonwealth has resulted from inertia, where the relevant legislation requires that designation be made by Order in Council, or similar methods of proclamation. Attention was drawn at the 1982 Meeting to the Commonwealth Countries Act of Barbados and New Zealand, which offered an alternative and simpler model of application of legislation to Commonwealth countries.

21. The 1982 Meeting accepted the suggestion made in the Consultative Document that no amendment to the Scheme itself was desirable to remedy its incomplete application in practice. To amend the Scheme in such a way as explicitly to exclude selective application of the Scheme seemed undesirable as an implication of infringement of the sovereign legislative independence of each Member country. On the other hand, there was general agreement at the Meeting that bureaucratic inertia accounted for a good deal of the present incompleteness of application, with consequent "safe havens" for fugitives, and recognition of the desirability that urgent consideration be given at the governmental level in each Member country to the desirability of applying the Scheme to other Member countries (with such modifications, envisaged by Clause 16, as might be necessary) without preconditions as to bilateral assurances of reciprocity.

22. The Meeting's conclusion on this question was expressed in the Final Communiqué, paragraph 5 (see Appendix A), which "urged governments collectively to consider whether, in respect of their own jurisdictions, they might be prepared to apply the Scheme broadly to other Commonwealth Members, without waiting for assurances of reciprocity. There was a general feeling that governments would not wish to appear to be acting selectively within the Commonwealth association."

Provisional Warrant of Arrest - INTERPOL Notices

23. Under Clause 4 of the 1966 Scheme, where a fugitive is suspected of being in, or on his way to, another part of the Commonwealth, the competent judicial authority in the latter part may issue a provisional warrant of arrest "on such information and under such circumstances as would, in that authority's opinion, justify the issue of a warrant if the returnable offence of which the fugitive is accused had been an offence committed within that authority's jurisdiction." The meeting agreed that no particular difficulty had been encountered in practice in the matter of provisional warrants, but that thought should be given to the question of giving status, either in the Scheme, or in national legislation, to the international circulations ("Red Notices") of the International Criminal Police Organisation (INTERPOL). These circulations indicate that an arrest warrant has been issued in a country, that the requesting authorities of that country guarantee that arrest will be followed by a formal request for extradition, and that the Secretary-General of INTERPOL is satisfied that there is no reason to believe that the fugitive is wanted for political, military, racial, or religious reasons.

24. A detailed presentation on the procedures and safeguards applied by INTERPOL was given to the meeting by its Deputy Chief of the General and Research Studies Division, Dr. K.S. Karunatileke. The meeting also noted that reference was made to the status of INTERPOL circulations in the European Extradition Convention, 1957. It was agreed that, although the present provisions of laws in Commonwealth countries justifying the issue of a provisional warrant of arrest were probably wide enough, in most cases, to allow information provided through INTERPOL channels to be taken into account, it would be desirable to recognise the importance of the facilities provided by INTERPOL in securing the speedy apprehension of fugitives by including an express reference in the Scheme.

25. The meeting accordingly recommended the addition to the present clause 4(1) of the words:

"and for the purpose of this paragraph, information contained in an international notice

issued by the International Criminal Police Organisation (INTERPOL) in respect of a fugitive may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that fugitive."

Scope of Returnable Offences

26. The offences to which the Scheme presently applies are set out in Annex 1 to the Scheme. No person may be extradited except for a returnable offence as described in the Annex and punishable in the requesting country by imprisonment for twelve months or by a greater penalty.

27. The Meeting considered two distinct questions arising from the present scope of returnable offences. The first was whether reference should be included in the list to offences created by multilateral international conventions, such as crimes in relation to aircraft, and internationally protected persons. It was pointed out that the obligation to extradite for such offences arose from the contractual obligations assumed under the relevant Convention itself. But since the Commonwealth Scheme is often considered that the Scheme ought, for the sake of completeness, to include an "open-ended" reference to such offences so as to ensure that no gap was disclosed. It was further considered that, reflective of the reciprocity principles underlying the Scheme, the inclusion of offences under international conventions should be only of those to which both the requested and the requesting countries were parties. The meeting therefore recommended that to Annex 1 of the Scheme be added a new paragraph C as follows:-

"C. Extradition offences established under multilateral international conventions to which both the requesting and the requested parts of the Commonwealth are parties."

28. The second question raised concerned the possibility of widening the scope of returnable offences to include a number which had not previously been covered. The Canadian Bill, for example, proposed that certain offences against the administration of justice, escape from custody, public disorder, and offences against firearms and nuclear safety laws be made extraditable. Some countries also considered that income tax evasion and other offences of a fiscal character ought to be extraditable. The Meeting discussed the desirability of the inclusion of these items, and although there was agreement that crimes of a purely fiscal character need not necessarily, in principle, be non-extraditable, there was no consensus as to the particular additional offences which ought to be made extraditable.

29. It was recalled that, at the 1966 Meeting, the specific enumeration of offences was preferred, as a model, to the European formula of specifying offences only by way of punishability by a certain degree of severity. So far as non-fiscal offences were concerned, it was thought that at this stage the two approaches might be combined, by retaining the present list but adding an "open-ended" formula allowing additional offences to be included on the basis of reciprocity between requesting and requested States.

30. So far as fiscal offences were concerned, it was pointed out that a certain degree of caution was evident in other international conventions on extradition. In the European Convention, fiscal offences were extraditable only by special agreement as between the parties. It was considered by the Meeting, after some discussion, that a similarly flexible approach should be adopted by the Commonwealth, leaving it to each Member country to decide for itself which fiscal offences should be extraditable, and permitting extradition for such offences to take place as between it and other Commonwealth countries whose laws provided similarly. Since the approach in this regard was the same as that decided for opening the list to other offences generally, it was decided to combine both decisions in the one comprehensive formula, as follows:

"D. Offences not described in paragraphs A, B, or C, but which are returnable under the law of the requested part of the Commonwealth, notwithstanding that any such offences are of a purely fiscal character."

Appeals By Requesting Governments

31. The 1966 Scheme provides in Clause 8 for review of a committal order for extradition by way of habeas corpus or like process. No corresponding right is given under the Scheme to requesting countries (or the authorities acting on their behalf) to a review of decisions not to commit for extradition. Whether such a right might exist by way of certiorari, mandamus, or other similar processes is doubtful, and has been the subject of conflicting judicial decisions in Commonwealth jurisdictions.

32. A proposal was made in the Consultative Document that a clear right of review on behalf of requesting governments be included in the Scheme, extending not only to questions of law but also to the weight of the evidence. The Meeting noted that the Canadian Bill of 1979 had provided for a right of review by requesting governments limited to questions of law, and opinion was divided as to the desirability of extending the right to questions of fact. The delegate of India pointed out that, in some jurisdictions, the requesting government was not a formal party to the proceedings resulting from its request, and that the proposed addition could not be put in the form of a "right of appeal by requesting governments". In reply, it was stated that the exact wording of the Scheme was in any event not binding; the principles of the Scheme were rather to be looked to, which might require varied translation in legislative implementation to accord with the particular circumstances of local institutions and laws.

33. In view of the special need for local adaptation of such provisions as clause 8, and the absence of a consensus as to whether the right of review by requesting governments should extend to both questions of law and questions of fact, the Meeting decided to adopt a formula which would leave these matters to the legislative discretion of each Member. It therefore agreed that the following paragraph should be added to clause 8 of the Scheme:

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

Circumstances Precluding Return

34. The Imperial Act of 1881 had provided for general grounds on which the return of the fugitive might be refused. These grounds were triviality, lack of good faith on the part of the requesting authorities, or "otherwise" where it would be "unjust, or oppressive, or too severe a punishment to return the fugitive". In 1966 it was considered that these grounds should be made more specific in view of the difficulty that had been encountered in interpreting the word "otherwise", and also in view of the fact that political offences were now to be excepted from the operation of the Scheme. Cases under the 1967 UK Act implementing the Scheme, however, showed that doubts still remained as to what circumstances should be taken into account, and criticism had been directed at the Scheme, in this respect, for being too restrictive.

35. The Meeting agreed that the clause should be reworded so that a greater degree of discretion should be allowed in the consideration of circumstances precluding return. It was also agreed that the words "under which the offence was committed" in the phrase "it would, having regard to all the circumstances under which the offence was committed, be unjust, or oppressive or too severe a punishment" were unnecessarily restrictive also and should be omitted.

36. Accordingly the Meeting agreed to add a new paragraph (d) to existing paragraph (3) of clause 9, reading:-

"or, (d) any other sufficient cause"

and to reword the continuation of paragraph 3 as follows:-

"it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment to return the fugitive or, as the case may be, to return him before the expiry of a period specified by that authority."

The Double Criminality Rule

37. The double criminality rule is a fundamental rule of extradition and finds expression in the Scheme in clause 10, which provides that "the return of a fugitive offender will either be precluded by law or be subject to refusal by the competent executive authority if the facts on which the request for his return is grounded do not constitute an offence under the law of the country or territory in which he is found."

38. The difficulty encountered with this rule since 1966 derived not from the Scheme itself but from the draftsmanship of section 3(1) of the United Kingdom Fugitive Offenders Act, 1967, which implemented clause 10 of the Scheme. This section had the effect of requiring the elements constituting the offence for which extradition was requested to be the same in the laws of both the requesting and the requested States, instead of looking to the facts of which the fugitive was accused. The result of this section, which had been copied in some other Commonwealth jurisdictions, had been to make Commonwealth extradition more

exacting, in this respect, than extradition with non-Commonwealth countries under treaties, and to lead to such unmeritorious discharge of fugitives as in the case of R. v. Brixton Prison, ex parte Gardner [1968] 2 Q.B. 399.

39. The Meeting unanimously agreed that the United Kingdom provision was an unfortunate translation of clause 10 into legislative terms and that its emulation was undesirable. Attention was drawn to such alternative and preferable offence as "an offence, however described, that, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in Schedule 1."

40. Since the fault lay not in the Scheme itself but in particular national legislation based on the Scheme, no proposal for amendment was adopted by the Meeting. It was agreed, however, that the views of the Meeting on this point should be reflected in the Communiqué, which accordingly contained, in paragraph 9, the note that -

"The Meeting also recognised that the double criminality requirement as expressed in some national legislation was unsatisfactory, but that the fault did not lie with the Scheme. Those governments who had followed the precedent in question were invited to look at their legislation with a view to meeting the difficulties arising in Gardner's case."

The Speciality Rule

41. The speciality rule is an important general rule of extradition law, which was incorporated into intra-Commonwealth practice for the first time by the 1966 scheme. The rule upholds three important principles. First, it protects the alleged fugitive from having to face charges after return of which he has had insufficient notice, and of which no prima facie case of guilt has been made out before the judicial authorities of the requested country. Secondly, it reinforces both the double criminality rule and the rule prohibiting extradition for political offences, ensuring that such offences cannot be charged after surrender. Thirdly, it protects from abuse the legal processes of the requested country which is called upon in extradition to surrender its personal jurisdiction over, and protection of, the accused fugitive.

42. In approaching proposed modifications of this rule, arising out of particular problems which various countries had encountered under the Scheme, the Meeting was conscious of the degree of care needed to ensure that the basic protection of the rights of the fugitive, secured under the principle, was not substantially diminished.

43. A minor modification, proposed by Uganda, was readily accepted by the Meeting. This was to remove the unduly restrictive words in clause 13(1) which required that the fugitive be afforded an opportunity "of going back to the first mentioned part" [i.e. the originally requested part of the Commonwealth] before being prosecuted for offences other than those for which he had been extradited. It was pointed out that the principle required only that the fugitive be given an opportunity to leave the prosecuting country, and the Meeting agreed to the substitution of the words:-

"of leaving the second mentioned part."

44. The major problem encountered in the working of the Scheme arising from the speciality rule was of delay or refusal of consent to the prosecution after return for offences other than those for which extradition had been granted. It was not an uncommon experience that additional offences came to light only after return, although, as some pointed out at the Meeting, lack of diligence could also be a factor in some cases. The wording of the present Scheme, in clause 13(2), allowed requests for consent only in respect of "a returnable offence of the same nature as the offence for which he was returned", which was generally felt to be unduly restrictive. On the other hand, if the consent provisions were to be widened to include any returnable offence, and thus to include offences which might have nothing to do with the facts proved in the earlier extradition proceedings, the requested country might wish to be satisfied that a prima facie case was made out before giving consent.

45. Accordingly it was agreed that, in paragraph (2) of clause 13, the words "a returnable offence of the same nature as the offence for which he was returned" be deleted and replaced by:-

"any returnable offence",

and that a new paragraph, to be numbered (3), be added to clause 13 reading:

"When considering a request for consent under paragraph (2) the executive authority of the requested part of the Commonwealth may call for such particulars as it may require in order that it may be satisfied that such request is otherwise consistent with the principles of this Scheme, and shall not unreasonably withhold consent; but where in the opinion of the requested part of the Commonwealth it appears that, on the facts known to the requesting part of the Commonwealth at the time of the original application for return of the fugitive offender, application should have been made in respect of such offence at that time, that fact may constitute a ground for refusal."

46. A consequence of the re-ordering of paragraphs in clause 13 was to draw attention to the need to re-draft the present paragraph (3), dealing with re-extradition to third countries, more felicitously, and to impose the same conditions on re-extradition as were now to be imposed on consent to prosecution. Accordingly, the existing paragraph (3) of clause 13 was deleted, and the following new paragraph (4) agreed to by the meeting:-

"The requesting part of the Commonwealth shall not, without the consent of the requested part, return or surrender to another country or territory a fugitive offender returned to the requesting part and sought by such other country or territory in respect of any offence committed prior to his return; and in considering a request under this paragraph the requested part of the Commonwealth may call for the particulars referred to in paragraph (3) and shall not unreasonably withhold consent."

47. A further problem raised at the Meeting was of the very common occurrence that a person being sentenced for a certain offence asks that other admitted offences be taken into account in the imposition of penalty. The request that other offences be taken into account is made only after conviction for the originally charged offence. Where a person has been extradited to face trial on that offence, much time could elapse before the necessary consent is obtained from the requested State for the taking into account of such offences. Moreover, where the additional offences which the returned fugitive requests be taken into account in sentencing are not extraditable, no consent can be requested. In those circumstances it becomes practically impossible for the fugitive "to wipe the slate clean". The Meeting agreed that the Scheme should accommodate this situation, and resolved that the following new paragraph (5) be added to clause 13:-

"Nothing in this clause shall prevent a court in the requesting part of the Commonwealth from taking into account at the request of the fugitive any other offence, whether returnable or not under this Scheme, for the purpose of passing sentence on a fugitive convicted of an offence for which he has been returned under this Scheme, where the fugitive desires that such other offences shall be taken into account."

The Death Penalty

48. Considerable variation in practice with regard to the death penalty exists among Commonwealth countries. In the drafting of the 1966 Scheme, it was considered that, in view of these variations, no uniform rule could be devised. As a result, an optional provision was placed in Annex 2 of the Scheme allowing countries which did not carry out the death penalty (either at all, or in relation to the particular offence for which extradition was requested) to refuse extradition where such a penalty might be imposed. In considering refusal of extradition on this ground however, countries were to have regard "to all the circumstances of the case and to any likelihood that if not returned (the fugitive) would be immune from punishment."

49. The Meeting discussed these provisions at considerable length, but in the end rejected a suggestion that the discretion to refuse extradition on account of the death penalty be removed into the body of the Scheme, since this would be seen as an attempt to elevate an optional discretion into a rule. On the other hand, much support was found for the suggestion that reference should be made in the provision to the growing informal practice of securing assurances from requesting countries that the death penalty, if imposed, would not be carried out. However, as Jamaica pointed out, the difficulty with such "assurances" was that, in any constitutional systems, they could not be given, since commutation of the death penalty was a prerogative act, the exercise of which could not be assumed or guaranteed.

50. The formula finally adopted by the Meeting appeared in a new paragraph (2) to clause 1 of Annex 2, as follows:-

"In determining whether a fugitive would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of

the requesting part of the Commonwealth may make with regard to the possibility that the death penalty, if imposed, will not be carried out."

Return By Consent

51. Not infrequently an accused fugitive, on being made aware that a warrant for his arrest has been issued to another country and that extradition proceedings are to be instituted, wishes to return to that country immediately to face trial, or to plead guilty, and to waive formal committal proceedings. At present the Scheme does not provide for this; requested authorities are reluctant to accept the fugitive's word and to allow him to depart freely, for fear that he may change his mind and escape to a third country.

52. The Meeting considered that there would be much advantage in a new provision in the Scheme that would allow committal proceedings to be waived, provided that the wishes of the fugitive were made genuinely freely, and for the fugitive to be returned to the requesting country in proper custody. India questioned whether admission to bail pending the return ought to be allowed as an option, but it was pointed out that in extradition cases generally this was a discretionary matter to be decided under local law and practice. A point was also raised whether the speciality rule should protect the voluntary returnee after his return, in the same way as an extradited fugitive. The Meeting decided that the person consenting to return should be given the option of waiving the speciality rule before, but not after, return.

53. Accordingly the Meeting approved the following new clause, to be inserted into the Scheme as clause 5A:-

"(1) A fugitive offender may waive committal proceedings, and if satisfied that the fugitive has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the fugitive offender to prison, or for his admission to bail, to wait return.

(2) The competent executive authority may thereafter order return at any time, notwithstanding the provisions of clause 6 (relating to seeking habeas corpus).

(3) The provisions of clause 13 (relating to the speciality rule) shall apply in relation to a fugitive offender returned under this clause, unless waived by him."

Political Offences and Terrorism

54. The provisions of clause 9(1) and (2) excluding offences of a political character from the scope of the Scheme, and for the preclusion of return where prosecution or prejudice on account of race, religion, nationality or political opinions is likely in the opinion of the requested authorities, were the single most notable change in the Commonwealth Scheme from the old Imperial Act of 1881. The provisions were largely borrowed from the European Extradition Convention, 1957.

55. No suggestion was made at the meeting that these provisions were unsatisfactory, as they stood. However, it was pointed out that experience since 1966 had revealed a strong belief that many acts of indiscriminate violence, such as the hijacking or destruction of civil aircraft, hostage-taking and the like, even though committed for political purposes, ought not to be protected as non-extraditable offences. International conventions had already declared that two crimes, genocide and apartheid, ought on no account to be treated as being of a political character for the purposes of extradition. Other conventions had stopped short of so declaring crimes to be non-political, but had gone some way towards this end by declaring that countries having custody of offenders were obliged either to prosecute themselves or to extradite to another State having jurisdiction. Examples of such conventions are the Hague and Montreal Conventions on Hijacking and Crimes in Relation to Aircraft, and the Convention on Crimes Against Internationally Protected Persons. The European Convention on the Suppression of Terrorism, 1977, went much further in cataloguing an extensive list of crimes of violence which would not qualify as political for the purposes of extradition.

56. The extensive discussion of this item at the Meeting revealed that there was considerable support for any efforts designed to curb the increase in politically motivated indiscriminate violence, causing death or injury to innocent by-standers, and also for the incorporation into the Commonwealth Scheme of present and future multilateral conventions restricting the invocation of the political offence exception. Since reciprocity underlay the Commonwealth Scheme, and there was little likelihood that any one list of such offences

would command universal acceptance, it was decided that an indicative list of offences to which the exception might not apply be placed in the optional provisions of the Scheme as new Annex 3. Any Member country could adopt all or any of the offences on this list or additional offences not included in the list, and apply these exceptions on a basis of reciprocity to other Member countries.

57. The proposal made in the Consultative Document for the exclusion from the category of political offences of attacks on the life of a Head of State was rejected by the Meeting as too restrictive. The Meeting considered that this item should appear as just one of the optional items in Annex 3, which would embrace also attacks on the life of Ministers of governments, murder generally, and acts declared to be crimes under certain international conventions, where an option to prosecute or extradite was given.

58. The Meeting resolved to amend the body of the Scheme in only one respect. This was to renumber the present Clause 9(1) as Clause 9(1)(a), and to add a new paragraph (b) to incorporate the exclusion from the category of political offences of those crimes declared by multilateral international conventions to be extraditable notwithstanding their political character. At present these conventions are only the Genocide Convention, and the Convention on the Crime of Apartheid, but others might later be concluded, and would thus become automatically incorporated into the Scheme as between those Member countries which became parties to the convention. The new sub-paragraph (b) reads:-

"Paragraph (a) shall not apply in relation to offences established under any multilateral international convention to which both the requesting and the requested parts of the Commonwealth are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition."

59. The Meeting then resolved to place in new optional Annex 3 the remaining categories of offences which Member countries would be free to regard, on a basis of reciprocity, as extraditable notwithstanding their political character. Annex 3 reads as follows:-

"Discretion as to Definition of Political Offences

1. It may be provided by a law in any part of the Commonwealth that certain acts shall not be held to be offences of a political character including:-

- (a) an offence against the life or person of a Head of State or a member of his immediate family or any related offence described in Annex 1(B),
- (b) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence described in Annex 1(B),
- (c) murder, or any related offence described in Annex 1(B),
- (d) an act declared to constitute an offence under a multilateral international convention whose purpose is to prevent or repress a specific category of offences and which imposes on the parties thereto an obligation either to extradite or to prosecute the person sought.

2. Any part of the Commonwealth may restrict the application of any of the provisions made under the paragraph 1 to a request from a part of the Commonwealth which has made similar provisions in its law."

Costs of Extradition

60. The Meeting considered and agreed with the proposal in the Consultative Document that no provision was required in the Scheme dealing with the bearing of the cost burden of representing requesting countries in extradition proceedings. Since the 1966 Scheme came into operation, informal arrangements had been reached in which such assistance was often offered on a basis of reciprocity. This matter could satisfactorily be left to such information regulation.

Legal Aid

61. The Meeting similarly considered that no express provision was needed in the Scheme relating to the provision of free or subsidised legal representation to accused fugitives. This matter too could be left to be regulated by the laws and practices of the countries concerned.

Presentation of a Prima Facie Case

62. The delegate of Kenya had earlier reserved the question of the prima facie case for general discussion. The rule that a requesting country must establish before the judicial authorities of the requested country a prima facie case of guilt of the offence for which extradition is requested, is a rule peculiar to countries of the common law tradition. It does not find a place in the extradition laws of non-Commonwealth countries, nor in such conventions as the European Extradition Convention. It was noted that recently in the United Kingdom an Interdepartmental Working Party reviewing the law and practise of extradition had been divided on the question whether to recommend dispensing with the rule. On the other hand, it was pointed out to the meeting that States which had hitherto dispensed with the rule were also States which refused to extradite their own citizens. This was not generally the case with Commonwealth countries.

63. The Meeting resolved not to delete or amend Clause 5(a) of the 1966 Scheme, which incorporates the prima facie case requirement. At the same time it recognised that the 'hearsay rule' might give rise to difficulty in presenting a prima facie case from a distance, but that the Scheme did not itself prohibit the presentation of such evidence. These views were reported in paragraph 11 of the Communiqué.

APPENDIX A

MEETING TO REVIEW COMMONWEALTH EXTRADITION ARRANGEMENTS HELD AT MARLBOROUGH HOUSE, 22 -26 NOVEMBER 1981

COMMUNIQUÉ

Representatives of 36 Commonwealth jurisdictions met in Marlborough House for the week of 22 to 26 November 1982 to review in detail the workings of the 1966 Commonwealth Scheme Relating to the Rendition of Offenders. The Meeting unanimously elected the Attorney-General of Singapore, the Hon. Tan Boon Teik to act as its Chairman.

2. The Meeting, which was opened by the Deputy Secretary-General, Chief E.C. Anyaoku, marked the culmination of a period of intensive Commonwealth consultation which began in Barbados in 1980, when Commonwealth Law Ministers reviewed the Scheme in general terms. Ministers concluded then that the Scheme had served the Commonwealth well, but had identified areas in which it might be improved. The Commonwealth Secretary-General, responding to an invitation from Law Ministers, had then invited Professor Ivan Shearer to prepare a series of specific proposals for consideration by governments.

3. Representatives expressed the view that the Commonwealth Scheme has worked well, but noted that some jurisdictions had still not adopted it. The Meeting was pleased to learn from a number of representatives that their governments were actively reviewing their extradition arrangements with a view to early legislation.

4. Overriding considerations of the Meeting were that the Scheme be, and be seen to be, fair as between the individual and the state, and that essential safeguards should not be impaired by any proposal to make the Scheme more efficient.

5. The Meeting was conscious, too, of the fact that wanted fugitives can exploit loopholes which exist by virtue of any incomplete application of extradition arrangements between Commonwealth countries. While they recognised the right of a government to insist upon reciprocity in such matters, delegates urged governments collectively to consider whether, in respect of their own jurisdictions, they might be prepared to apply the Scheme broadly to other Commonwealth Members, without waiting for assurances of reciprocity. There was a general feeling that governments would not wish to appear to be acting selectively within the Commonwealth association. Moreover, the Meeting was anxious to encourage designation on as wide a basis as possible and saw the formula contained in Barbados and New Zealand legislation as offering one approach which would minimise administrative effort in keeping lists up-to-date. It also expressed its gratitude to the Commonwealth Legal Advisory Service for its work in conjunction with the Commonwealth Secretariat in providing a most valuable survey of Commonwealth extradition laws and the parts of the Commonwealth to which they extend. They asked that the Survey be revised regularly and kept up-to-date, and invited governments to ensure that the Secretariat is kept fully informed of developments.

6. In the course of the deliberations, the Meeting agreed to amendments to the Scheme in a number of important areas. To enable police to respond quickly to the presence of fugitives in their jurisdiction, the Meeting agreed that the role of INTERPOL should be recognised, so that the information contained in their "international red notices" would be receivable by the courts when an application is made for a provisional warrant.

7. Recognising the need to respond to problems of international terrorism, delegates discussed at length the problems presented by the "political offences" exception, an exception which appears in other multilateral international extradition agreements. There was a widely held view that murder could, in no circumstances, be a political act and so be immune from punishment by reason of the murderer crossing an international boundary. Many delegates saw as invidious any selection of individuals who would be granted special treatment, such as Heads of State, and felt that the category should be as broad as it can be. They saw the lives of innocent bystanders as being no less deserving of protection than those of anyone else. The Meeting saw the matter as deserving further study. It accepted an amendment to the Scheme that was narrower than many delegates would wish. It invited the Commonwealth Secretary-General to consult with governments with a view to their considering whether there was a need for a broader category of acts which should not be regarded as being offences of a political character for the purposes of extradition.

8. The Meeting agreed that extradition offences created by international conventions to which both countries involved are parties, should be included as returnable offences, even if they were not within the list of such offences appended to the Scheme. To broaden the scope of the Scheme further, delegates agreed that other offences not in the list but returnable under the laws of the requested part of the Commonwealth should be incorporated. This, delegates hoped, would lead to a broadening of the list of returnable offences as countries amend their own laws, without the need to meet periodically simply to review the list.

9. The Meeting also reviewed the mechanics of the extradition hearing. It agreed that the requesting State should have a right of judicial review, as is already the case with an accused person. It also agreed that it should be open to a fugitive to consent to his return, and so save both the time he might otherwise spend in custody and considerable expense and inconvenience. The Meeting also recognised that the "double criminality" requirement as expressed in some national legislation was unsatisfactory, but that the fault did not lie with the Scheme. Those governments who had followed the precedent in question were invited to look at their legislation with a view to meeting the difficulties arising in Gardner's case.

10. Delegates also recognised that, as a consequence of the rise in international "white collar" crime, there was a need to examine the position of fiscal offences. Fraud, theft, and similar offences were already within the Scheme, but the considerable strain on the economies of some countries was being aggravated by those who defrauded the revenue or unlawfully plundered a country's depleted holdings of foreign exchange. Agreement was reached on an amendment which, it was hoped, would enable some of these practices to be attacked. However, frequently foreign fiscal laws did not satisfy the requirement of "double criminality", a concept on which the Scheme is based.

11. Delegates also considered whether the requirement that a requesting State first establish a prima facie case before extradition was granted might be removed from the Scheme. Difficulties with the "hearsay rule" and other rules of evidence had been encountered in establishing a prima facie case from a distance. It was observed that the Scheme was not intended to preclude the admission of hearsay evidence. The Meeting drew attention to difficulties encountered where the same evidence might be admissible in one jurisdiction but not in another, and invited governments to bear this in mind when reviewing their extradition laws. The meeting felt that the requirement of a prima facie case was a principle essential to the Scheme.

12. The Meeting invited its Chairman to report the outcome of the deliberations to Commonwealth Law Ministers for adoption by them in Colombo, Sri Lanka in February 1983

13. The Meeting expressed its gratitude to the Hon. Tan Boon Teik for the skilful manner in which he guided their proceedings. These dealt at times with highly technical matters and the meeting applauded the Attorney-General's skill in achieving a consensus against a background of varying State practice. It also expressed its indebtedness to Dr. Ivan Shearer and Dr. Torsten Stein, consultants to the Meeting: Dr. Shearer, for his constructive suggestions which formed the basis for their deliberations and Dr. Stein for sharing with delegates the benefits of the European experience in the field of extradition. The Meeting also thanked the Commonwealth Secretary-General and the staff of the Commonwealth Secretariat for the manner in which the Meeting was conceived and carried into effect.

**FINAL REVISED SCHEME AS RECOMMENDED BY THE MEETING
TO
LAW MINISTERS**

Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth

Scope

1. (1) The general provisions set out in this Scheme will govern the return of a person from one part of the Commonwealth, in which he is found, to another part thereof, in which he is accused of an offence; and in particular his return will only be precluded by law, or be subject to refusal by the competent executive authority, in the circumstances mentioned in this Scheme.

(2) for the purposes of this Scheme a person liable to return as mentioned in paragraph (1) is described as a fugitive offender and each of the following areas is described as constituting a separate part of the Commonwealth, that is to say:-

- (a) each sovereign and independent country within the Commonwealth together with any dependent territories (which expression, for the purposes aforesaid, includes protectorates and protected states) which that country designates, and
- (b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.

Returnable Offences

2. (1) A fugitive will only be returned for a returnable offence.

(2) For the purposes of this Scheme a returnable offence is an offence described in Annex 1 (whatever the name of the offence under the law of the countries and territories concerned, and whether or not it is described in that law by reference to some special intent or any special circumstances of aggravation), being an offence which is punishable by a competent court in the country or territory to which return is requested by imprisonment for twelve months or a greater penalty.

Warrants, Other Than Provisional Warrants

3. (1) A fugitive offender will only be returned if a warrant for his arrest has been issued in that part of the Commonwealth to which his return is requested and either -

- (a) that warrant is endorsed by a competent judicial authority in the part in which he is found (in which case, the endorsed warrant will be sufficient authority for his arrest), or
- (b) A further warrant for his arrest is issued by the competent judicial authority in the part in which he is found, not being a provisional warrant issued as mentioned in clause 4.

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

Provisional Warrants

4. (1) Where a fugitive offender is, or is suspected of being, in or on his way to any part of the Commonwealth but no warrant has been endorsed as mentioned in clause 3(1)(a) or issued as mentioned in clause 3(1)(b), the competent judicial authority in that part of the Commonwealth may issue a provisional warrant for his arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the returnable offence of which the fugitive is accused had been an offence committed within that authority's jurisdiction

and for the purposes of this paragraph information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a fugitive may be considered by the authority, either alone or with other information, in

deciding whether a provisional warrant should be issued for the arrest of that fugitive.

(2) A report of the issue of such a provisional warrant, together with the information in justification or a certified copy thereof, will be sent to the competent executive authority and, in a case in which that authority decides on the said information and any other information which may have become available that the fugitive should be discharged, that authority may so order.

Committal Proceedings

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

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

(3) Where a provisional warrant has been issued as mentioned in clause 4 but, within such reasonable time as with reference to the circumstances of the case the competent judicial authority may fix -

(a) a warrant has not been endorsed or issued as mentioned in clause 3(1), or

(b) where such endorsement or issue of a warrant has been made conditional on the issue of an order to proceed, as mentioned in clause 3(2), no such order has been issued,

the competent judicial authority will order the fugitive to be discharged.

(4) Where a warrant has been endorsed or issued as mentioned in clause 3(1) the competent judicial authority may commit the fugitive to prison to await his return if-

(a) such evidence is produced as establishes a prima facie case that he committed the offence of which he is accused, and

(b) his return is not precluded by law, but, otherwise, will order him to be discharged.

(5) Where a fugitive offender is committed to prison to await his return as mentioned in the preceding paragraph, notice of the fact will forthwith be given to the competent executive authority in that part of the Commonwealth in which he is committed.

Consent Order For Return

5A. (1) A fugitive offender may waive committal proceedings, and if satisfied that the fugitive offender has voluntarily and with an understanding of its significance requested such waiver, the competent judicial authority may make an order by consent for the committal of the fugitive offender to prison, or for his admission to bail, to await return.

(2) The competent executive authority may thereafter order return at any time, notwithstanding the provisions of clause 6.

(3) The provisions of clause 13 shall apply in relation to a fugitive offender returned under this Clause unless waived by him.

Return or Discharge By Executive Authority

6. After the expiry of 15 days from the date of the committal of a fugitive offender to prison to await his return, as mentioned in clause 5, for, if a writ of habeas corpus or other like process is issued with reference to him, from the date of the final decision thereon of the competent judicial authority (which-ever date is the later), the competent executive authority will order his return unless it appears to that authority that, in accordance with the provisions set out in this Scheme, his return is precluded by law or should be refused, in which case that authority will order his discharge.

Discharge By Judicial Authority

7. (1) Where after the expiry of the period mentioned in paragraph (2) a fugitive

offender has not been returned, an application to the competent judicial authority may be made by or on behalf of the fugitive for his discharge and if

- (a) reasonable notice of the application has been given to the competent executive authority, and
- (b) sufficient cause for the delay is not shown, the competent judicial authority, will order his discharge.

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

- (a) not later than two months from the fugitive's committal to prison as mentioned in clause 5, or
- (b) not later than one month from the date of the order for his return made as mentioned in clause 6.

Habeas Corpus and Review

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

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

Circumstances Precluding Return

9.(1)(a) The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that the offence is of a political character.

(b) Paragraph (a) shall not apply in relation to offences established under any multilateral international convention to which both the requesting and the requested parts of the Commonwealth are parties and which are declared thereby not to be regarded as political offences for the purposes of extradition.

(c) Any part of the Commonwealth may adopt the provisions set out in Annex 3.

(2) The return of a fugitive offender will be precluded by law if it appears to the competent judicial or executive authority -

(a) that the request for his surrender although purporting to be made for a returnable offence was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions, or

(b) that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

(3) The return of a fugitive offender, or his return before the expiry of a specified period, will be precluded by law if the competent judicial or executive authority is satisfied that by reason of -

(a) the trivial nature of the case, or

(b) the accusation against the fugitive not having been made in good faith or in the interests of justice, or

(c) the passage of time since the commission of the offence, or

(d) any other sufficient cause,

it would, having regard to all the circumstances be unjust or oppressive or too severe a punishment to return the fugitive or, as the case may be, to return him before the expiry of a period specified by that authority.

(4) The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that he has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or

has been acquitted, whether within or outside the Commonwealth, of the offence of which he is accused.

(5) The competent authorities for the purposes of this clause will include -

- (a) any judicial authority which hears or is competent to hear such an application as is mentioned in clause 8, and
- (b) the executive authority by whom any order for the fugitive's return would fall to be made.

(6) It will be sufficient compliance with any one of the paragraphs (1), (2), (3), (4) and (5) if a country decides that the competent authority for the purposes of that paragraph is exclusively the judicial authority or the executive authority.

(7) If the competent executive authority -

- (a) is empowered by law to certify that the offence of which a fugitive offender is accused is an offence of a political character, and
- (b) in the case of a particular fugitive offender, so certifies,

the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

Double - Criminality Rule

10. The return of a fugitive offender will either be precluded by law or be subject to refusal by the competent executive authority if the facts on which the request for his return is grounded do not constitute an offence under the law of the country or territory in which he is found.

Postponement of Return of Fugitive Charged or Sentenced when Found

11. Where a fugitive offender -

- (a) has been charged with an offence triable by a court in that part of the Commonwealth in which he is found, or
- (b) is serving a sentence imposed by a court in that part of the Commonwealth, then until such time as he has been discharged (whether by acquittal, the expiration or remission of his sentence, or otherwise) his return will either be precluded by law or be subject to refusal by the competent executive authority as the law of the country or territory concerned may provide.

Priority Where Two or More Requests Made

12. Where requests for the return of a fugitive offender to two or more parts of the Commonwealth fall to be dealt with at the same time, the competent executive authority will determine to which part he should be returned and, accordingly, may refuse the other requests; and in determining the matter that authority will consider all the circumstances of the case and in particular -

- (a) the relative seriousness of the offences,
- (b) the relative dates on which the requests were made, and
- (c) the citizenship or other national status of the fugitive and his ordinary residence.

Speciality Rule

13. (1) This clause relates to a fugitive offender, who has been returned from one part of the Commonwealth to another part thereof, so long as he has not had a reasonable opportunity of leaving the second mentioned part.

(2) In the case of a fugitive offender to whom this clause relates, his detention or trial in the part of the Commonwealth to which he has been returned for any offence committed prior to his return (other than the one for which he was returned or any lesser offence proved by the facts on which that return was grounded or, with the consent of the

requested country or territory, any returnable offence) will be precluded by law.

(3) When considering a request for consent under paragraph (2) the executive authority of the requested part of the Commonwealth may call for such particulars as it may require in order that it may be satisfied that such request is otherwise consistent with the principles of this Scheme, and shall not unreasonably withhold consent; but where in the opinion of the requested part of the Commonwealth it appears that, on the facts known to the requesting part of the Commonwealth at the time of the original application for return of the fugitive offender, application should have been made in respect of such offence at that time, that fact may constitute a ground for refusal.

(4) The requesting part of the Commonwealth shall not, without the consent of the requested part, return or surrender to another country or territory a fugitive offender returned to the requesting part and sought by such other country or territory in respect of any offence committed prior to his return; and in considering a request under this paragraph the requested part of the Commonwealth may call for the particulars referred to in paragraph (3) and shall not unreasonably withhold consent.

(5) Nothing in this clause shall prevent a court in the requesting part of the Commonwealth from taking into account at the request of the fugitive any other offence, whether returnable or not under this Scheme, for the purpose of passing sentence on a fugitive convicted of an offence for which he has been returned under this Scheme, where the fugitive desires that such other offence shall be taken into account.

Return of Escaped Prisoners

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

- (a) has been convicted of a returnable offence by a court in any part of the Commonwealth and is unlawfully at large before the expiry of his sentence for that offence, and
- (b) is found in some other part of the Commonwealth, the provisions set out in this Scheme, as applied for the purposes of this clause by paragraph (2), will govern his return to the part of the Commonwealth in which he was convicted.

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

- (a) any reference to a fugitive offender shall be construed as including a reference to such a person as is mentioned in paragraph (1), and
- (b) the reference in clause 5(4) to such evidence as establishes a prima facie case that he committed the offence of which he is accused shall be construed as a reference to such evidence as establishes that he has been convicted.

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

Ancillary Provisions

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

- (a) the return of a fugitive offender who is in transit in its territory for that purpose,
- (b) the delivery of property found in the possession of a fugitive offender at the time of his arrest which may be material evidence of the offence of which he is accused, and
- (c) the proof of warrants, certificates of conviction, depositions and other documents.

Alternative Arrangements and Modifications

16. Nothing in this Scheme shall prevent -

- (a) the making of arrangements between two or more parts of the Commonwealth for further or alternative provision for the return of offenders,
- (b) the application of the Scheme with modifications by any part of the Commonwealth in relation to any other part which has not brought clauses 1 to 15 fully into effect.

Supplementary Provisions

- 17. Any part of the Commonwealth may or may not adopt either or both of the supplementary provisions set out in Annex 2 but, where such a provision is adopted, any other part of the Commonwealth may in relation to the first part reserve its position as to whether it will give effect to clauses 1 to 15 or will give effect to them subject to such exceptions and modifications as appear to it to be necessary or expedient or give effect to any arrangement made under clause 16(a).

ANNEX 1

Description of Returnable Offences

- A. 1. Murder of any degree
- 2. Manslaughter
- 3. An offence against the law relating to abortion
- 4. Maliciously or wilfully wounding or inflicting grievous bodily harm
- 5. Assault occasioning actual bodily harm
- 6. Rape
- 7. Unlawful sexual intercourse with a female
- 8. Indecent assault
- 9. Procuring, or trafficking in, women or young persons for immoral purposes
- 10. Bigamy
- 11. Kidnapping, abduction or false imprisonment, or dealing in slaves
- 12. Stealing, abandoning, exposing or unlawfully detaining a child
- 13. Bribery
- 14. Perjury or subornation of perjury or conspiring to defeat the course of justice
- 15. Arson
- 16. An offence concerning counterfeit currency
- 17. An offence against the law relating to forgery
- 18. Stealing, embezzlement, fraudulent conversion, fraudulent false accounting obtaining property or credit by false pretences, receiving stolen property or any other offence in respect of property involving fraud
- 19. Burglary, housebreaking or any similar offence
- 20. Robbery
- 21. Blackmail or extortion by means of threats or by abuse of authority
- 22. An offence against bankruptcy law or company law
- 23. Malicious or wilful damage to property

24. Acts done with the intention of endangering vehicles, vessels or aircraft
25. An offence against the law relating to dangerous drugs or narcotics
26. Piracy
27. Revolt against the authority of the master of a ship or the commander of an aircraft
28. Contravention of import or export prohibitions relating to precious stones, gold and other precious metals

B. Aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the offences listed in paragraph A above.

C. Extradition offences established under multilateral international conventions to which both the requesting and the requested parts of the Commonwealth are parties.

D. Offences not described in paragraphs A,B or C, but which are returnable under the law of the requested part of the Commonwealth, notwithstanding that any such offences are of a purely fiscal character.

ANNEX 2

Supplementary Provisions

Discretion as Regards Return For Offences Punishable By Death

1. (1) The return of a fugitive offender may be refused by the competent executive authority where it appears to that authority that, by reason that -

- (a) if he was returned he would be likely to suffer the death penalty for the offence for which his return is requested, and
- (b) in the country or territory in which he is found or in any part thereof that offence is not punishable by death,

it would, having regard to all the circumstances of the case and to any likelihood that if not returned he would be immune from punishment, be unjust or oppressive or too severe a punishment to return him.

(2) In determining whether a fugitive would be likely to suffer the death penalty, the executive authority shall take into account any representations which the authorities of the requesting part of the Commonwealth may make with regard to the possibility that the death penalty, if imposed, will not be carried out.

Discretion as Regards Return of Citizens etc.

2. (1) The return of a fugitive offender who is a national or permanent resident of the part of the Commonwealth in which he is found -

- (a) may be precluded by law, or
- (b) may be refused by the competent executive authority:

Provided that return will not be so refused if the fugitive is also a national of that part of the Commonwealth to which his return is requested.

(2) For the purposes of this paragraph a fugitive shall be treated as a national of a part of the Commonwealth if that part consists of, or includes -

- (a) a Commonwealth country of which he is a citizen, or
- (b) a country or territory his connection with which determines his national status,

in either case at the date of the request.

ANNEX 3

Discretion as to Definition of Political Offences

1. It may be provided by a law in any part of the Commonwealth that certain acts shall not be held to be offences of a political character including:-

- (a) an offence against the life or person of a Head of State or a member of his immediate family or any related offence described in Annex 1 (B);
- (b) an offence against the life or person of a Head of Government, or of a Minister of a Government, or any related offence described in Annex 1(B);
- (c) murder, or any related offence described in Annex 1(B),
- (d) an act declared to constitute an offence under a multilateral international convention whose purpose is to prevent or repress a specific category of offences and which imposes on the parties thereto an obligation either to extradite or to prosecute the person sought.

2. Any part of the Commonwealth may restrict the application of any of the provisions made under paragraph 1 to a request from a part of the Commonwealth which has made similar provisions in its laws.

COMPLAINTS AGAINST THE POLICE

Memorandum by the Commonwealth Secretariat
and a paper by PROFESSOR SIR ROY MARSHALL,
C.B.E., M.A., Ph.D., LL.D., Barrister,
Vice-Chancellor of the University of Hull.

In the past several years the police in many Commonwealth jurisdictions have been very much in the public eye. While civil liberties groups have voiced disquiet about the manner in which complaints against the police are handled, others have been pressing for increased police powers to stem the rise in crime.

2. It is widely recognised that the maintenance of public order depends to a large degree on a public which respects its laws and wishes to see them fairly enforced. One of the keys to achieving such a state of affairs is public confidence in, and respect for, their police.

3. In establishing and maintaining such confidence, the existence of adequate machinery to handle complaints against the police is widely considered to be essential.

4. At the same time, a balance must be struck between the rights of the public and the need for the police to be able to act with confidence in the discharge of their duties.

5. The annexed paper has been prepared at the invitation of the Secretariat by Sir Roy Marshall, a distinguished Barbadian lawyer who has also had experience as a member of the (UK) Police Complaints' Board.

COMPLAINTS AGAINST THE POLICE

A discussion paper by
 PROFESSOR SIR ROY MARSHALL,
 C.B.E., M.A., Ph.D., LL.D.

Introduction

This paper is not intended to be, and is not, comprehensive and definitive. It does not cover the entire Commonwealth and it does not deal with all aspects of the subject "Complaints against the Police". Its preparation has been facilitated by material provided by relevant departments and agencies in Australia, Barbados, Canada, Hong Kong, Fiji, New Zealand and Singapore.

2. The procedure for dealing with complaints against the police has been a matter of increasing public concern and debate¹ over the last two decades. The concern is not surprising in the context of modern society. Police have considerable powers over the liberty and safety of the citizen in societies, whose emphasis is on rights as much as, and perhaps more than, obligations and in which abuse of power, when admitted or discovered, is the subject of extensive media coverage. The subject is of great importance and often of considerable difficulty. The powers of the police and their good name depend largely on the confidence felt by the public that a complaint made against a police officer will always be fully and impartially investigated and that, if it is proved, redress will follow. At the same time police officers need to be protected against vexatious or malicious accusations to which their duties at times make them liable.

3. The debate reflects a wide spectrum of opinion as to both the state of public opinion and what needs to be done to retain or recover public confidence. There are some who share the view of Sir Eric St Johnston² that "there are in society some who wish to denigrate the police and who are never prepared to believe that the police are honest and objective. It will never be possible to satisfy such people who are usually articulate and voluble. It is never possible to appease the unappeasable and I do not believe that one should try to do so by altering a well established and well tried system which satisfies the majority."

4. In its extreme form this appraisal of the situation goes beyond the complacent and becomes alarmist. The following is quoted by Gelhorn³ to illustrate the reaction of American police associations to the introduction of civilian review boards into the procedures for handling complaints against the police:

"How can law and order be maintained if policemen are bound in chains - if policemen are deprived not only of their necessary powers, but also their ordinary rights as citizens? The answer is that there are those hidden far in the background in the push to set up review boards who do not want law and order maintained. Their purposes could be served by a breakdown in law enforcement.... Review Boards can and do serve as a secret weapon for the Communist Party."

5. When we turn to what needs to be done the main criticism is based on the principle that justice is not seen to be done if the police continue to investigate and adjudicate complaints, since that makes them judges in their own cause. This was expressed forcibly by the late Professor Goodhart in a dissenting Report of the Royal Commission on the Police in 1962:⁴ "Unfortunately even though the Chief Constable may be scrupulously fair, this will not answer the major criticism against the present system, which is that it violates the basic principle of justice that no man shall be a judge in his own cause". It is inevitable that some complainants will feel that it is in the interest of the Chief Constable that as few as possible of his police officers should be found guilty of wrong-doing, and that this has influenced his judgment. The fact that the interest is indirect does not affect the point for, as Lord Campbell said in Dimes v Grand Junction Canal Co.:⁵ "It is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest." Professor Goodhart went on to point out that when Sir

Robert Peel appointed the original Commissioners of the Metropolitan Police, he insisted that one should be an army officer, and the other a trained lawyer so as to give confidence to the public that the police were acting under the law.

6. Lord Scarman makes the point compellingly in his Report on the Brixton Disorders:⁶ "It is clear to me that many will continue to criticise it (the present machinery) so long as the investigation of complaints remains in police hands. These people argue that the fact that the police investigate the police means that the investigation, if not obviously rigged in favour of the accused police officer, is likely to be generally favourable to him."

7. It is in fact this principle of natural justice which prompts the search for ways of introducing an independent element into the complaints machinery. We shall examine later the various forms which this has taken and may take.

8. But there is a contrary view about the merits of an external and independent element. It is described by Milte and Weber in Police in Australia⁷ and by Goldstein⁸ in the Journal of Criminal Law, Criminology and Police Science. The argument is that the police are trained to maintain and promote law and order and that conflicting demands are made of them by their supervisors in pursuance of that object. They are expected both to get results and to observe a code of conduct in so doing. But since much of their work is by its nature covert, supervision is sometimes non-existent. There is therefore a temptation to cut corners. The risks of doing so are great since the protagonists of law and order (to whom according to this viewpoint the investigation and adjudication of complaints are invariably allotted) are usually tolerant of police action taken in pursuit of that aim. Hence protests tend to fall on deaf ears whether those of superior officers in the force or of external assessors. This tolerance is facilitated by the esprit de corps which is a concomitant of a disciplined force where a norm of secrecy and mutual protectiveness is likely to develop and gather strength. Paradoxically, resort to the system of external investigation and adjudication is capable of destroying the system of law enforcement itself by undermining its structural integrity. Such a system misapprehends the realities of police work and reliance upon it has no better chance of success than reliance upon the criminal law to achieve social control. It would be more profitable to seek a remedy by trying to motivate the force itself to observe their code of conduct, and to reduce the pressures upon them to disregard it. To achieve this will require something akin to an educational and managerial revolution. The proposed managerial changes involve a loosening of the hierarchial organisation of the force.

9. The case for having an independent element in the complaints machinery is unlikely to be impeded by such views; but this is not to say that some aspects of them do not merit serious consideration. I have in mind the importance of the education and training of police officers for their role in modern society. The views of Sir Kenneth Newman, the Metropolitan Police Commissioner, on this issue are important. He believes that the police officers should be part of a force imbued with the view that to succeed in today's often turbulent society, it must be impartial and adhere to the rule of law itself. In his view "the rights of the individual are as much an objective of the police as the detection of criminals and that does require something of a shift in thinking."⁹

Procedures

10. I do not propose to give a detailed description of every aspect of the procedures for handling complaints in the many countries of the Commonwealth but rather to draw attention to some of their main features and to discuss the important issues that arise.

The lodging of complaints

11. It seems to be generally accepted that many individuals feel reluctant to complain about anything to anybody in authority, and particularly so to the police. This is especially true of those with criminal records (at least until they have been charged) but there are also many with unblemished reputations who are timorous about lodging complaints. There is also the fact that a high proportion¹⁰ of those who do complain withdraw their complaints before they are investigated.

12. Reluctance to make and pursue complaints is leading to a consensus of view that:

- the police station should not be the only place at which complaints can be made;
- complaints should be capable of being made by others on behalf of the

complainant;

- information should be made widely available to members of the public about the various methods of making complaints;¹¹
- there should be no requirement for a complaint to be made under oath;
- anonymous complaints should not be rejected out of hand but should be investigated as far as possible; and
- the formalities for dealing with complaints should aim at satisfying the complainant as much as proving the police officer to be wrong.

13. As Lord Scarman has said about the last point:¹² a great number of complaints could, if both sides agreed, be dealt with by informal conciliation rather than formal investigation. In many cases all that is sought is the opportunity to register a grievance and receive in return a few words of explanation or apology. This recommendation is supported by the Home Affairs Committee in their Fourth Report and has been accepted by the British Government ^{12a}.

The investigation of complaints

14. In the countries examined investigation of the police by the police is the norm, but safeguards both internal and external are common.

15. Internal safeguards put the investigation into the hands of a senior officer from a different chain of command from the officer complained of, or from another Force. This is done in England and Wales, Barbados, Fiji and New Zealand.

16. Alternatively, the safeguard is found in the setting up of a special investigative unit within the Force itself. Thus in the Metropolitan Police District of England a specialised section has been established within the Force to conduct investigations into the conduct of officers suspected of being, or alleged by members of the public to be, guilty of breaches of discipline or criminal offences. It is called A10 and comprises officers from both criminal investigation and uniformed departments. It consists of officers chosen from the service and not volunteers. Tours of duty are short. Its commander is of a rank equal to that of the persons in charge of the divisions whose personnel may be the subject of an A10 investigation. Such an investigation occurs in the case of all serious complaints including allegations of crime by police officers. A10 has been used as the model for the Australian Internal Investigation Division which investigates initially all complaints about the conduct of police officers as distinct from those relating to the practices and procedures of the Force, which are ordinarily investigated by the Ombudsman.

17. In Hong Kong complaints are investigated by the Complaints and Internal Investigations Branch of the Royal Hong Kong Police Force. The Branch has two main functions:

- (i) the investigation and processing of complaints, which is done by the Complaints against the Police Office (CAPO) with support functions provided by the headquarters staff, and
- (ii) the investigation of some of the more serious cases of misconduct within the Force, which is done by the Internal Investigations Office (I10). It is headed by a Superintendent.

18. In Singapore complaints of a serious nature and all complaints from members of the public are investigated by the Internal Investigation Section of the Force. This is under the control of the Personal Division of the Manpower and Administration Department of the Force. It is headed by a Deputy Superintendent of Police.

19. Increasingly, however, safeguards are found in some form of supervision or control of the investigation by an independent external body. This is the situation in Toronto and Australia and to some extent in Fiji and New Zealand. It has been proposed for England and Wales. The Metropolitan Police Force Complaints Project Act, 1981, of Ontario establishes a three-year pilot project for Toronto. It creates the office of Public Complaints Commissioner which is totally separate and distinct from the Metropolitan Toronto Police Force. The main duty of the Commissioner is to monitor the handling of a complaint at the initial stages by the Metro Force and to conduct a full review if the

citizen is dissatisfied with the initial handling. Complaints may be made in the first instance directly to his office, and if not so made must be reported to him. He can intervene in the investigation at any time in exceptional circumstances, particularly when there is undue delay or other impropriety in the initial investigation. He also has the power to intervene after the receipt of the initial report from the police, which must be prepared within 30 days from the time the complaint is received. He also has important powers with regard to adjudication which will be considered later.

20. In Australia the Complaints (Australian Federal Police) Act, 1981, came into force as recently as 1 May 1982. It applies to complaints in respect of members of the Australian Federal Police and its purpose is to establish a system which permits just and thorough investigation of complaints against the police, while at the same time upholding morale and discipline in the difficult work police have to do.

21. As I have already indicated, a complaint by a member of the public as to the conduct of an individual police officer may be made either to the police or to the Ombudsman; and where made to a police officer, the Ombudsman must be notified. Normally, the investigation is carried out by the Internal Investigation Division, which I have already mentioned. If the Ombudsman is dissatisfied with the report of the Investigation Division on a complaint, he may ask for a further investigation by the Investigation Division or he may carry out an investigation by his own office. In special circumstances the Commissioner of Police and the Ombudsman may agree that either the Ombudsman or a person outside the Investigation Division should make the initial investigation of a complaint. If the Ombudsman and the Commissioner cannot agree the Minister decides.

22. In Fiji and New Zealand any complainant who is dissatisfied with the police investigation into a complaint may ask the Ombudsman to investigate or review the matter.

23. In England and Wales investigations are carried out by the police who report their results to the Deputy Chief Constable, who sends a copy together with his decision to the Police Complaints Board, established by the Police Act, 1976, to provide an independent element in the investigation and adjudication of complaints. The Board do not themselves carry out investigations, but may request additional information from the Deputy Chief Constable, and if they disagree with his decision may direct that disciplinary proceedings should be taken.

24. In 1980 the Board published their First Triennial Report.¹³ They expressed themselves satisfied that, in the vast majority of cases "a thorough and fair investigation has been made by the police into the complainant's allegations."¹⁴ Nevertheless they recognised that genuine public anxiety existed in cases where unexplained serious injury was sustained during the course of arrest or while in police custody, and they recommended that this category of complaint only should be dealt with by a specialist body of investigating officers, seconded for a period of two or three years from all police forces in England and Wales and answerable, not to a police officer, but to a "lawyer of experience and repute... preferably one who has exercised judicial office." This recommendation was supported by the Royal Commission on Criminal Procedure.¹⁵ In July 1980 the Government set up a Working Party under the Chairmanship of Lord Plowden to consider the possible implementation of the Board's recommendation. The Working Party reported in March 1981¹⁶ and instead of the proposed specialist team recommended the more frequent use of officers from outside forces to investigate serious cases and the granting of extra powers of supervision either to the Director of Public Prosecutions or the Chairman of the Police Complaints Board. In July 1981 the Government set up a further Working Group under Lord Belstead to examine the matter further and their Report¹⁷ endorses and builds upon the approach advocated by the Plowden Working Party.

25. A number of different proposals were put to the House of Commons Home Affairs Committee. The National Council for Civil Liberties proposed an independent system that would give to a body outside the police force (possibly the Police Complaints Board) the responsibility for investigating complaints with an augmented staff of investigators, some of them seconded police officers. The Commission for Local Administration also favoured independent investigation by a system of local or regional ombudsmen similar to that in operation for complaints against maladministration in local government. Lord Scarman supported the system introduced in Toronto in 1981.

26. In its evidence the Home Office adopting the recommendations of the Plowden and Belstead Working Parties rejected total acceptance of the principle of external investigation. Instead they suggested different procedures for different categories of complaints - for the

"less serious" a new informal procedure aimed at bringing about conciliation (conciliation is a feature of the Australian and Toronto systems); for an intervening category - the more substantial - retention of existing procedures - and for the really serious,¹⁸ investigation by a senior police officer from an outside force acting under the supervision of an independent assessor who might be either the Director of Public Prosecutions or the Chairman of the Police Complaints Board.

27. The House of Commons Home Affairs Committee made two sets of proposals which are not entirely self-consistent. First, they supported the proposals of the Royal Commission on Criminal Procedure for the introduction of a Crown Prosecutor system to cover every police force area. In their view such a system modelled on the Procurators Fiscal of Scotland, would provide the most promising framework for the investigation of complaints against the police.

28. The Committee saw this as a long term solution and therefore made a second set of proposals for the short-term. They were not convinced that an independent organisation would do a more effective job than senior officers in the actual investigation of complaints. However they accepted that external safeguards are necessary to command the confidence of public and police alike. They saw such safeguards emerging through the establishment of regional Complaints Offices, headed by independent assessors, who would assume overall responsibility for the handling of complaints alleging a serious criminal offence. The offices would also be involved in the settlement by conciliation of complaints not involving criminal allegations, and would act as a convenient point of contact for members of the public who had reason to feel concerned about the handling of minor or disciplinary complaints. There is a great deal of imprecision about their second set of proposals, and about the relationship between that and the first.

29. In its recent White Paper, the Government has confirmed its adoption of the Home Office evidence as presented to the House of Commons Affairs Committee, and indicated that the independent assessor will be the Chairman or Deputy Chairman of the Police Complaints Board.^{18a} It defers decision on the Home Affairs Committee's proposals for the establishment of a Crown Prosecutor system, pending the completion of a Study in depth on the best model for the organisation of an independent prosecutions service, the problems that might arise, how they could be solved and the resource implications.^{18b} The Government sees merit in a system of regional Complaints Offices, but is unwilling to establish a full network of such Offices from the outset.^{18c}

30. Exceptionally the safeguard is found by placing the investigation of certain types of misconduct on the part of the police in the hands of an agency which is virtually a second police force. Thus in Hong Kong neither CAPO nor 110 investigate corruption *per se*. Investigations into that type of misconduct are the responsibility of the Independent Commission against Corruption, which, however, maintains operational links with both CAPO and 110. Similarly in Singapore investigations into corruption and offences involving dangerous drugs on the part of police officers are carried out by the Corrupt Practices Investigation Bureau or the Central Narcotics Bureau. This is done without any police involvement. Indeed, if a matter is reported to the police involving corruption or dangerous drugs, they immediately hand over the case to one or other of the Bureaux. These special agencies or second police forces appear to be confined to those forms of improper conduct on the part of the police which are destructive of the system of law enforcement itself.

Critique

31. It is clear that there are a number of conflicts to be resolved in determining how far investigation of complaints against the police should be conducted by an independent external agency. These are well brought out in the Home Office evidence¹⁹ to the House of Commons Home Affairs Select Committee. One has to reconcile the conflicting interests that exist between satisfying complainants and being fair to the officers complained against, and between independent investigation and management responsibility - (i.e. how to make Chief Officers of Police fully accountable if they are not also responsible). In resolving this conflict one has to take account of a number of practical considerations. If you establish an independent body, to whom is it accountable? Is it to deal with all, or only some, and if so, which complaints? How would the role of the independent body fit in with the role of the Director of Public Prosecutions where he is constitutionally responsible for the prosecution of criminal charges? How would the independent body relate to the Chief of Police in the preferment of disciplinary charges? Is the cost of an independent investigatory body tolerable in the light of the functions it may be called upon to perform? Does the extent of public concern warrant the introduction in all cases of an independent body?

32. Would it be ultimately more cost-effective to relieve the police of the task of investigating themselves and thus leave them free to spend more time on the investigation of crime? Is it sensible that police should have to spend time on investigating whether one of their members has been rude to the complainant, if the consequence is that they have less time to look into, say, burglary? On the other hand, what is the outcome of external investigation likely to be upon the Chief Officer's responsibility for the discipline of his own force? In the light of these difficulties, it should not come as a matter of surprise that no country has yet gone over to a system of totally independent investigation for all complaints in all circumstances. Compromise in this area is to be expected and as we have seen it may take many forms.

Adjudication

33. When the investigation is complete and a report made it has to be evaluated with a view to determining what action to take. There are three possibilities that a prosecution should be instituted for a criminal offence; that disciplinary action should be taken either through the laying and hearing of charges or, without going that far, by the issue of a warning or the giving of a caution or doing something similar; or that no action be taken. I leave for later discussion cases where criminal proceedings may be brought: the conduct complained of may be capable of being both a crime and a breach of discipline and accordingly the scope of the "double jeopardy" principle has to be examined. This section is concerned only with the disciplinary consequences of the investigation.

34. The laying and hearing of charges may be done by the police entirely without external supervision. This was the situation in England and Wales until the Police Act, 1976. That Act established the independent Police Complaints Board, to which Deputy Chief Constables are obliged to send a copy of the report of the officer investigating the complaint together with a memorandum stating whether he has decided to bring disciplinary charges and, if not, his reasons for not doing so. The Board may request additional information from the Deputy Chief Constable and, if they disagree with his decision, may advise, or, in the last resort, direct that disciplinary proceedings be taken. In the event of such a direction the charges are heard by a Tribunal chaired by the Chief Constable and comprising two members of the Board who have had no previous connection with the complaint. In the absence of a direction the Chief Constable alone hears the charges. Where there is a Tribunal, the decision is by majority, but the fixing of the penalty is done by the Chief Constable after consulting the other two members.

35. This is the procedure for discipline. Where, however, the Deputy Chief Constable, after considering the report of the investigating officer, is not satisfied that no criminal offence may have been committed, he refers the matter to the Director of Public Prosecutions, whose decision effectively rules out the bringing of disciplinary charges as we shall see later.

36. In New Zealand the hearing is by a Tribunal of two, one only of whom is a member of the Police, in cases where the complaint affects commissioned officers below the rank of Chief Superintendent. In the case of non-commissioned officers, the Commissioner of Police appoints a single person, whether a member of the police or not, to hear the charges. Similarly in Barbados the Police Service Commission, and in Singapore the Public Service Commission, has disciplinary jurisdiction over certain ranks of commissioned officers.

37. In addition in some countries, there is provision for ex post facto review. Thus in New Zealand, a dissatisfied complainant can ask the Ombudsman to review the way in which the police handled his complaint with a view to determining what, if anything, had not been administered properly. The main disadvantage of this system is that it does not affect the action taken in a particular case.

38. In his Report for 1978 the New Zealand Ombudsman drew attention to three limitations upon his ability to make effective investigations of complaints about the police. First, a jurisdictional limitation. The Ombudsman can only investigate matters "relating to a matter of administration". He found that Commissioners of Police regarded some vital decisions - whether to accept a complaint, or to commence a criminal prosecution - as not "relating to matters of administration", but as being an independent exercise of judgment and discretion vested in them by law. Their view was supported by an opinion from the Crown Law Office which went even further in contending that the law enforcement operations of the police

generally did not relate to matters of administration. The Ombudsman does not accept this view, but the difference remains unresolved, no situation having arisen in practice which made it necessary to test it.

39. It is interesting that a similar jurisdictional problem exists in England and Wales. The Police Complaints Board deals with "complaints" which are not substantively defined in the Police Act, 1976. The Home Office Circular giving guidance on the Act does, however, state that complaints about the general administration, efficiency, or procedures of the force are not required to be recorded by the police. Since the Board has no functions until a complaint is recorded, they are powerless to look into force procedures. They express dissatisfaction in their First Triennial Report²⁰ that "the body which has the final word on the disciplinary aspects of complaints should have no say in whether a matter should be treated as a complaint in the first instance."

40. A second difficulty facing the New Zealand Ombudsman was that of determining what was actually said or done in the absence of a written record of independent witness. The Ombudsman recognises that this is not readily soluble as do the Police Complaints Board in their Report for 1978²¹ and their First Triennial Report²² where they say: "It is not easy for someone utterly convinced of the truth of his complaint to be persuaded that a denial by the officer cannot be formally challenged in the absence of evidence to point to which side is being truthful. Our function is to ensure that every effort has been made to find such evidence as may exist. We cannot manufacture it. And it cannot be said too often that a police officer who is accused has the same right to the presumption of innocence as anyone else."

41. The Ombudsman's third difficulty was that of deciding upon an appropriate recommendation for remedial action. This is inherent in a system of ex post facto review of the administrative aspects of a complaint, but it also affects other systems whose aim is to establish and punish breach of discipline rather than to provide redress for the complainant.

42. In Hong Kong there is also an independent element in the police complaints machinery. This is provided by the UMELCO Police Group (Unofficial Members of the Executive and Legislative Councils), whose terms of reference are:

- (i) to monitor and when it considers appropriate to review the handling by the Police of complaints by the public;
- (ii) to keep under review statistics of the types of conduct by Police Officers which lead to complaints by members of the public;
- (iii) to identify any faults in police procedure which lead or might lead to complaints; and
- (iv) when it considers appropriate, to make recommendations to the Commissioner of Police or where necessary to the Governor.

43. In yet other countries there is provision for the adjudication itself to be done by external bodies. In Australia after considering the report of the Investigation Division or the report of his own investigation, the Ombudsman may recommend that criminal or disciplinary charges be brought. If the Commissioner does not agree with the recommendation, the matter is referred to the Attorney-General who decides what charges, if any, are to be brought.

44. Criminal charges are brought in the ordinary Courts; disciplinary charges originating from a complaint from a member of the public are dealt with by the Federal Police Disciplinary Tribunal; other disciplinary charges are also heard by the Tribunal if the member of the force so requests or the Commissioner so determines. The Tribunal consists of a Judge, magistrate or legal practitioner. Where the Tribunal is constituted by a Judge, he determines both guilt and punishment. Where constituted otherwise it deals with guilt and refers the question of punishment to the Commissioner.

45. In Toronto, where the complainant is dissatisfied with the initial investigation the Public Complaints Commissioner may order a hearing in public before an independent Police Complaints Board, which may be constituted by a single legally trained member or by a panel of three members. The Board consists of fifteen members, five legally trained.

Critique

46. The search for ways of introducing or expanding the independent element in the investigation and adjudication of complaints against the police reveals a broad spectrum of opinion, a sample of which is appended hereto as Appendices E and F. What is to be expected, however, is that the greater the size of the independent element, the greater will be the demand for a strengthening of the "civil rights" of police officers who are complained against. This is now the position in England and Wales. After years of opposition to any independent element in police complaints procedures, the Police Federation and the Police Superintendents' Association made a complete turnabout and expressed their conversion to a wholly independent system with, in return, increased legal protection for officers who are complained against. This would include legal representation in disciplinary proceedings, the application of rules of evidence and the Judge's Rules, and appeals to the Crown Court.

47. The House of Commons Home Affairs Committee rejected the quid pro quo.²³ They agree that police officers should have exactly the same rights when faced with a criminal charge as are enjoyed by any other citizen, but they do not consider that the police should be entitled to expect a higher standard of legal protection in relation to alleged offences against discipline than is available to members of most other professions.

48. The difficulty is manifest in determining the extent of the right of silence in the face of questions arising in the course of the investigation of a disciplinary offence or during the conduct of the hearing. Here you have two competing principles -one, that a person ought not to be required to answer questions which incriminate him or may tend, by admission, to prove that he has committed an offence; the other, that a member of a discipline service, sworn to uphold the law, ought not to be allowed to frustrate investigations and disciplinary hearings by refusing to answer relevant questions.

49. In Australia, the Complaints (Australian Federal Police) Act, 1981, deals with the problem in the following way. Where the investigation is carried out by the Investigation Division, a member of the force can be directed to furnish information, produce documents and answer questions that are relevant.²⁴ The member is not excused from this requirement on the ground that to do so would be contrary to the public interest, would expose him to a penalty or would tend to incriminate him; but the information, document or answer is not admissible in evidence against him in any civil or criminal proceedings other than disciplinary proceedings. Refusal without reasonable excuse, renders the member liable to a penalty or imprisonment.

50. The Ombudsman has similar powers in relation to investigations conducted by him.²⁵

51. When the matter gets to the Tribunal, however, a member is liable in the same way as in the course of an investigation to produce documents and answer questions, but it is a reasonable excuse for him to do so on the grounds that it would show that he had committed either a crime or a breach of discipline. Where, however, the hearing concerns a matter into which the Minister has directed the Tribunal to hold the enquiry²⁶ the member must produce the document or answer the question, even if it does incriminate him in relation to that hearing, but the answer and the document are not admissible against him in any subsequent civil or criminal proceedings.

51. The principle that a person is not obliged to answer questions in a criminal prosecution which would tend to prove him guilty is not affected.

The relationship between criminal offences and breaches of discipline: the double jeopardy principle²⁷

52. The rule against "double jeopardy" means that the same person may not be punished more than once by the criminal law for the same offence, or be called upon to defend himself in a criminal court more than once against the same charge. In short a verdict of conviction or acquittal is final. Accordingly a police officer who is convicted or acquitted of a criminal charge in a criminal court is entitled to plead autrefois acquit or autrefois convict as a bar to any subsequent prosecution based on the same facts.

53. It must be emphasised that what is prohibited is double punishment for the same offence - not double punishment for the same act.²⁸ As Humphreys J. said in R v Thomas²⁹

"It is not the law that a person shall not be liable to be punished twice for the same

act; it has never been so stated in any case, and the Interpretation Act itself does not say so. What (that Act) says is: 'No person shall be liable to be punished twice for the same offence.' Not only is it not the law that a person shall not be punished twice for the same act, but it never has been the law."

54. There are numerous instances of the same act giving rise to both criminal and non-criminal proceedings. A motorist found guilty of dangerous driving may be sued in a civil court for damages suffered as a result of such driving: a doctor charged with rape may be struck off for infamous conduct in a professional respect even if he is acquitted on the ground that the woman consented: a soldier may be disciplined for breach of Queen's Regulations even if he has been convicted - or acquitted - in a criminal court on charges arising out of the same facts. And Police Discipline Regulations in most countries make it a specific disciplinary offence to have been convicted of a criminal charge. In short neither conviction nor acquittal is a bar to disciplinary proceedings arising from the same act or omission.³⁰

55. The provisions of the Police Act, 1976 in England and Wales distorts the position as set out above. Section 11 provides that, where a member of a police force has been acquitted or convicted of a criminal offence, he is not to be charged with any offence against discipline which is in substance the same as the offence of which he has been convicted or acquitted, though this does not apply when the disciplinary offence consists of having been found guilty on a criminal charge.

56. Section 3(8) provides that the Police Complaints Board in discharging their functions must have regard to any guidance given by the Secretary of State which may affect the preferring or withdrawal of disciplinary charges. The guidance of the Home Secretary³¹ is to the effect that "where it has been decided after reference to the Director of Public Prosecutions (or otherwise) that criminal proceedings should not be taken, there should normally be no disciplinary charges if the evidence required to substantiate a disciplinary charge is the same as that required to substantiate the criminal charge."

57. The combined effect of the legislation and the guidance is that the Police Complaints Board have regarded themselves as precluded from recommending or directing disciplinary proceedings in practically every case where the Director of Public Prosecutions has directed that no criminal prosecution should take place because there is insufficient evidence to justify that course. It is different where the Director decides not to prosecute on other grounds (e.g. that it is not in the public interest to do so). It is interesting that in Hong Kong the relationship between criminal and disciplinary proceedings is interpreted in the same way as in England and Wales.

58. A number of bodies³² who gave evidence to the House of Commons Home Affairs Committee were critical of the view taken by the Police Complaints Board. They contend that the Police Complaints Board is not absolutely bound by the Home Office guidance: their obligation is to have regard to it. Moreover, the obligation is not as extensive as the Board appear to think. It does not preclude discipline in all cases where the Director refuses to prosecute because of insufficient evidence: it merely indicates that to be the normal result.

59. What seems to be incontrovertible, is that Section 11 alters the common law rules of autrefois acquit and autrefois convict. The common law prohibited a second trial for the same criminal offence: it did not prevent disciplinary action following after criminal charges, whether successfully prosecuted or otherwise. Section 11 does prevent such action where the "offence against discipline" is in substance the same as the criminal offence. It is not in every case that this will be so, e.g., the criminal offence may require proof of mens rea: the disciplinary offence may not, in which case disciplinary proceedings will be available notwithstanding the criminal charge.

60. What is equally incontrovertible is that the Home Office guidelines go further than Section 11 requires. It is not directed towards the similarities in substance between the crime and the breach of discipline: it is concerned with the similarities in evidence required to prove them. To this extent it can be contended to be ultra vires.

61. The situation in England and Wales is clearly open to criticism and there will be widespread support for the recommendation of the House of Commons Home Affairs Committee³³ that the Home Office guidelines should be revised both to clarify the position of Chief Constables and the Police Complaints Board and to ensure that there is no

diminution of their statutory power to take disciplinary action, if necessary, even where the Director of Public Prosecutions has decided against prosecution.

62. The Government White Paper indicates that in future the Chief Constable will be given much greater discretion as to the cases which he refers to the Director of Public Prosecutions for possible criminal charges and those which he deals with himself for possible preferment of disciplinary charges. As regards the latter the Police Complaints Board could direct the Chief Constable to refer the matter to the Director of Public Prosecutions if they consider the matter to be too serious to be treated as one of discipline only.³⁴ But the Government continues to regard it as right that in respect of the same events a police officer should not be liable to be proceeded against both in respect of a criminal offence and for a like offence under the discipline code.³⁵

63. It would be wrong, however, to assume that such changes will lead to a markedly greater number of disciplinary proceedings being instituted. After all in deciding not to prosecute the Director of Public Prosecutions having made a deliberate evaluation of the evidence finds it insufficient. Another body invested with the power to institute disciplinary proceedings is, in my submission, unlikely to come to a different conclusion on the same evidence in relation to substantively similar disciplinary offences.

Summary

64. There is considerable support in every country, which has examined the matter, for the introduction of an independent element into police complaints procedures. In many such countries some safeguards now exist, both within police forces and outside them, aimed at ensuring that as far as practicable complaints are effectively investigated and fairly adjudicated. It is for consideration how far these safeguards can or should be extended. There are difficult problems of how best to reconcile conflicting interests between satisfying complainants and being fair to the officers complained against, and between independent investigation and management responsibility (i.e. how to make Chief Officers of Police fully accountable if they are not also fully responsible). It is to be expected that the greater the size of the independent element the greater will be the demand for strengthening the "civil rights" of police officers who are complained against. They (and more particularly their associations) are more likely to be willing to forego such rights when they appear before their own Chief Constables than when they are arraigned before Disciplinary Tribunals. An immediate problem will be to reconcile two competing principles affecting the right of silence - one, that a person ought not to be required to answer questions which incriminate him, and the other, that a member of a disciplined service, sworn to uphold the law, ought not to be allowed to frustrate investigations and disciplinary hearings by refusing to answer relevant questions. The Australian legislation sets a worthwhile precedent in this regard. The statutory departures in England and Wales from the common law rules of "double jeopardy" have protected police officers from disciplinary proceedings in situations in which members of other professions are not. This generates an inordinate degree of public suspicion and is not attended by any counteracting advantages.

FOOTNOTES

1. The bibliography is extensive: see Appendix A
2. Report on the Victorian Police Force, Melbourne, 1971, para. 25.
3. When Americans Complain, 172 quoting "Police Review Boards - A Threat to Law Enforcement" 3-4 (undated but distributed in 1965).
4. Cmnd. 1728 (1962) HMSO para. 63.
5. (1852) 3 H.L. Cas. 794.
6. Cmnd. 8427 (1981) HMSO.
7. Butterworths (Australia) 1977. Chapter 13 "Discipline and Complaints Investigation"
8. "Administrative Problems in the Control of Police Behaviour" (1967) 58 J.C.L.C. And P.S. 160.

9. The Times October 2, 1982.
10. 49 per cent of all complaints in England and Wales in 1980 (15,205 out of 31,009).
11. The form which such information takes in England and Wales and in Toronto is shown in Appendices B, C and D. The "Police and Public" leaflet in England is to be amended in the light of the changes proposed in the Government Reply to the Fourth Report from the Home Affairs Committee. See Cmnd. 8681, 1982 para 12.
12. Op. cit. para 7,24.
- 12a. Cmnd. 8681 1982, paras 18 and 19.
13. Cmnd. 7966.
14. Ibid. para 62.
15. Cmnd. 8092, para 4, 119.
16. Cmnd. 8193.
17. Published as Appendix E to the Home Office Memorandum to the House of Commons Home Affairs Committee Enquiry into Police Complaints Procedures: HC 98 - 11 (1982) pp. 222 - 230.
18. The "really serious" includes death and serious injury: "serious injury" means medical evidence of fracture, damage to internal organs, impairment of bodily function, deep cut or laceration, but not bruising or superficial laceration.
- 18a. Cmnd. 8681, 1982 Annex A para 25.
- 18b. Ibid para 14.
- 18c. Ibid para 16.
19. H.C. 98-11 (1982) pp. 205 et seq.
20. Cmnd. 7966, para 27.
21. Ibid para 47.
22. Op. cit. para 117.
23. H.C. 98 - 1 para 50.
24. Section 7.
25. Ibid s.27.
26. Ibid ss. 70 and 83.
27. For a lucid exposition, see Appendix 13 H.C. 98-11.
28. See Mohamed Yussoff Bin Samadi v Attorney-General of Singapore (1975) 1 Malayan Law Journal 1 at p.2 per Chua J.
29. [1950] 1 K.B. 26 at p.31.
30. R. v Statutory Committee of Pharmaceutical Society of Great Britain [1981] 2 All E.R. 805.
31. Home Office Circular No. 32/1980.
32. Especially the National Council for Civil Liberties and Justice.
33. H.C. 98 - 1, para 15.

34. Cmd. 8681, 1982 para 8 and Annex A paras 13-15.

35. Ibid para 8.

APPENDIX A

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Police and public

Complaints against the police

Police Acts 1964 and 1976

This leaflet explains the procedure for members of the public who consider they have grounds for complaint against the conduct of a member of a police force in England and Wales. It also explains the way in which complaints are investigated and what action may be taken on them.*

The procedure described in this leaflet applies only to complaints about incidents occurring after 31 May 1977.

The handling of complaints

The law requires the chief officer of each police force to see that complaints against members of his force are promptly recorded, and are investigated. The deputy chief constable of a force outside London, or a senior officer in the Metropolitan or City of London Police, is responsible for considering what action to take as a result of each investigation. There is also an independent element in the procedure. This is provided by the Director of Public Prosecutions where a complaint suggests that a police officer may have broken the criminal law, and by the Police Complaints Board where there may have been an offence against police discipline. The records of complaints are regularly inspected by HM Inspectors of Constabulary and police authorities are required by law to keep themselves informed about the manner in which complaints are dealt with.

Making a complaint

Any complaint about the conduct of a police officer should be made in writing to the chief officer of the police force concerned (who is the Chief Constable of a force outside London and in London the Commissioner of Police of the Metropolis or of the City of London Police), or by calling at any police station. Only the police have the authority to investigate complaints against police officers. If a complainant writes to the Police Complaints Board, or to anyone other than the appropriate chief officer, his complaint has to be sent on to that chief officer; otherwise it cannot be investigated.

*The relevant statutory provisions in England and Wales are sections 49 and 50 of the Police Act 1964, the Police Act 1976, the Police (Discipline) Regulations 1977, the Police (Complaints) (General) Regulations 1977, the Police (Copies of Complaints) Regulations 1977 and the Police (Withdrawn, Anonymous etc Complaints) Regulations 1977. Under these provisions the chief officer can delegate his responsibilities for investigating and considering a complaint to his deputy or, in the Metropolitan or City of London Police, to another senior officer.

The investigation of a complaint

The investigation of a complaint against a police officer is carried out by a senior officer who may come from a different police force. It will normally start at once. If, however, the complaint is closely associated with criminal proceedings against the complainant or someone else and those charges are to be heard in court, the investigation will not as a rule begin until after the court proceedings are completed. The complainant will be asked to make a full statement, and the police will also seek information from anyone else who can help to establish the facts. The police officer who is complained about will also have an opportunity to make a statement. At the end of the investigation, a report will be sent to the deputy chief constable.

Criminal proceedings

Police officers, like everyone else, are subject to the law of the land. When a deputy chief constable receives the report of an investigation into a complaint he must first send it to the Director of Public Prosecutions unless he is satisfied that no criminal offence has been committed. The Director will consider whether or not criminal proceedings should be brought and he will inform both the deputy chief constable and the complainant whether or not he proposes to prosecute. If there is a prosecution, the complainant can be called upon to give evidence before the court.

Disciplinary proceedings

Police officers are also subject to a strict discipline code. The deputy chief constable will therefore consider (after any reference has been made to the Director of Public Prosecutions) whether as a result of the investigation of a complaint the evidence is such as to justify bringing a disciplinary charge. If the deputy chief constable decides that a disciplinary charge would not be justified he must send a report to the Police Complaints Board. If the Board accept that no disciplinary charges should be brought, they will inform the deputy chief constable and the complainant. If, however, the Board disagree with the deputy chief constable, they may recommend, and in the absence of agreement direct, that disciplinary charges should be brought. Where charges are to be brought the police will inform the complainant. (Even if a complaint proves to have some substance, it may not be necessary to deal with it by formal disciplinary charges; for example, advice to the officer concerned may be more appropriate.)

Hearing of disciplinary charges

Where disciplinary charges are brought against a police officer, there is a formal hearing. This will normally be before the chief officer alone but, in exceptional circumstances, the Police Complaints Board may direct that the charges should be heard by a tribunal consisting of the chief officer and two members of the Board. The hearing is in private, but, unless the accused officer has admitted the charges, the complainant has a right to attend and will normally be expected to give evidence.

Civil proceedings

A complainant may have a remedy at civil law. The police cannot give advice as to whether there is cause for a civil action this is a matter for a solicitor. A Citizens Advice Bureau will be able to provide a list of solicitors practising in the area who can advise on this matter and give information about legal aid and advice schemes. If a complainant wishes to bring a civil action, the investigation of the complaint may sometimes be deferred until the civil action has been completed.

The rights of the officer

A police officer against whom a complaint has been made will normally receive a copy of the original complaint or of an account of it if the complaint was not made in writing. He is given a copy automatically if he is charged with any disciplinary offence as a result of the complaint; if he is not charged he can ask for a copy when the case is closed. A false and malicious complaint against a police officer may lead to his bringing legal proceedings for defamation.

Reminder

This leaflet explains what happens if you make a complaint about the conduct of a police officer. Inquiries into complaints are thorough and take a lot of police time. Before you complain please think carefully whether your complaint is against the police; it might, for example, be against some part of the law that the police have to enforce.

Remember that the police do a difficult and dangerous job on behalf of us all.

Prepared by the Home Office and the Central Office of Information 1977.

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contact

the Public Complaints Commissioner

A civilian service set up to resolve disputes
between You and Your Police.

Questions & Answers about police complaints in Metropolitan Toronto

New procedures are now in place for handling complaints from members of the public against police officers on the Metropolitan Toronto Police Force. This new system is a marked departure from the previous one where the police alone were responsible for these matters.

A citizen can now lodge a grievance directly with an independent civilian who is not connected with the police in any way. This person, the Public Complaints Commissioner, has the power to do his own investigation, completely separate from that conducted by the police. He is responsible for making sure that all complaints concerning allegations of misconduct are dealt with promptly and fairly.

As well, he may order a public hearing by the newly established Police Complaints Board. The members of this Board are also independent civilians.

The Public Complaints Commissioner is in a position to identify those police practices or procedures which may be particularly productive of citizen complaints and he can recommend that appropriate changes are made to remedy these situations.

To assist the public, the Office of the Public Complaints Commissioner has assembled answers to the following common questions often put to it about the Metropolitan Police Force Complaints Project Act, 1981.

Question

Where do I make a complaint about the conduct of a police officer on the Metropolitan Toronto Police Force?

Answer

You may make your complaint at any one of the following locations:

- a) the Office of the Public Complaints Commissioner, 157 Bloor Street West, Toronto, Ontario M5S 1P7, telephone: 963-1141.
- b) the Metropolitan Toronto Police Public Complaints Investigation Bureau, 3080 Yonge Street, Toronto, Ontario M4N 3N1, telephone: 967-2367.
- c) any police station in Metropolitan Toronto (telephone 967-2222 for the station closest to you).

Question

When does the Public Complaints Commissioner become involved with my complaint?

Answer

IMMEDIATELY. No matter where you make your complaint, a copy is sent to the Office of the Public Complaints Commissioner. He monitors the investigation from the start.

Question

Who will investigate my complaint?

Answer

Initially, your complaint will be investigated by a police officer from the Public Complaints Investigation Bureau of the Metropolitan Toronto Police Force. The Bureau is a separate unit within the Force.

If it is possible for your complaint to be resolved informally, the officer in charge of the Bureau may attempt to do so, but only if you and the police officer involved agree.

Question

Can the Office of the Public Complaints Commissioner investigate my complaint?

Answer

YES. The Public Complaints Commissioner can conduct his own civilian investigation 30 days after you make your complaint. In some situations, the Public Complaints Commissioner can start his own investigation immediately.

Question

When do I find out about the status of my complaint?

Answer

In general, within 30 days of making a complaint, you will receive an interim report on the investigation done up to that time. You will also receive further reports during the course of the investigation and a final report when it is completed. All of these reports are in writing.

Question

What happens after the final investigation report is made?

Answer

The Chief of Police will review the matter, decide what action, if any, is to be taken, and give written notice of his decision to you, the Public Complaints Commissioner, and the police officer concerned.

Question

What if I am not satisfied with the decision made by the Chief of Police?

Answer

You may ask the Public Complaints Commissioner to conduct a review. He may order that a public hearing be held by the Police Complaints Board, if he believes that it is in the public interest to hold such a hearing.

Question

What is the Police Complaints Board?

Answer

The Police Complaints Board is a group of civilians specifically appointed to conduct hearings into citizens' complaints about the conduct of police officers on the Metropolitan Toronto Police Force. The Public Complaints Commissioner is the Chairman of the Board and he assigns members of the Board to conduct these hearings.

Question

Do I have the right to attend the Police Complaints Board hearing and take part in it?

Answer

YES. You will be notified in writing of the date of the hearing. A lawyer will present the case to the Board but you may choose to be represented by your own lawyer or an agent. You will also be given a chance, before the hearing, to examine any written evidence or any report that will be given in evidence at the hearing.

Question

If the Police Complaints Board finds that the police officer is guilty of misconduct, what penalties can it impose?

Answer

The penalties that can be imposed by the Police Complaints Board depend on the nature of the misconduct. The maximum penalty that the Board can impose is dismissal of the police officer from the Metropolitan Toronto Police Force.

Question

What if I want to complain about a police officer who does not belong to the Metropolitan Toronto Police Force?

Answer

Consult a member of the police force concerned, the local board of commissioners of police or the local municipal council. You may also contact the Ontario Police Commission, 25 Grosvenor Street, Toronto, Ontario M4A 2G9, telephone: 965-6071.

Question

What if I want to charge a police officer with a criminal offence or sue the police officer in the civil courts?

Answer

Your right to take either of these alternatives is not affected by this new complaints procedure.

You may charge a police officer with a criminal offence by attending at the office of a Justice of the Peace. For the office nearest you, telephone 965-7541.

If you want to sue a police officer, you should contact a lawyer.

All civil suits and some criminal charges must be started within six months of the date the incident occurred.

Question

Where can I get more information about the Metropolitan Police Force Complaints Project Act?

Answer

You can obtain a copy of the Act from the Ontario Government Bookstore, 880 Bay Street, Toronto, Ontario, telephone: 965-2054.

As well, you can telephone the Office of the Public Complaints Commissioner at 963-1141.

If you make a complaint, you will be given a document that sets out the procedures that are followed and your rights under the Act.



Sidney B. Linden, Q.C.
Public Complaints
Commissioner

During the course of this pilot project I am hopeful that I will be able to count on the support of the citizens of Metropolitan Toronto, the Metropolitan Police Force and the Metropolitan Toronto Police Association.

I am confident that the expressions of goodwill received since my appointment as Public Complaints Commissioner will continue to provide a foundation for an atmosphere of co-operation and mutual respect that will ensure the success of this unique experiment.

Sincerely,

SIDNEY B. LINDEN, Q.C.
PUBLIC COMPLAINTS COMMISSIONER

Mr. Linden is a native of Toronto who, until his appointment as Public Complaints Commissioner, was a prominent member of the criminal bar and a well-known labour arbitrator. He was General Counsel to the Canadian Civil Liberties Association and served on its Board of Directors. He was Vice-President of the Criminal Lawyers Association and also active on the Legal Aid Committee of the Law Society of Upper Canada.

The Metropolitan Police Force Complaints Project Act, 1981, was proclaimed December 21, 1981. The project is funded by the Ontario Ministry of the Attorney General and the Municipality of Metropolitan Toronto.



The Office of the
Public Complaints Commissioner

157 Bloor Street West, Toronto, Ontario M5S 1P7
Telephone: 963 1141

METROPOLITAN POLICE FORCE COMPLAINTS PROJECT ACT, 1981**POLICE COMPLAINT PROCEDURES AND RIGHTS
OF A PERSON MAKING A COMPLAINT**

To the Complainant:

This statement briefly sets out the procedures that will be followed upon receipt of your complaint against a member of The Metropolitan Toronto Police Force and your rights under the **Metropolitan Police Force Complaints Project Act, 1981**.

Who Sees Your Complaint

1. No matter where your complaint is recorded a copy of the complaint will be sent to the Public Complaints Commissioner and the Public Complaints Investigation Bureau (the Bureau) of the Metropolitan Toronto Police Force.
2. The police officer concerned will be informed of the substance of the complaint unless the investigation might be adversely affected if the police officer is so informed.

Informal Resolution

3. The person in charge of the Bureau will consider whether your complaint can be resolved informally and if this is possible he will attempt to do so, but only if he has your consent and the consent of the police officer concerned.
4. No complaint can be resolved informally unless both you and the police officer concerned agree in writing to the resolution.

Investigations and Reports

5. If the complaint is not resolved informally, the Bureau will investigate the complaint. The investigator will interview you, the police officer concerned and any other witnesses.
6. You will receive a report not later than thirty days after you make your complaint and on a monthly basis thereafter unless the investigation of the complaint might be adversely affected by a report or there are no new matters to report. The Public Complaints Commissioner will also receive these reports.
7. If at any time you are not satisfied with the manner in which your complaint is being handled you may contact the Office of the Public Complaints Commissioner, telephone: 963-1141
8. In certain situations the Public Complaints Commissioner may decide to do his own investigation before the Bureau completes its investigation.
9. When the Bureau investigation has been completed, a final report will be sent to you, the Public Complaints Commissioner, the chief of police and the police officer concerned.

Decision of the Chief of Police

10. The chief of police or his designate will review all investigation reports and make one of the following decisions:
 - i. Order further investigation.
 - ii. Decide that no further action is warranted.
 - iii. Cause a charge to be laid against the police officer and refer the matter to the Crown Attorney for prosecution.
 - iv. Refer the matter to the Police Complaints Board for a hearing.
 - v. Cause disciplinary proceedings to be taken against the police officer under the Police Act.
 - vi. Counsel or caution the police officer regarding his conduct.
11. You will be informed in writing of the decision made by the chief of police.

Review By Public Complaints Commissioner

12. If you are not satisfied with any of the following decisions you may request the Public Complaints Commissioner to review the matter:
 - i. The decision of the chief of police that no further action is warranted.
 - ii. The decision of the chief of police to counsel or caution the police officer regarding his conduct.
 - iii. The decision made in a disciplinary proceeding under the **Police Act**.
13. Upon receipt of your request, the Public Complaints Commissioner will review the matter, and his staff have broad powers to investigate. Documents must be made available, and individuals can be subpoenaed to answer questions.
14. After his review, the Public Complaints Commissioner may order a hearing before the Police Complaints Board where he feels that the public interest requires it. If he decides that there should not be a hearing, he will give you his reasons. The Public Complaints Commissioner will write to you, the chief of police and the police officer concerned about his decision.

Police Complaints Board Hearing

15. If a Police Complaints Board hearing is ordered, you will be notified in writing of the date and place of the hearing. You have a right to attend and take part in the hearing and to be represented by counsel or an agent. You will also be given an opportunity, prior to the hearing, to examine any written or documentary evidence or any report that will be given in evidence at the hearing. The hearing will be open to the public. You will receive a copy of the Board's decision.

(Being Annex A to The Government Reply to the Fourth Report from the Home Affairs Committee, Cmnd. 8681 1982)

ANNEX A

THE GOVERNMENT'S PROPOSED NEW ARRANGEMENTS FOR HANDLING COMPLAINTS AGAINST THE POLICE

PRESENT SYSTEM

1. The effect of the existing legislation is that every complaint by a member of the public against a member of a police force, unless withdrawn or not proceeded with by the complainant, has to be investigated by a senior police officer whose report receives independent consideration. Where there is an allegation of criminal conduct the report of the investigation must be sent to the Director of Public Prosecutions (DPP) who advises whether the officer should be charged with a criminal offence. After any reference to the DPP the report is submitted to the Police Complaints Board (PCB) for their consideration of the disciplinary aspects. A more detailed account of present arrangements is at the Appendix.

THE PROPOSED NEW THREE-TIER APPROACH

2. It is proposed to substitute for the present uniform arrangements a three-tier system to operate according to the seriousness of the case. It would allow relatively minor matters to be dealt with locally by informal resolution and, in the most serious complaints, would provide for an independent element in the process of investigation. Thus:—

- (a) less serious complaints would be subject to an informal procedure, including an element of conciliation;
- (b) more substantial complaints and those where informal resolution could not be achieved would be investigated and independently considered by the PCB, although complaints involving crime would no longer be automatically referred to the DPP;
- (c) the most serious complaints would be subject to investigation by a senior police officer normally, but not exclusively, from an outside force under the supervision of an independent assessor.

The details of the scheme are set out below.

RECEIPT OF COMPLAINTS

3. Although the chief officer of police would remain the receiving point for complaints and no action could start until a complaint was brought to a force's attention, a complaint could be lodged either by the complainant or by any person on his behalf, orally or in writing. Thus, it would be open to a complainant to go, for example, to a citizen's advice bureau or community relations officer and for them to forward the complaint to the police.

4. On receipt of a complaint against a member of his force the chief officer would cause it to be recorded and to have made such preliminary inquiries as were necessary to decide whether the matter should be handled initially by informal resolution or by formal investigation and, if the latter, whether the independent assessor should be involved. He may also need to initiate immediate local action, e.g. in order to preserve evidence.

5. Informal resolution would *not* be an option where the complaint alleged:—
- (a) a criminal offence with which the officer had not been charged and which would either require reference of the report to the DPP or which in the opinion of the chief officer merited criminal proceedings without such reference (see paragraphs 13–15 below); or
 - (b) conduct which, if supporting evidence were forthcoming, would be likely to result in the officer in practice being charged with an offence against the Police Discipline Code.

INFORMAL RESOLUTION

6. The complainant would be seen (unless this were impracticable) by a supervisory officer of a rank not less than Inspector who would explain that, subject to paragraph 5 above, the matter could be dealt with, according to the complainant's wishes, either informally or by investigation by a senior police officer and reference to the DPP and PCB, as appropriate, for independent consideration of the outcome.

7. Where informality was preferred the supervisory officer would make such arrangements as he considered appropriate for this purpose. It would be open to him to resolve the matter in such a way as proved acceptable to the complainant. The outcome would be recorded by the police in a register available for inspection by the police authority and HM Inspector of Constabulary, and from which it would be open to a complainant to ask for a copy of the record of the entry for his complaint at any time within three months of its outcome being entered in the register. No entry of any kind relating to either attempted or successful informal resolution would be made in the personal record of an officer.

8. The arrangements made for the informal resolution process might include, at the supervisory officer's discretion, a meeting attended by a lay person where the complainant so wished. No officer could be compelled to attend such a meeting if he did not so wish. The function of the lay person would be to represent a non-police presence in support of the conciliation process and to assist in arriving at a conclusion in accordance with paragraph 7 above. The lay person could be drawn from a panel of people, perhaps maintained by the police authority for this purpose; he or she would have had no previous connection with the complainant or interest in the case.

Mutual protection of police officer and complainant

9. In order to preserve the informality of the procedure and encourage a co-operative and forthcoming spirit, it would be necessary to ensure that both the police officer and the complainant felt they could enter conciliation without running avoidable personal risks. Accordingly, provided no material change of circumstance occurred as envisaged in paragraph 12 below, no reference would be allowed in any subsequent disciplinary or criminal proceedings to what an officer said or did in the conciliation process, and any statement by him made in the course of preliminary enquiries or for conciliation purposes would not be admissible. That is to say, any proceedings could normally be based only on statements made to the officer appointed to conduct a formal investigation. Nor would anything said or done in the course of informal resolution be admissible in any subsequent civil proceedings by the complainant. By the same token there would be no arrangements for a copy of the complaint to be available to the officer concerned.

Oversight

10. Whilst the PCB's locus would continue to be confined to where a complaint was dealt with by formal investigation, the present requirement for police authorities and Inspectors of Constabulary to keep themselves informed as to the manner in which complaints are dealt with by chief officers (section 50 of the Police Act 1964) would be developed. Thus, both could be required, for example, to inform themselves also about how the system of informal resolution worked in practice and to encourage resort to that system so far as possible. In addition, Inspectors could be charged with identifying good practice generally, disseminating knowledge of it through the service and, with police authorities, encouraging its adoption, ultimately by inclusion in guidance issued by the Home Secretary. No amendment of the existing legislation would be necessary for this purpose.

FORMAL INVESTIGATION AND INDEPENDENT CONSIDERATION

11. Where a complaint could not be resolved informally to his or the complainant's satisfaction or was of a nature described in paragraph 5 above the chief officer would be required to cause it to be investigated by a senior officer¹ from a different division or from another force, appointed for the purpose, as now. This would be subject to the grant of any dispensation by the PCB from the requirements in respect of complaints which were anonymous, repetitive or otherwise incapable of investigation, as presently provided by Regulation 4 of the Police (Withdrawn, Anonymous Etc Complaints) Regulations 1977.

12. Where in the course of attempted conciliation information came to light which brought the complaint within paragraph 5 above, the process would cease and the complaint would be referred for formal investigation.

Reference to DPP and PCB

13. Existing arrangements in relation to allegations of criminal conduct would be changed. At present the chief officer is required to submit investigation reports to the DPP in every case. In future, however, this automatic requirement would be varied but in such a way as to allow the chief officer to decide lesser criminal allegations himself and to bring either criminal or (without the consent of the Board) disciplinary proceedings without going to the DPP first. There would, however, be a safeguard since the PCB would be empowered to direct that the papers be submitted to the DPP (without considering whether or not the evidence was sufficient) if of the opinion that the allegation, if true, was too serious to be disposed of disciplinary.

14. This would have the effects of reducing the flow of more trivial cases to the DPP. Guidance would be issued to chief officers on how the arrangements were to be operated.

15. In the cases that continued to be referred to him, the DPP would consider whether the evidence was sufficient for criminal proceedings and would so advise the chief officer and the complainant, as now. After any reference to the DPP, the PCB would consider the disciplinary aspects, as now.

¹Of the rank of chief inspector or above is intended (as now required in the Metropolitan Police) rather than superintendent as for the provinces at present. This and a related change that would permit the delegation of chief officer functions to assistant chief constable could be accomplished by regulations under existing powers.

INVESTIGATION UNDER THE INDEPENDENT ASSESSOR

Mandatory reference

16. Where a complaint alleged that police action had been responsible for a death or serious injury¹, and in the view of the chief officer it could have been caused in the way alleged, he would be required to refer it to the independent assessor.

Discretionary reference

17. The chief officer would be able to refer any other case to the assessor where he considered it right to do so by reason of the gravity of the allegation or other exceptional circumstances. (This would facilitate the reference of a "serious case of assault" not falling within paragraph 16 above, e.g. where the injury itself although not very serious was consistent with the assault alleged and for which there was apparently no other explanation; or a serious corruption case.)

Reserve powers

18. The assessor would be empowered at his discretion to require a chief officer to submit for consideration any complaint not already referred to him, together with such information as may be necessary to enable the assessor to decide whether by reason of the gravity of the allegation or other exceptional circumstances it should be investigated under his supervision.

Independent assessor's decision on handling

19. In any case referred to, or called in by, him the assessor would consider the chief officer's proposals for investigation and decide either:—

- (a) that the investigation should be carried out under his supervision by an officer from a different division of the force or from another force; or
- (b) that the case should be referred back to the chief officer to be dealt with as at paragraphs 11–15 above.

For purposes of (a) the independent assessor would be empowered to endorse the nomination of the investigating officer or to require the submission of alternative proposals.

Conduct of investigation under independent assessor

20. In relation to the conduct of the investigation the function of the assessor would be to ensure that the investigation was done expeditiously, thoroughly and impartially. In the exercise of that function, he would be empowered to make such reasonable directions as were necessary, with the consent of the DPP in matters concerning the collection of evidence for possible criminal proceedings.

¹"Serious injury" means medical evidence of fracture, damage to internal organ, impairment of bodily function, deep cut or laceration, but not bruising or superficial laceration.

Reports

21. The investigating officer would be required to make to the assessor, and copy to the chief officer concerned, such interim reports as the assessor might reasonably require.
22. Where in the opinion of the investigating officer the investigation revealed internal disciplinary matters not arising directly from the complaint or giving rise to proposals for the suspension of officers under suspicion these would be reported by him directly to the chief officer. Such reports would have to be copied to the assessor.
23. The investigating officer's final report would be submitted to the assessor and copied to the chief officer. The chief officer would submit the report to the DPP as necessary. When the assessor was satisfied with the conduct of the investigation he would notify the chief officer and DPP as appropriate. No decisions on criminal or disciplinary action would be taken until the assessor had signified his satisfaction with the investigation. Where the DPP decided against prosecution the chief officer would consider the need for disciplinary proceedings and refer the report to the PCB.
24. Any request by the DPP or chief officer for further information for their respective purposes would be notified to the assessor.

Location of assessor

25. The assessor would be the Chairman of the Police Complaints Board or a Deputy appointed for this purpose. Assistant assessors to whom his functions could be delegated would be appointed as members of the Board as necessary. The working methods and location of the assistant assessor would not be prescribed although they would be expected to maintain close and direct contact with the conduct of the investigation. They might be appointed initially on a broad regional basis and a comprehensive regional presence would not be ruled out if experience suggested it was desirable.

APPENDIX

THE PRESENT SYSTEM

1. Under section 49 of the Police Act 1964, where the chief officer¹ of police for any police area receives a complaint from a member of the public against a member of his force, he must, unless the complaint alleges an offence with which the officer has already been charged, record the complaint forthwith and cause it to be investigated. By virtue of this provision he may, and shall if so directed by the Secretary of State, request the chief officer of police for any other police area to provide an officer to carry out the investigation, and that chief officer must comply with the request. Under the Police (Discipline) Regulations 1977 a complaint which suggests that the officer concerned may have offended against the Regulations must be investigated by an officer of the rank of superintendent or above and from a different division of the force.²

¹In practice the functions of the chief officer under section 49 and the connected functions under the Police Act 1976 are delegated to the deputy chief constable, or his equivalent in the Metropolitan and City of London forces.

²In the Metropolitan Police the requirement is for an officer of the rank of chief inspector or above. The Regulations also require that in the Metropolitan Police he be from a different "sub-division". But a change in nomenclature in 1978 brought the Metropolitan Police more into line with other forces, and what were formerly sub-divisions are, in practice, now known as "divisions".

2. The investigating officer submits his report to the deputy chief constable. Where it is alleged that an officer has committed a criminal offence the deputy chief constable is required by section 49(3) of the Police Act 1964, unless he is satisfied that no criminal offence has been committed, to send the report to the Director of Public Prosecutions. The Director recommends whether or not the officer should be charged with a criminal offence. After any reference has been made to the Director on the criminal aspects the deputy chief constable decides whether the circumstances are such as to justify bringing a disciplinary charge against the officer in accordance with the Police (Discipline) Regulations. He is required by the Police Act 1976 to send to the Police Complaints Board a copy of the investigating officer's report together with a memorandum stating whether he has decided to bring disciplinary proceedings against the officer concerned and, if he has not, his reasons for not doing so. If the Board disagree with the decision of the deputy chief constable not to bring proceedings, they may recommend that disciplinary charges be brought. Where such charges are preferred and are denied by the officer the Board can direct that they be heard by a tribunal of two members of the Board in addition to the chief officer instead of the chief officer sitting alone. In the last resort the Board may direct that charges be brought, and in these circumstances, if they are denied by the officer, they must be heard by a tribunal.

3. Section 50 of the Police Act 1964 requires every police authority in carrying out their duty with respect to the maintenance of an adequate and efficient police force, and HM Inspectors of Constabulary in carrying out their duties with respect to the efficiency of any police force, to keep themselves informed as to the manner in which complaints are dealt with by the chief officer.

(Being Appendix 7 of Evidence Submitted to the Home Affairs Committee 1981-2 H.C. 98 - JJ)

APPENDIX 7

Memorandum submitted by the Commission for Local Administration in England

COMPLAINTS AGAINST THE POLICE--AN OMBUDSMAN SYSTEM

1. As requested when representatives of the Commission gave evidence to the Home Affairs Committee on 24 February 1982, this paper suggests the kind of procedures that might be introduced into the arrangements for considering complaints against the police if it were decided that these should be centred on a Police Ombudsman system.

2. In the written evidence they have already submitted to the Home Affairs Committee, the Commission set down the principles on which a complaint system should be based and their impressions after nearly eight years of investigating complaints. The points made can be summarised by saying that a complaint system:

- must be fair to the complainant and to those against whom a complaint is made, and thus carry their confidence;
- must be well publicised and known to those who may wish to use it;
- must be easy to use and sensitive and unbureaucratic in operation;
- must provide the possibility, through a local complaint procedure, for complaints to be settled locally;
- but must include a completely independent person (Police Ombudsman) to whom a complaint can be referred if local settlement is not possible, or if for other reasons the complaint needs independent investigation;
- must provide the Police Ombudsman with his own investigative and independent financial resources, and the power to recommend appropriate action, backed by some system for ensuring that such action was taken.

STAGE 1

3. Any complaint is best settled locally if that can be done properly, i.e. without pressure being exerted on the complainant or important issues, for example the need to improve administration or discipline, being concealed.

4. There should be a time limit within which complaints should be made. All complaints should be registered locally at a local police station but preferably in a way that need not involve a complainant in having to put his complaint to the very officer against whom the complaint was made. Complaints could therefore be made:

- (a) direct by the complainant at the police station; or
- (b) by the complainant to a Member of Parliament; or
- (c) by the complainant to a member of the Police Authority; or
- (d) by the complainant to a local organisation such as a Citizens' Advice Bureau.

5. Whichever channel was used, the complaint would end up at the local police station. Each police force would be required to have a local complaint procedure, and as part of it a simple arrangement for recording all complaints received. Every complainant, whichever channel he or she use, should then be given a simple statement about the complaint procedure, including a clear reference to the right to take a complaint to the independent Police Ombudsman if he or she was not satisfied with the way the complaint was handled under the local complaint procedure.

STAGE 2--CONCILIATION

6. To judge from the high number of complaints against the police which are "withdrawn or not proceeded with", there is ample scope (as with complaints against other bodies) for informal conciliation leading to local settlement, for example of a complaint of rudeness or minor inefficiency.

7. The local complaint procedure would deal with these complaints and should ensure that a complaint was handled with the minimum of bureaucracy and formality. The procedure should be set out in a readily understandable document explaining, for example, which local officers would be responsible for doing the conciliating.

8. When a complaint was settled at this local level the fact would be recorded in the register kept by the police, and any person or body who had referred the complaint should be told the outcome in sufficient detail to show that the settlement was genuine.

9. Certain classes of complaint, i.e. those classified by the legislation as serious, would be excluded from the local conciliation procedure. After registration by the police they would be sent straight to the Police Ombudsman.

STAGE 3

10. This stage would be for the Police Ombudsman to handle. It would cover consideration and investigation of:

- (a) the special classes of complaint referred to in paragraph 9;
- (b) complaints not settled locally by conciliation for whatever reason (e.g. a complainant might claim that, although the complaint in itself was minor, it raised issues which should be considered by an independent person);
- (c) complaints where the police themselves felt, and the complainant agreed, that the Police Ombudsman should be left to make an investigation and judgment.

11. The complaints where conciliation had failed—category (b)—could reach the Police Ombudsman either direct from the complainant or from the third party through whom the complaint was originally referred. But they should always be in writing, and in a form to satisfy the Police Ombudsman that the complainant himself wanted him to deal with the matter

THE OMBUDSMAN'S ROLE

12. The number of complaints that would reach the Police Ombudsman for consideration in a year is difficult to quantify, but might be somewhere between 3,000 (the present number of complaints of assault or serious injury) and 16,000 (the present total number of complaints not withdrawn).

13. It is suggested that the legislation would have to cover the following:

- (a) as with local government, more than one Police Ombudsman would be required: a national Commission could be the solution consisting of full-time Police Ombudsmen responsible for particular areas, large enough to prevent their becoming identified with a particular police force;
- (b) the source of the Police Ombudsman's investigative staff: it is suggested that they need not be drawn from police forces although, as with other Ombudsmen, some of them could be seconded or former policemen. The vital thing is to get people of high calibre with the right human and intellectual qualities. It could be helpful to have provision also for *ad hoc* secondment of specialists to assist in investigating particular complaints;
- (c) the investigative procedure, as with all existing Ombudsmen, should be at the discretion of the Police Ombudsman; and he should have power to secure such evidence as he considered necessary and to allow anyone involved in the complaint to be represented.
- (d) no complaint should be investigated without the police force concerned, and any individual officers involved, being given a reasonable opportunity to comment on the allegations made;
- (e) as part of his discretion, the Police Ombudsman should be free to decide that a complaint referred to him should not be investigated further (giving the reasons for his decision), or that efforts at local settlement should be made, perhaps with the help of one of his staff;
- (f) the process for investigating the complaint should be in private, and should lead to a written report containing the Police Ombudsman's findings, but not normally the names of those involved. The report should always be sent to the Chief Constable concerned as well as to the complainant and to anyone through whom the complaint was referred. The Police Ombudsman should have discretion also to send it to the Director of Public Prosecutions if action by him seemed necessary. Provisions regarding privilege would be required;

- (g) if in light of a report the Police Ombudsman considered that the Chief Constable should take some specific action, either disciplinary or administrative, e.g. to improve procedures, the Chief Constable should be required to respond and tell the Police Ombudsman what action he had taken or proposed to take. If the Police ombudsman was not satisfied with that action he should be bound to report to the Police Authority (the Home Secretary in the case of the Metropolis) so that the Authority could consider the matter. (Under Section 50, Police Act 1964, they must keep themselves informed on the manner in which complaints against the police are dealt with by the Chief Constable);
- (h) the Commission of Police Ombudsmen, should also have the *right* to report on individual cases to the Home Affairs Committee of the House of Commons, and the *duty* to report to the Committee annually on the year's work as a whole.

14. The Commission believe that arrangements on these lines, would be practicable, would command public and police confidence, and could lead to many complaints being dealt with locally under a standard simple procedure which would not waste time or money through the automatic involvement of high-ranking officers. There would be a need, however, regularly to monitor the working of the procedure locally, a task which might be performed either by the Police Authority or by the staff of the Police Ombudsman.

21 Queen Anne's Gate
London SW1H 9BU

10 March 1982

PRINCIPLES AND OBJECTIVES OF CRIMINAL LAW

Memorandum by
THE GOVERNMENT OF CANADA

Introduction

In August 1982, the Minister of Justice of Canada publicly released a major statement of government policy with respect to Canadian criminal law. This statement, entitled The Criminal Law in Canadian Society, is unique in Canadian experience in setting out an explicit statement of principles on the basis of which criminal law policy is to be pursued in the coming years.

2. More significantly, the statement will serve as a set of guidelines for the massive Criminal Law Review project recently launched by the Federal government, in co-operation with the Provinces.

The Criminal Law Review : Background

3. In Canada, constitutional responsibility for criminal justice is divided between the Federal and Provincial governments. The Federal Parliament has the overall jurisdiction to enact legislation with respect to criminal law and procedure and provide for the establishment and maintenance of penitentiaries (where sentences of two years or more are served), while the Federal Government has power to appoint superior and county court judges. The Provincial legislatures, for their part, have jurisdiction over the "administration of justice", and for the establishment and maintenance of prisons (where sentences of less than two years are served). They may also provide for the imposition of punishment to further the enforcement of Provincial law. Provincial Attorneys-General prosecute offences under the federally-enacted Criminal Code.

4. As a result of this constitutional arrangement, the Federal Government and more specifically the Federal Minister of Justice, carries primary responsibility for proposing legislation relating to criminal law.

5. In the past few years, the combined effect of a number of factors convinced both the Federal and Provincial governments that priority had to be given to the complex job of overhauling Canadian criminal law. Canada, like other Western post-industrial nations, has experienced in the past two decades a continued growth in traditional "street" crime, growing public concern about the apparent breakdown in social controls (especially as shown in rising violent crime), the emergence of new forms of sophisticated white collar and organised crime, escalating costs for the criminal justice system and growing doubts about its effectiveness, recurring problems in prisons and penitentiaries, and intensified debates about the proper point of balance between civil liberties and individual rights on the one hand, and powers granted to criminal justice agents to prevent and detect crime on the other hand.

6. In this climate, doubts came increasingly to be raised, not only about specific aspects of the statutes of the criminal justice system, but also about the basic assumptions and orientation of the criminal law as a whole.

7. While these doubts have been brought into sharper focus in the past decade, they represent the culmination of many years of commissions, inquiries and committees which have examined various elements of the Canadian system of justice since Confederation.

8. By 1969, the Report of the Canadian Committee on Corrections (Ouimet Report) felt it necessary to recommend "that the Government of Canada establish in the near future a Committee of Royal Commission to examine the substantive criminal law".

9. In 1970, Parliament responded by enacting legislation establishing the Law Reform Commission of Canada, whose mandate ranged from "the removal of anachronisms and anomalies in the law", to "the development of new approaches to and new concepts of the law in keeping with and responsive to the changing needs of modern Canadian society and of individual members of that society". The Minister of Justice of the day made the suggestion that "the Commission should have a complete re-writing of the criminal law as

one of its first projects", in light of his view that "the Criminal Code of Canada... is in need of thorough housekeeping, thorough revision not merely in the lawyer's law as it applies to the Criminal Code, but also in many of the Code's social aspects".

10. Over the past nine years, the Commission has published eight formal reports, eighteen working papers and a host of studies with respect to various aspects of substantive criminal law and criminal procedure. Some of this work related to specific and fairly technical matters, while other elements were concerned with basic questions of philosophy and principle.

11. In October 1979, some twenty Federal and Provincial Ministers responsible for the various aspects of the criminal justice system in Canada met in Ottawa and unanimously agreed that the process of reform should be accelerated.

12. As a result of that agreement, a detailed proposal was developed by the Federal and Provincial governments to launch an accelerated review aimed at expediting the enactment of a modern, responsive and effective Canadian criminal law.

The Criminal Law Review : Process

13. Beginning with recommendations from the Law Reform Commission, the Federal government - in cooperation with the Provinces - will systematically examine all aspects of Canadian criminal law. By the end of 1985, the Law Reform Commission is scheduled to complete work on more than fifty individual projects addressing the substantive and procedural aspects of the law. The Federal government will analyse these findings and present proposals to Parliament in logically-connected policy groupings, to enable the coordinated and timely implementation of the Review process. The Federal Minister of Justice carries overall responsibility for the review.

14. The process will take the form of three separate but complementary phases with respect to the 50 projects involved :

Phase I (research and recommendation) is basically the responsibility of the Law Reform Commission of Canada. For each topic, the Law Reform Commission will produce two major publications: a working paper which identifies issues and explores options, and a final report which makes recommendations. Appropriate consultation is undertaken during this phase with Federal and Provincial government departments, the judiciary, the Bar and other groups and individuals.

Phase II (governmental consideration) involves formal examination of the recommendations by the appropriate Federal departments (principally the Department of Justice and the Ministry of the Solicitor-General), in terms not only of legal implications of these recommendations but also in terms of overall Federal policy and Federal-Provincial considerations. The federal government also formally consults provincial governments and other groups during this phase. As a result of this process of examination and consultation, Cabinet is approached with recommendations regarding legislative and/or administrative action. In order to expedite the Review, provision is made for incremental implementation as work is completed on discrete areas of the law, as opposed to implementation only when all aspects of the Review have been completed.

Phase III (implementation) consists of Parliamentary consideration of legislative proposals or administrative changes requiring budgetary allocation, and executive implementation of changes. Parliamentary consideration carries the possibility of further public consultation before Committees, when appropriate.

The Criminal Law In Canadian Society

15. In approving the Criminal Law Review, Cabinet instructed the Minister of Justice to submit a statement of principles and objectives which would serve to give overall guidance to the Review process, as it moves to consider the myriad of more specific issues that must be addressed in the context of the individual projects.

16. The Criminal Law in Canadian Society was prepared in response to that decision, and is aimed at accomplishing three major goals:

- (a) to give Canadians a summary outline of the context in which criminal law policy should be viewed;
- (b) to articulate a statement of the appropriate scope, purpose and principles of criminal law, on the basis of a discussion of its basic nature and philosophical underpinnings; and
- (c) to give an indication of the general implications of endorsing the statement of scope, purpose and principles, in order to provide guidance for the more specific decisions that must be taken as the Review process evolves.

17. In essence, the general theme of the document can be seen as an endorsement of the fundamental approach to criminal law adopted by the Law Reform Commission and the Canadian Committee on Corrections (Ouimet Committee). This approach calls for restraint to be employed in the use of criminal law and the criminal justice system, on the basis of a conception of the criminal law as the ultimate point along the spectrum of society's informal and formal methods of dealing with conduct.

18. Issued at the outset of the complex Review process, The Criminal Law in Canadian Society is intended to focus discussion and debate by offering a framework of general principles to which reference can be made.

19. Annex A is a five page Executive Summary of the document. More information about the review may be obtained from :

Co-ordinator,
Criminal Law Review,
Department of Justice,
Kent and Wellington Streets,
Ottawa
CANADA K1A 0H8

ANNEX A

THE CRIMINAL LAW IN CANADIAN SOCIETY

Executive Summary

Part I outlines the background of the Criminal Law Review and identifies the aims of this paper, which are to :

1. Provide Canadians with a summary outline of the context in which criminal law policy should be viewed;
2. Articulate a statement of the appropriate scope, purpose and principles of criminal law, on the basis of a discussion of its basic nature and philosophical underpinnings; and
3. Give an indication of the general implications of endorsing the statement of scope, purpose and principles, in order to provide guidance for the more specific decisions that must be taken as the Review process evolves.

Part II analytically discusses crime trends, various explanations offered for the phenomenon of crime, and the policy response made to crime by governments over the past several decades.

The Canadian experience is seen as similar to that of most western democracies, with respect to :

- . the vastly expanded scope of "criminal law", taken in its broad sense, that has accompanied growth in public sector involvement in the economic and social spheres;
- . the large growth in crime, especially in the last two decades, as the post-war baby boom passed through adolescence into early adulthood;

- the dedication of increasingly large amounts of public sector resources to criminal justice system activities, especially police;
- the existence of conflicting pressures to further expand resources to offer protection on the one hand, and to tighten up or re-allocate resources in view of financial constraints and doubts about the efficacy of traditional justice system activities on the other hand;
- the trend to rely much less on imprisonment as the primary sanction for many forms of non-violent property crimes, while maintaining or increasing the severity of sentences for offenders involved in crimes of violence;
- the propensity of the Canadian justice system to respond to crime by a greater overall use of imprisonment compared to the justice systems of many similar countries; and
- the growing recognition of the interrelatedness of the criminal law and the various components that constitute the criminal justice system, combined with continued or increased sensitivity to issues of intergovernmental jurisdiction .

Many of these factors will continue to influence the general shape of future events.

Part III identifies seven major concerns that encompass the wide range of specific criticisms, problems and complaints with respect to criminal law and the criminal justice system. These concerns involve :

1. The effectiveness of the criminal law in combatting crime and correcting offenders;
2. Enhancing the effectiveness of preventive measures and alternative measures less coercive and intrusive than the criminal law;
3. The proper role of the victim in the criminal law, and the victim's needs and treatment in the criminal justice system;
4. The balance between powers granted to criminal justice agents and the rights and liberties of individuals;
5. Accountability in the exercise of discretion and in the use of public resources to achieve objectives;
6. Sentencing and post-sentencing processes; and
7. The proper scope of the criminal law, the proper purpose of the criminal law, and the distinctions that should be made between the criminal law and other types of law or social measures.

Part IV addresses the underlying question of the proper scope, purpose and objectives of the criminal law, by distinguishing four subsidiary issues:

1. With respect to the purpose of the criminal law, the paper concludes that:
 - the criminal law and the criminal justice system must pursue two major sets of purposes - "justice" and "security";
 - criminal sanctions, whether justified in terms of utilitarian or retributive aims, are primarily punitive in nature, and are understood as such both by society and by those on whom they are imposed;
 - acceptance of retributive justifications for punishment implies neither rejection of utilitarian justifications for punishment, nor the acceptance of harsh, cruel or vindictive forms or levels of punishment. Indeed, the retributive approach acts as a brake, in setting a maximum permissible limit on punishment that might otherwise be subject to no such limit in its pursuit of various utilitarian goals such as deterrence, incapacitation, or even rehabilitation. This distinguishes the concept of retribution from that of vengeance; and

- . the necessity of pursuing these twin, and sometimes-conflicting, purposes requires an approach to be developed for defining the proper point of balance.
2. With respect to the proper scope of criminal law, the paper concludes that:
- . it makes sense to distinguish between the criminal law and other forms of social control;
 - . the major criterion for determining what conduct merits response from the criminal law is whether the conduct causes or threatens serious harm to individuals or society; and
 - . any such "criteria" are in reality only guidelines, because their necessarily general level of abstraction always leaves room for interpretation, and because the judgment of Parliament on what conduct is to be treated as criminal cannot be bound by anything other than constitutional limits.
3. With respect to the concepts of responsibility and blame, the paper concludes that:
- . it is vital to retain a standard of responsibility and fault in the criminal law because of the impact of the criminal process and criminal sanctions.
 - . it is important to define clearly the standard of responsibility required by each criminal offence; and
 - . it is not desirable to confine the criminal law to acts committed by individuals against other individuals; rather, it is advisable to provide for the liability of organizations, and individuals acting within organizations, where serious harm to an individual or to the general good is caused or threatened.
4. With respect to the limits on the powers and sanctions of criminal law, the paper concludes that:
- . the principles of justice, necessity and economy should be considered in determining the means that may legitimately be employed by the criminal law and the criminal justice system to effect its ends;
 - . justice may require the criminal law to respond to some conduct -anything less would be inappropriate;
 - . the substantive and procedural limiting principles well known to criminal law act as restraints on the extent to which the law and the system may legitimately pursue the "security" objectives;
 - . it is unjust to go beyond the minimum intervention necessary for an adequate and appropriate response to be made to criminal conduct -both from a utilitarian and a retributive perspective; and
 - . the tension that results between the justice and security objectives requires the criminal law to strike a delicate balance.

In summary, the criminal law has the positive objectives of contributing to the promotion of a just, peaceful and safe society: "justice" and "security" objectives. Its role in pursuing the "security" objectives is limited by application of the principles of justice, necessity and economy - principles which reflect the concept of criminal law as society's ultimate recourse along the spectrum of informal and formal means for influencing and responding to conduct. These principles restrict the appropriate scope of the criminal law to conduct which is culpable, seriously harmful, and generally conceived of as deserving of punishment. They restrict the appropriate form and amount of powers and sanctions by virtue of well-recognized legal rights, largely of a procedural nature; and by the presumption against any intrusion into individual rights and freedoms, unless a burden of proof can be discharged by the state which demonstrates on reasonable factual grounds that such intrusion is necessary. Furthermore, the intrusion must not exceed the minimum necessary and adequate in the circumstances.

Statement of Purpose and Principles

Recognizing that :

In the Charter of Rights and Freedoms, Canada has guaranteed certain rights and freedoms consonant with the rule of law and with principles of justice fundamental to a free and democratic society;

Canada has, in addition, undertaken international obligations to maintain certain standards with respect to its criminal justice system;

The criminal law is necessary for the protection of the public and the establishment and maintenance of social order;

The criminal law potentially involves many of the most serious forms of interference by the state with individual rights and freedoms; and

Criminal law policy should be based on a clear appreciation of the fundamental purpose and principles for the criminal law;

It is appropriate to set forth a statement of purpose and principles for the criminal law in Canada.

Purpose of the Criminal Law

The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

Principles to be Applied in Achieving this Purpose

The purpose of the criminal law should be achieved through means consonant with the rights set forth in the Canadian Charter of Rights and Freedoms, and in accordance with the following principles:

- (a) the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose;
- (b) the criminal law should clearly and accessibly set forth:
 - (i) the nature of conduct declared criminal;
 - (ii) the responsibility required to be proven for a finding of criminal liability;
- (c) the criminal law should also clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process;
- (d) unless otherwise provided by Parliament, the burden of proving every material element of a crime should be on the prosecution, which burden should not be discharged by anything less than proof beyond a reasonable doubt;
- (e) the criminal law should provide and clearly define powers necessary to facilitate the conduct of criminal investigations and the arrest and detention of offenders, without unreasonably or arbitrarily interfering with individual rights and freedoms;
- (f) the criminal law should provide sanctions for criminal conduct that are related to the gravity of the offence and the degree of responsibility of the offender, and that reflect the need for protection of the public against further offences by the offender and for adequate deterrence against similar offences by others;
- (g) wherever possible and appropriate, the criminal law and the criminal justice system should also promote and provide for :
 - (i) opportunities for the reconciliation of the victim, community, and offender;
 - (ii) redress or recompense for the harm done to the victim of the offence;
 - (iii) opportunities aimed at the personal reformation of the offender and his reintegration into the community;

- (h) persons found guilty of similar offences should receive similar sentences where the relevant circumstances are similar;
- (i) in awarding sentences, preference should be given to the least restrictive alternative adequate and appropriate in the circumstances;
- (j) in order to ensure equality of treatment and accountability, discretion at critical points of the criminal justice process should be governed by appropriate controls;
- (k) any person alleging illegal or improper treatment by an official of the criminal justice system should have ready access to a fair investigative and remedial procedure;
- (l) wherever possible and appropriate, opportunities should be provided for lay participation in the criminal justice process and the determination of community interests.

Part V explains some of the implications of the proposed statement of objectives and principles, taking each of the elements of the statement in turn. The specific recommendation of the Law Reform Commission of Canada that a clear distinction be drawn between "real" crimes and other offences is endorsed in principle in the policy statement. The need is identified, in this context, to direct attention to a number of issues not explicitly addressed by the Law Reform Commission, in order to achieve the most effective and appropriate distinction in light of concerns about practical matters of administration, enforcement, and statutory location. Since approximately 300 Federal statutes create offences, only a small proportion of which would be seen as "real" crimes, the implementation of this recommendation will have to be undertaken on an incremental and long-term basis, primarily through consideration by individual departments of the particular statutes they administer.

Part VI summarises and concludes the paper by reiterating the importance of employing the concept of restraint in addressing the specific criminal law issues to be addressed over the next several years by the Criminal Law Review. The ability to conclude the overall process with a criminal law that is credible, effective and reflective of the interests and values of Canadians requires the understanding and support of the public at large. For this reason, comment and reaction to the concepts put forward in this paper is invited.

**EMERGING PROBLEMS IN THE FIELD OF COPYRIGHT,
ESPECIALLY WITH RESPECT TO PIRACY**

Memorandum by the Commonwealth Secretariat
and a paper by Mr. DENIS DE FREITAS, OBE, MA
a Consultant on intellectual property and
Chairman of the British Copyright Council

In recent years the laws of copyright in Commonwealth countries, as in others, have come under increasing tension. The explosion in new technology, and the remarkable reduction in the costs of reproduction, appear to many to have rendered existing legal protection meaningless.

2. Arising from concern expressed to us by a number of Law Ministers, the Commonwealth Secretariat invited Mr. Denis de Freitas, a distinguished lawyer from the Caribbean who has practised in the UK specialising in intellectual property matters and who is currently Chairman of the British Copyright Council, to prepare a discussion paper on aspects of the problem of contemporary concern. His paper is annexed hereto.

**EMERGING PROBLEMS IN THE FIELD OF COPYRIGHT,
ESPECIALLY WITH RESPECT TO PIRACY**

A paper prepared by Mr. DENIS DE FREITAS, OBE, MA,
a Consultant on intellectual property and Chairman
of the British Copyright Council

I. Introductory

Life in this century has been transformed by technology, and perhaps nowhere has the change been more spectacular than in the field of communication. The principal concern of copyright is with communication. The copyright system has been devised and developed over the last century or more to encourage the creation of culture, the dissemination of information and ideas, and thereby to enrich people's lives by opening their eyes and minds to wider and more diversified views of the world and by giving them a greater understanding of themselves and each other.

2. The copyright system pursues this purpose by giving those who create cultural works rights of control over the use to which the public may put those works, in effect over the communication of such works to the public by one means or another; and the first point to be made is that the ambit of this control has evolved to meet new forms of use as they have appeared. In the 18th Century when the first copyright statute was enacted - the Statute of Anne 1709 - the communication to the public on any significant scale took place solely through the printing and publishing of literary works, and copyright control was correspondingly concerned with the right to make and distribute copies. By the end of the 19th Century copyright laws had been amended to give copyright owners control over other forms of use, such as public performance. By the first decade of the 20th Century the first glimpses of technology were beginning to appear and primitive applications of Baird's scientific discoveries were being made; but the copyright laws of the turn of the century knew nothing, and said nothing, about broadcasting or about films - Hollywood was merely a foggy area not far from Los Angeles - and the art of recording sound was in its early scratchy state of development; electronic computers were undreamt of.

3. Today we are surrounded by technological marvels - radio and television broadcasting (terrestrial and by satellite), cable distribution systems, audio and video recording, reprography in all its forms, and computers - and the skills to link these technologies into vast multi-facility networks.

4. Practically every Commonwealth country or territory has a law of copyright; in some cases it is still the United Kingdom Copyright Act 1911 which applied directly, upon enactment, to all Her Majesty's Dominions; an example of this is Singapore. In others, the current United Kingdom law, the Copyright Act 1956, has been expressly extended to the Country; an example of this is Guyana; but in an increasing number of Commonwealth countries, and certainly in the majority of them, the current law relating to copyright has been enacted, usually after independence, by the national legislature. Examples of these are Australia (Copyright Act 1968), India (Copyright Act 1957), Nigeria (Copyright Decree 1970), and the most recent, Barbados (Copyright Act 1982).

5. On the international plane, starting in 1886 when the Berne Union was first established, an international copyright community has evolved through membership of either the Berne Union or the Universal Copyright Convention, both of which are multilateral copyright treaties with two principal objectives -

- (a) to stipulate minimum standards of copyright protection which the national laws of member States must meet; and
- (b) to require each member State to protect the works from all other member States to the same extent as its own national works are protected.

Appendix I to this paper contains two lists published by the World Intellectual Property Organisation (WIPO) in Geneva, showing the membership of both the Berne Convention and

the Universal Copyright Convention as at 1st January 1982. It will be seen that although most Commonwealth countries belong to one or other of the two Conventions - and many belong to both - there are some which appear on neither list, either because of deliberate Government policy against membership, such as Singapore, or because of uncertainty over the membership status of the country following its independence, as is the case with the West Indian countries such as Barbados, Jamaica, Trinidad and Tobago. The Berne Convention has been substantially revised six times, the last being at Paris in 1971/72; the Universal Copyright Convention has been revised once, also in Paris in 1971/72; and as the lists in Appendix I show, not all member States belong to the same text as either Convention.

6. Examination of national laws reveals very considerable diversity in legislative language, drafting style and length (the Australian Copyright Act 1968 runs to 249 sections, the Nigerian Copyright Act 1970 is contained in 20 sections). However, notwithstanding this diversity, all laws will be found to give the author (or his assignee) exclusive rights over certain important forms of use, and, in particular, over the reproduction, the public performance and the communication to the public by either wired or wireless means of communication, of literary, dramatic, musical and artistic works. Examination of the practical implementation of the laws of copyright in the Commonwealth will also reveal a common feature, viz: that, notwithstanding the existence of these basic rights, it is probably true that all existing copyright laws, even the most recent, are to some extent inadequate for dealing with the impact on the copyright system of various forms of technology. The following paragraphs of this paper will examine in more detail the effect on the copyright system of some of these technologies and will identify the problems and discuss solutions.

II. Forms and scale of the contemporary use of copyright works made possible by technology

Reprography

7. Article 9 of the Berne Convention (Paris Act 1971) stipulates that "authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form", and all contemporary copyright laws contain provisions implementing this principle. Reproduction means the making of copies. At the turn of the century copies of copyright protected works were only produced for the public in any significant quantity by the age-old process of printing and publication; duplicating apparatus did exist but it was mostly used in offices for producing copies of commercial documents and was hardly ever used by individuals in their homes; by the middle of the century duplicating equipment was more sophisticated and in greater use, for example, in schools and libraries, so that the second generation of 20th Century legislation began to exclude the making of copies by duplicating processes from the exemption enjoyed by the educational institutions, e.g. section 41(1) of the United Kingdom Copyright Act 1956. Today the scene is totally different; the facilities for making copies of literary, dramatic, musical and artistic works are almost limitless in their possibilities. Photocopying equipment enables facsimile copies indistinguishable from the original to be made instantly and cheaply on equipment which is simplicity itself to operate. Today, no office, school or library is without photocopying equipment and the number of copies churned out by this apparatus around the world is astronomical. In the United Kingdom the Publishers Association has estimated, on the basis of two detailed studies, that the amount of photocopying in schools each year amounts to the equivalent of 1,000,000 books. There can be little doubt that a high proportion of the material copied is protected by copyright. An American study of library copying indicated that 60 per cent of the material copied was protected. In principle the copyright law will give the author or his assignee (usually his publisher) the right to control this form of reproduction of his work; but in practice, there are formidable difficulties in the way of enforcement. Rights of copyright are individual rights subsisting in individual works, so the individual copyright owner has to obtain evidence of the actual infringement of specific works of his - which in practice can be most difficult, if not impossible. Authors and other copyright owners do not wish to deprive the public of the benefits of technology, but simply to ensure that they are not the only sector of the public which does not share in the benefits of the technology which leads to such extensive public use of their works. The copyright system must therefore be adapted to accommodate both the interests of the public and of the author.

8. Reprography equipment does not merely enable private individuals to make copies for their personal use or institutions such as schools, universities, libraries, to make copies for

their various non-commercial activities, but, of course, it enables the entrepreneur to make copies for commercial purposes. He may be a legitimate operator obtaining permission from the copyright owner of the works he reproduces and paying agreed royalties. But he may not, and there are, unfortunately, a large and growing number of such persons within, though by no means confined to, Commonwealth countries. Until the last decade the term "pirate" conjured up visions of Henry Morgan and other swashbuckling buccaneers of the 17th Century Caribbean; but today in the field of intellectual and industrial property there is world-wide piracy of books on a staggering scale. The International Publishers Association has estimated that piracy costs publishers around the world something of the order of £500 million per annum; and it is said that in some countries pirated paper-backs of current best-selling hard-backs are on the market before a legitimate paper-back has been published anywhere. In December 1982 in Port Harcourt, Nigeria in proceedings brought by five publishers (two Nigerian, three foreign) a court ordered the inspection of five containers lying on the docks and consigned it is thought, from Taiwan. When opened two of the containers were filled with pirated books (about 150,000 in number with an estimated value of perhaps N.250,000; the other three containers held contraband goods of various kinds and goods infringing patent rights- all five containers, with contents were seized; legal proceedings are continuing.

Audio and Video Recording

9. The audio or video recording of a work protected by copyright is also an exercise of the reproduction right in the work. Under standard copyright legislation the private recording of a copyright work, unless done for private research or study, is an infringement if the copyright owner's permission is not obtained in advance. Tape recorders have been available to the general public for a number of decades and it is common knowledge that this equipment has been extensively used to make recordings of musical works, either by recording off-air broadcasts of performances or recordings of such works, or by recording from a record or another tape recording. Until recent years, however, copyright owners paid little attention to this form of infringement, extensive though it was. There were, perhaps, two main reasons for this - in retrospect - unfortunate failure to enforce their rights.

10. The first was that the record industry was booming and the composers, music publishers and record companies were content with the annually increasing income generated simply by the manufacture and sale of more and more records and tapes; but with the coming of the world-wide economic recession the record industry, though still basically sound, can no longer afford to overlook a significant source of potential but unrealised income. The other reason was, and is, the difficulty of obtaining the necessary evidence to establish that a specific work protected by copyright had been reproduced in a private house, otherwise than for private research or study.

11. The growing concern of the record industry at the growth in sales of recording equipment and blank tape has led to various surveys being carried out so that today there is a substantial amount of statistical evidence - as opposed to the "common knowledge" guesses of the past - showing the actual extent of the damage to the interests of copyright owners caused by this particular use of recording technology. For example, the report of a taping survey carried out during January 1982 in Australia on behalf of the Australian Record Industry Association concluded from a sample designed to represent 74 per cent of the Australian population, that during a period of 12 months an equivalent of 55.1 million LPs were taped either from records, pre-recorded tapes or from radio and television. At an average retail price of Aust. \$8.00 per LP this represents Aus. \$440.8 million per year. However, not all this necessarily represents lost sales; the survey concluded that from the volume of home taping the loss to the copyright owners and other interests in the music industry was the equivalent of 7 million LPs in 12 months representing Aust.\$56.16 million.

12. In the United Kingdom the British Phonographic Industry commissioned a series of surveys of the volume, nature and effect of home recording of recorded works, principally music. These surveys commenced in 1973, and the two latest - the 4th and 5th - were conducted in November 1980/January 1981 and November 1981/January 1982. They indicate that in 1979 the amount of music recorded by home taping was 158.5 million hours, and in 1981, 179.7 million hours; of these gross totals the surveys indicated that in 1979, 25 per cent, and in 1981, 22 per cent of the music recorded prevented the purchase of a corresponding record or tape from normal retail outlets, and that the total value of those lost sales were £282 million in 1979 and £305 million in 1981.

13. In addition to the erosion of the rights of composers, musicians and record companies resulting from home taping, the losses suffered from record piracy are enormous. It has been estimated that probably half the records currently being sold around the world are either "pirated", "counterfeit", or "bootlegged". These three expressions have come to denote different versions of unauthorised recordings. A "pirated" recording is one made by transferring without permission a legitimate recording intended for retail sales on to a blank tape carrying no label, or a new label which is not simply a copy of the original label. A "counterfeit" recording is made in the same way save that it carried a label imitating the original label, i.e. purporting to be an authorised recording. A "bootlegged" recording is a recording made of the music played at a live concert without the authority of either the performer(s) or the copyright owner(s) of the music. The International Federation of Phonogram and Videogram Producers has been mobilising anti-piracy action internationally, and has collected data on the extent of piracy around the world. The following selection of statistics provided by IFPI show that record piracy (i.e. the unauthorised re-recording for commercial purposes of legitimately produced recordings) is wide-spread throughout the Commonwealth, indeed the world. Thus -

- (a) in the late 1970s reports from Fiji indicated that 90 per cent of the cassette market had been captured by pirated recordings, principally from Singapore;
- (b) reports from India indicate that for 1980, 12.5 million units to the value of Rs. 320 million were sold capturing 90 per cent of the cassette market;
- (c) in Kenya the reports indicate that in 1980, 1.5 million units to the value of Ks. 40 million representing 60 per cent of the cassette market were sold;
- (d) in Malaysia the reports suggest that in 1980, 15 million units to the value of Rps. 45 million representing 60 per cent of the cassette market were sold, but this represents a substantial improvement as in earlier years the whole cassette market was regarded as supplied by pirated products;
- (e) in Nigeria in 1980, 10 per cent of the disc market and 95 per cent of the cassette market was pirated product, of a total value of N.12.5 million;
- (f) Singapore is regarded as the world's most prolific producer of pirated audio-cassettes: the Singapore market is nearly 100 per cent pirated and exports of pirated product are estimated to be in excess of 100 million cassettes per annum.

14. Paragraphs 9 to 13 describe the audio recording scene and the huge scale of piracy in that field, but the dimensions of piracy of sound recordings are likely to be exceeded by similar unauthorised and illegal activity in the video field. The manufacture of video recording equipment began over ten years ago but only in the last few years has it established significant markets; however, since its establishment, the growth in the use of this technology has been phenomenal. Video recording equipment in its various forms and configurations enables three different operations to be carried out -

- (a) By connecting a video recorder to a standard television set, a broadcast programme received by that set may be recorded onto a blank video tape and subsequently projected onto the screen of the television set whenever and as often as desired; moreover, the recorder may be pre-set so as to record automatically a selected programme, or set of programmes, to be transmitted up to two or more weeks ahead.
- (b) By linking two video recorders via a television set, it is possible for an authorised video programme to be played on one video recorder and recorded onto blank tape on the other, thereby producing an unauthorised copy.
- (c) Feature films produced for cinema and/or television exhibition may be recorded onto video tape and unlimited copies may be made from such recordings.

15. In the present state of the technology, video recorders capable of the operations described in (a) and (b) retail at prices starting around £300; and blank video tapes with a playing time of 130 minutes can be bought for £5 or less. This equipment, and the operations they make possible, are therefore within the reach of the general public, and the public is buying this equipment at an ever increasing rate. So far, most of the production of video recording equipment suitable for domestic use has come from Japan and the production has roughly doubled annually since the 1970s, growing from 763,000 units in 1977

to 9.54 million in 1981, and an output of 15 to 15.5 million units has been forecast for 1982. These statistics are a measure of the capacity existing today in private homes for the video recording of programmes of one kind or another. Save in quite exceptional cases, programmes produced for television broadcasting and films (whether produced for cinema and/or television exhibition) will be protected by most national copyright laws; programmes and films are normally protected as entire works separate and distinct from their various components; in addition, the literary (the script), musical (the score), artistic (photographs, illustrations) components, will normally all enjoy separate copyright protection; and the performers (the actors, singers, musicians, dancers) may have rights subsisting either directly under statute, or by virtue of contract. The operation of this equipment, therefore, affects the interests of a wide spectrum of right owners, with a very considerable investment in the original programmes and films. By comparison with sound recording technology, the art of video is a newcomer to the scene and there are not, as yet, reliable statistics which show how the new equipment is being used and the extent to which that use involves the unauthorised recording of material protected by copyright.

16. However, there are some indications. According to a survey recently carried out for the British Video association in 1981 total sales of blank video cassettes amounted to 13.5 million of which 6.8 million were purchased by private consumers, 5.2 million were used by pirates for making unauthorised copies for commercial purposes, and 1.5 million were used for legitimate authorised recordings. As virtually all broadcast programmes and films are protected by national copyright laws there is a clear inference that, in the United Kingdom, 6.8 million blank cassettes must have been used for recording copyright material; when the existing stock of blank tape already in the possession of video recorder owners, and the fact that recordings are probably held and used for a limited period and erased so that the tape can be used for further recordings, are taken into account, the number of individual recordings of copyright material made in private homes must be very considerable.

17. Even more serious than the volume of private recordings mentioned in paragraph 15, is the large and still growing volume of pirate recording also mentioned in paragraph 15 above. In certain countries it would appear that this has become organised crime on the scale of big business like the illicit manufacture, distribution and sale of liquor in the USA during the days of Prohibition. It is more serious, not only because of the financial losses suffered by the various interests involved in the creation, production and distribution of legitimate material and, it must not be forgotten, the considerable loss of revenue to Government resulting from lost income tax, VAT, sales tax and so on, but because of the association of this activity with more sinister anti-social behaviour. There is not much hard evidence, but there are some pointers. Thus, an increasing number of those prosecuted in the United Kingdom for video piracy are found to have criminal records, and the Parliamentary Under Secretary of State for Trade, Mr Ian Sproat, in Parliament on 9 July 1982, in relation to video piracy stated "... one hears stories about the Mafia being involved and how drug rings are funded by sales of violent video. The trade impinges on a nasty area. That is why the Government are determined to take it seriously ...". As to the dimensions of video piracy, the survey carried out for the British Video Association estimated that in 1981 pirated material accounted for 78 per cent of the video market, a statistic which, no doubt, led the President of the Motion Picture Association of America (MPAA) to describe the United Kingdom as the headquarters of world-wide video piracy.

18. The rapidity with which video piracy is developing is well illustrated by some statistics from the Copyright Divisions of the Customs and Excise Service in Hong Kong (responsible for combating piracy of intellectual and industrial property). The first complaint of video piracy was received by the division in 1979; two years later, in 1981 the division investigated 33 cases, seized 4,000 tapes, made 57 arrests and the value of tapes and equipment seized was nearly HK\$1 million.

19. The investment in the production of an audio-visual programme, whether it be a programme intended for television broadcasting or a film intended for cinema and/or television broadcasting, is considerable, and in many countries, for example, India, the film industry is a large and important part of the economic infrastructure of the country. The television set/video recorder population in India may not yet be large but the technology is racing ahead at such a rate that it must only be a matter of time before the use of the equipment becomes wide spread in developing countries; indeed, in an address to a "world-wide forum on the piracy of sound and audio-visual recordings", organised by the World Intellectual Property Organisation in Geneva in March 1981, Mr James Bouras, Vice President of the MPAA, drew attention to the fact that, at that time, the demand for pre-recorded video material was not necessarily most pronounced in either the USA or Europe, whereas, many of the developing countries qualified as "heavy users of pirated video cassettes".

20. The principal purpose of this paper is to discuss the problems of piracy in the field of copyright, which have resulted from technology. However, the impact of technology on the copyright system is not confined to the criminal activities of intellectual property pirates, and an overview of the situation would be incomplete without some focus on two other developments - cable television linked with satellite broadcasting, and computers. The following paragraphs, therefore, briefly describe how these two technologies have affected the copyright system.

Cable Television - satellite broadcasting

21. Cable television began as a community antenna service - in the USA, where most technology begins. In areas where because of mountains or remoteness the reception of television signals on ordinary domestic aerials was of poor quality, groups of householders clubbed together, erected a large central aerial which more effectively collected the signals which were then led by wire to the individual television sets. In origin it was simply a local co-operative operation, entirely non-profit and non-commercial in character. Today in North America and in Europe, cable television has become a high growth industry, serving millions of subscribers. In 1980 it was estimated that in the United States there were 15.5 million households served by cable systems; in Canada there are 4.5 million households connected to cable systems. In Europe the development has been slower, but the systems are currently expanding rapidly; in the United Kingdom there are about 2.5 million households receiving the television programmes of the BBC and independent television via cable. For copyright purposes, cable television carries two different kinds of programme -

- (a) programmes produced by, and originating with, the cable operator;
- (b) programmes produced by or for, and initially transmitted via wireless means, by broadcasting services, which the cable operators receive off-air and then retransmit via their cable networks to their subscribers.

22. Under article 11bis of the Berne Convention and under most national copyright laws, the communication to the public via wired systems of works protected by copyright is an activity requiring permission from the copyright owner. The cable television distribution of programmes in category (a) presents no particular problem; the cable operator must obtain all the necessary permissions from the copyright owners of the material to be included in his programme and there are no particular practical difficulties in the way of his doing this. The problems arise, however, in the case of the cable transmission of programmes in category (b) i.e. programmes originally transmitted by a broadcasting organisation. The main problems are -

- (i) The difficulty of distinguishing a system which is simply an extension of the act of reception (e.g. a community antenna jointly owned by the occupants of a block of flats where the cost of installation and maintenance is shared on an entirely non-profit basis) from the activities of a larger enterprise, which might or might not be conducted for profit, but which is effectively providing a transmission service as opposed to a reception service.
- (ii) The problem of deciding whether the programmes transmitted by the cable operator have been originated by him or not. For example, if, for time zone considerations, a cable company records programmes transmitted by the original broadcaster and then distributes them by its cable systems some hours (or possibly days) later, does the absence of non-simultaneity make the cable company's programme original? Where a cable operator does not distribute the original broadcast in exactly the format in which it was transmitted by the broadcaster, for example, where advertisements are deleted or are replaced with different advertisements more suitable to the new market, is the transmission of the programme element now either unaccompanied by advertisement or accompanied by different advertisement, a new original programme? Suppose the programmes distributed by a cable company on one of its channels consists of a selection of programmes transmitted by several different broadcasting services, is this mix of programmes to be regarded in its entirety as an original programme?

23. Much discussion has taken place at national and international levels on these and other related questions. The general view is that the particular questions mentioned in subparagraph (ii) are to be answered in the affirmative. But whether the programmes

distributed by cable operators are to be regarded as original or simply as retransmissions of programmes originally transmitted by a broadcasting service, there is also general agreement that permission must be obtained by the cable operator from the copyright owners of all material in the programmes transmitted over the cable system. In the case of a simultaneous transmission of broadcast programmes this presents a real practical problem; the cable operator receives from the broadcasting service a complete package so that there is no possibility for him to negotiate with individual right owners or, where some refuse to grant permission on acceptable terms, to find alternative material; nor, indeed, and this is the overriding consideration, is there any time for negotiation between cable operator and right owner in advance of the cable transmission. No generally accepted solution to this problem has yet been devised; but there is almost universal agreement that there must be some system of blanket licensing; the divergence of opinion lies in whether such a licensing system should be imposed by statute (as in the USA and Austria, and currently under consideration in some Scandinavian countries), or be left to the private right owners to establish and operate (as strenuously favoured by Francophone countries); the problem in the latter case being the fact that in many countries (certainly all Commonwealth countries) there are not as yet collective agencies representing the whole range of copyright interests.

24. In countries such as Canada, Belgium, Austria, which adjoin larger countries whose language is the same as their own with well-established and extensive broadcasting services, cable systems have in recent years been more and more carrying the programmes broadcast by the neighbouring broadcasting services which, on a spill-over basis, are receivable in those countries. However, with the development of satellite broadcasting, the availability in one country of programmes broadcast in another and transmitted via satellites, will be increased manifold and the cable television systems of the future will undoubtedly be able to carry a very large proportion of programmes originally transmitted by foreign broadcasting services. The extent to which this will be permitted will depend, not simply on arrangements for clearing the rights of copyright, but on the policies of the governments in the receiving countries regarding the protection of their national cultures and the extent to which they impose controls or restrictions on the distribution of foreign programming in their countries - but these are considerations outside the scope of this paper.

Computers

25. Computer based technology has become so sophisticated and far-reaching that the term "computer" can mean any one of a myriad different kinds of equipment. Space would not permit, and the scope of this paper not justify, an examination of the different kinds of "computers". For this discussion the term is simply used to describe equipment which is able to store and process vast amounts of data with facilities for retrieval in a variety of forms. In relation to the copyright system, computers pose two different kinds of problem -

- (i) Whether the storage in, processing by, and retrieval from, a computer of a work protected by copyright, is an act which is or should be under the control of the copyright owner of that work.
- (ii) Whether computer software, i.e. the programmes which are needed to operate computers are themselves protected by copyright.

26. Like the problems arising from reprography, cable television, audio and video recordings (and piracy), the problems posed by the computer technology have also been extensively examined at national and international forums. As to the problem - or family of problems - covered by subparagraph (i) above, there is general agreement that, in principle, the storage in the computer of a copyright work, for example, a textbook or a directory of trade or scientific information, amounts to a "reproduction" of the work for the purposes of the Berne Convention and most national copyright laws; similarly, the retrieval of a work held in a computer database by presenting it on a television screen or in a material form, such as print-out, would also be within the convention rights of "communication to the public" or, as in the case of a print-out, "reproduction". Inevitably, however, a number of specific questions will arise which will need careful consideration, for example -

- (a) The distinction between the storage of bibliographic data about a work (name of author, title, publisher, subject, etc.) which would not require the copyright owner's permission, and the storage of a digest of the contents of a work, which would require permission.

- (b) When a copyright work containing statistical data has been stored in a computer, there may be problems over the right to update the statistics and over the question of ownership of the rights in the updated work.
- (c) With multi-national computer data-base systems, (such as Euronet) the "input" of copyright material may take place in one country and the "out-put" in another. Under the Euronet system a library in the United Kingdom may hold a reference book in its data-base, to which a user in Germany may have access, so that the contents of the work may be displayed on a screen in Germany, or a print-out may even be obtained. This will call for a sophisticated system for monitoring use, and calculating collecting and distributing payment for such use.

27. The question in paragraph 25 (ii) above is equally important. There is no doubt that the writing of a computer programme requires considerable skill and many argue that it involves as much imagination and creativity as composing a symphony. Moreover, in financial terms large sums have already been spent on the writing of programmes; and this investment will undoubtedly continue on an increasing scale. There is general agreement that the interests of those who have created and invested in computer software deserve protection against unauthorised use. So far, however, there has been no final decision, at international level, as to whether this protection should be provided under the copyright system, under patent law, or by some new international convention and new national legislation. In the USA computer programmes have already been registered as works entitled to copyright protection; and in the United Kingdom, opinion, in legal and official circles, is that computer programmes are entitled to protection under the Copyright Act 1956 as a form of "literary work"; and when that Act is replaced by new legislation, currently under consideration by the Government, this will probably be put beyond doubt by some new specific provision.

28. In deciding whether computer software should be protected under the copyright system there is one basic consideration which should be born in mind. Copyright does not protect ideas - an author who writes a cookery book, or an engineering manual with instructions on how to construct a bridge, can invoke his copyright to prevent others copying his books, but not from using his recipes to produce a meal nor his instructions to build a bridge. Computer software is, in essence, a set of instructions for using a computer to produce a desired result, and the protection sought by the software producer is against the unauthorised use of his instructions - a form of protection somewhat alien to the fundamental principles of copyright.

29. It has been suggested that for countries which do not as yet have a developed infrastructure concerned with computerisation and the protection of computer software, there is little point in protecting computer programmes. This is an understandable consideration, but is likely to be short-sighted. A developing country seeking to raise the level of its economic activities and generally improve the lot of its people, must surely need to make use of the technologies being developed and utilised in other countries; and it may find a natural reluctance amongst countries where computer software is produced to make programmes available if there is no, or inadequate, protection in the importing country.

III. Measures needed to adapt the copyright system to a world of technology

30. The first conclusion which emerges from the foregoing survey is that if, in today's world of technology, the copyright system is to continue to serve effectively the purpose for which it was designed, then both its statutory provisions and its practical methods of administration must be adapted - in many cases, substantially adapted. The second conclusion is that Government action is urgently needed to bring about directly, or encourage, the various adaptation that are essential if respect for private rights and the protection of the public interest in maintaining the rule of law, are to be restored and safeguarded.

31. Traditionally, although most copyright laws have always provided criminal penalties for various forms of infringement, these have seldom been invoked and copyright owners have enforced their rights, in the main, by civil litigation. The scale of unauthorised use and deliberate piracy today is such that it is no longer either practicable or appropriate for copyright legislation to be enforced solely by civil means; it is no longer simply a matter

for private individuals to assert their private rights; the dimensions of disregard for legal rights are such that respect for law and order in an important sector of human society is seriously undermined; and it has clearly become the duty of the State to take steps to combat this serious public mischief - not to the exclusion of action by the interests affected but in collaboration with those interests.

The measures needed are a combination of action of various kinds.

Public condemnation of piracy by Governments	(i) First and foremost, there must be a public commitment by Governments to the task of eradicating piracy; the public must be made aware that Governments regard such activity as a form of theft, and as such thoroughly anti-social and contrary to the public interest, and not merely as a matter affecting the private rights of individuals.
Copyright laws and amendments	(ii) Secondly, wherever necessary, Governments must, as a matter of urgency, amend national copyright laws to make them more effective; the amendments needed will vary from country to country but should cover the following -

Statutory measures

Penalties must be increased	(a) Criminal penalties for infringing acts must be increased so as to make them effectively deterrent; fines which are no more than a minute fraction of the turnover which a pirate can achieve in a day's work, are clearly useless. The United States Congress has just amended the US Copyright Act 1976 by increasing the penalties for unauthorised copying to imprisonment for five years and fines of US\$250,000 for each offence.

The copyright law of some countries contain no penal provisions whatever; this is the case, for example, in Nigeria. It is difficult to see how the copyright system can be effectively enforced if the law enforcement agencies of a country are not able to act; quite apart from the encouragement to pirates, which the absence of penal sanctions must present.

New offences	(b) New offences need to be created to deal with new forms of injurious activities. Under existing copyright laws it is usually an offence for a person to be in the possession of a plate which he knows is to be used for making infringing copies of a work protected by copyright (Australia 1968 Act s.132(3); India 1957 Act 3.65; UK Act 1956 s(21)(3)). Such provisions are directed at the person who actually makes the infringing copies, but not at those who are directly involved in the distribution of those copies. There is no reason why such persons should not also be regarded as full participants in the piratical activity. The UK Act was amended in 1982 to make it an offence for persons to be in possession of articles known to be infringing copies of sound recordings or cinematograph films. Other countries might consider a similar amendment.

These provisions give rise to another consideration. Under existing legislation the offences are only committed if the defendant knows that the plates are to be used for making infringing copies, or that the copies are infringing copies; which means that the onus of proving such knowledge is on the prosecution. Such proof may sometimes be difficult and although it is a general principle that persons should not be deemed to commit offences without guilty knowledge, there are exceptions to this principle. The Government of Hong Kong considered that piracy of intellectual property was such a special case, because the Hong Kong Copyright Ordinance 1973 makes it an offence for a person to have in his possession for trade or business an infringing copy of a work or a plate used for making infringing copies unless he proves to the court that he did not know and had no reason to believe that the copy was an infringement or that the plate was to be used for such purposes. (See Appendix II - s.6)

Control over
importation
required

It is worthwhile noting, perhaps, that in some Commonwealth countries there does not appear to be any control over the importation of what might be loosely described as "infringing copies". Copies of an Indian literary work published in India might be made in Taiwan, and imported into India, but as Indian works are not protected in Taiwan the making of the copies there does not amount to infringement. However, s.53 of the Indian Copyright Act 1957 empowers the Registrar of Copyrights to prohibit the importation into India of copies of a work which, if the copies had been made in India, would have been infringements. Provisions similar in effect are to be found in other Commonwealth laws (e.g. Australia 1968 Act s.102; UK 1956 Act s.5(2)). In countries where copyright laws do not contain such provisions, copyright owners appear to be defenceless against the importation of copies of their works made, without their authority, in countries which do not protect their works.

New rules
of evidence

- (c) New rules of evidence need to be introduced. Copyright litigation, in both criminal and civil proceedings, is notoriously "accident-risk", especially in countries where, because of the specialist nature of this branch of law, the judicial and the legal profession have, naturally, little experience of it. Although copyright is a national right subsisting under and by virtue of national law, it is nevertheless part of an international network so that in any given country the owners of the totality of rights subsisting under the copyright law of that country will be the authors, composers, artists, record and film producers, and their assignees from the majority of the countries of the world. An unscrupulous defendant - which is what a pirate will always be - can defend an infringement action by putting in issue questions as to the subsistence of copyright and ownership of rights which can present the prosecution or the plaintiff with formidable practical problems of proof. In almost all cases, such defences are totally meritless, and the administration of justice is clearly defective if they succeed.

Statutory
presumptions

Some copyright laws do contain statutory presumptions which may be invoked in infringement proceedings. These presumptions are usually of two kinds -

- (i) A presumption that copyright subsists in the work or other subject matter to which the proceedings relate, if the defendant does not put the question in issue;
- (ii) Presumptions as to the authorship, the circumstances in which a work was made, the name of the publisher and the date and country of publication, the name of the maker of a sound recording or producer of a film, unless the contrary is proved.

(Australia 1968 Act ss.126-131; UK Act s.20)

These are very helpful provisions; but by no means all copyright laws contain them and a country whose copyright laws do not make provision for such presumptions should certainly consider carefully whether they ought not to be introduced -for example Barbados, India, Nigeria, to mention just a few.

But even where presumptions of the kind described above do exist consideration might be given to amending the presumption which relates to the subsistence of copyright. If this question is put in issue by a defendant, and the work is a foreign one and created many years previously, it can be extremely difficult - and expensive - for the plaintiff to produce strict proof of the facts needed to establish the subsistence of copyright, i.e. the nationality or residence of the author at the time when the work was created, and proof that it was his original work and not copies from someone else's. In practice subsistence of copyright is seldom a genuine issue in cases involving piracy, and there would be little danger of injustice if this presumption was placed

on the same footing as those in sub-paragraph (ii) above, i.e. a presumption to be rebutted by evidence to the contrary.

Registers -
certificates
as prima
facie proof

Consideration might also be given to the establishment of registers for certain categories of copyright protected works and the attachment of evidentiary status to certificates issuing from such registries. Under the Berne Convention copyright protection may not be conditional upon compliance with formalities, such as registration (Article 5(2)); so such registration would need to be optional. It would also be important, to weigh carefully the cost of administering such a registry. The Indian Copyright Act 1957 makes provision for a registration system (ss.44-49), but no information as to how these provisions have worked in practice was available when this paper was prepared.

Affidavit
evidence

Express provision for the acceptance by courts of affidavit evidence as to the subsistence of copyright, ownership and whether or not exhibited works are true copies of an original should also be considered. The provisions in section 9 of the Copyright Ordinance 1973 of Hong Kong is an example of such a provision, which has worked very effectively in practice (see Appendix II).

Powers of
entry and
seizure

- (d) Powers to enter premises and seize evidence of infringement, and the equipment used for producing infringing copies, are indispensable if piracy is to be effectively combatted. It is also essential that such powers may be exercised swiftly and without advance warning to the pirate/potential defendant; and hence such powers must be available before proceedings are commenced (if necessary), otherwise evidence and stocks will simply disappear. In some jurisdictions, such as the United Kingdom, the High Court has power to issue ex parte orders (known as Anton Piller orders) and injunctions, which have proved to be very effective for this purpose. Application for such an order is usually made in camera and if granted the order directs the defendant/potential defendant to permit inspection of his premises by specified persons who are authorised to make copies of relevant evidence or take custody of relevant material found on the premises; and such orders may also direct the defendant to disclose immediately the names and addresses of all other persons in the chain of distribution of the infringing articles.

Freezing
defendant's
assets

Mareva injunctions may be granted to a plaintiff who has reason to believe that the defendant will move his assets out of the jurisdiction so as to prevent the plaintiff, if successful, from obtaining effective redress. The injunction, which binds third parties, such as banks, has the effect of freezing the defendant's assets until the proceedings are completed. In jurisdictions where these processes are not within the existing armoury of court orders consideration should be given to providing for them by statute.

Anton Piller
orders not
invalidated
by self-
incrimination

In connection with Anton Piller orders consideration should also be given to ensuring, by legislation if necessary, that the rules against self-incrimination do not stultify the efficacy of the orders. In the United Kingdom the Supreme Court Act 1982 contains special provisions for this purpose (see Appendix III).

Necessity for
early trial
of copyright
actions

- (e) Not only is there a need for swift, and effective, interlocutory proceedings, but it is just as important for infringement actions to be determined without delay. An action for damages against a pirate which is only heard 4/5 years after the writ has been served is an almost valueless remedy for the copyright owner; during the interim the pirate's profits will more than pay for any damages awarded in the original action. Governments should therefore examine ways and means of eliminating delay in copyright infringement cases - possibly by

establishing special courts (which might have the advantage of developing a cadre of judicial personnel with a thorough knowledge of this specialised field), or perhaps by some arrangement for copyright cases to leap-frog other actions of less urgency.

Administrative measures

Collaboration
between
Government
agencies and
private
interests

The police and other law enforcement agencies (e.g. Customs and Excise) need to collaborate fully with organisations representing copyright owners. In 1973 Hong Kong was one of the major centres of record piracy in the world. By 1979/80 piracy had been virtually eliminated. This was achieved by Copyright Investigation Unit which subsequently became the a Copyright Division within the Customs and Excise Service with an establishment, headed by an Assistant Superintendent, of forty officers and four civilian support. This Unit/Division worked in close collaboration with the International Federation of Phonographic Industries (IFPI) and with the powers of entry and seizure, and facilities for proof by affidavit, contained in the Copyright Ordinance 1973 (see Appendix II) mounted a determined campaign against the pirates, with virtually complete success. The experience of this effective collaboration in Hong Kong could be studied as a model for similar action in other countries.

Collective
administration

- (g) The rights subsisting under copyright legislation are rights which subsist in individual works and belong to individual right owners and, in the main, have up to now been administered on an individual basis by those right owners. The one exception to this generalisation has been in the field of music where from the beginning of the century composers and music publishers realised that their rights to control the public performances of their works (and later the rights of broadcasting and diffusion via cable systems) could not possibly be administered effectively on an individual work or individual publisher basis. They accordingly banded together and established non-profit organisations, like the Performing Right Society in the United Kingdom (established in 1914) to which they assign their public performance, broadcasting and diffusion rights for administration by the Society. Similar organisations were established in other countries, and they are all linked with each other by reciprocal representation agreements so that in each country the national society administers, in effect, the world's repertoire of public performance, broadcasting and diffusion rights in copyright music; later in the century similar organisations began to be established for the owner of rights in sound recordings, i.e. the record manufacturers. Until very recently, in the literary and other sectors of the copyright field there has been virtually no collective administration, and individual copyright owners, usually through a publisher, have retained control over the administration of the rights in their individual works. Moreover, authors and publishers have been positively reluctant to relinquish such control to collective agencies. Fortunately, more and more authors and publishers now realise that the only practical way to administer their rights when their works are reproduced or performed by means of technology - not simply in their own countries but around the world - is through blanket licensing systems operated by collective agencies. In the larger Commonwealth countries separate agencies exist, or are emerging, for different categories of rights; but in small countries limited resources, both of finance and of trained personnel, dictate that the number of separate collective agencies must be kept to a minimum; and indeed, in some regions where there are a number of very small countries, collective administration agencies may need to be regional, serving the authors of more than one country, e.g. possibly in the West Indies.

Final comments

32. There is little doubt that the biggest single threat to the copyright system comes from the present scale of piracy in all its forms and in all those sectors of the copyright system where it is to be found. As indicated above it can only be contained, much less eradicated, if a range of measures are taken. Moreover, the action needed must be taken in as many countries as possible. Although copyright laws, and the rights subsisting under them are national, technology has made the copyright system international. The authors and other copyright owners in one country need protection from piracy not only in that country but in as many countries as possible. Any Government which accepts the responsibility for protecting copyright owners, and securing respect for the copyright system, must join the international copyright community; and those Commonwealth countries which are not yet members of one or other of the copyright conventions should give urgent consideration to joining. It should not be forgotten that the limitation of national copyright laws to the protection of national works only means simply that those works will have greater difficulty in competing in the local market with foreign - unprotected - works.

33. Finally, although the effective operation of the copyright system on the international plain does not require complete standardisation of legislation throughout the copyright community of nations, nevertheless it is clearly desirable for as much uniformity as possible to exist. The contracts made for the commercial exploitation of copyright works today, because of technology, hardly ever contemplate simply a single national market; they relate normally to world markets. But when the rights with which such contracts deal vary from country to country, because of variations in national laws such contracts become unnecessarily complex. Some arrangement for ensuring as much harmonisation as possible, both in copyright legislation and in contracts, within the Commonwealth might be worth considering.

MEMBERSHIP OF COPYRIGHT CONVENTIONS

BERNE UNION

International Union for the Protection of Literary and Artistic Works

(Berne Union)

founded by the Berne Convention (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971)

Member States as on January 1, 1982

State	Class chosen	Starting date of membership	Latest Act by which State is bound and effective date
Argentina	IV	June 10, 1967	Substance : Administration : Brussels: June 10, 1967 Paris : October 8, 1980
Australia	III	April 14, 1928	Paris : March 1, 1978
Austria	VI	October 1, 1920	Substance : Administration : Brussels: October 14, 1953 Stockholm: August 18, 1973
Bahamas	VII	July 10, 1973	Substance : Administration : Brussels: July 10, 1973 Paris : January 8, 1977
Belgium	III	December 5, 1887	Substance : Administration : Brussels: August 1, 1951 Stockholm: February 12, 1975
Benin	VII	January 3, 1961	Paris : March 12, 1975
Brazil	III	February 9, 1922	Paris : April 20, 1975
Bulgaria	VI	December 5, 1921	Paris : December 4, 1974
Cameroon	VI	September 21, 1964	Paris : October 10, 1974
Canada	III	April 10, 1928	Paris : November 10, 1973 Rome : August 1, 1931 Stockholm : July 7, 1970
Central African Republic	VII	September 3, 1977	Paris : September 3, 1977
Chad	VII	November 25, 1971	Substance : Administration : Brussels : November 25, 1971 Stockholm : November 25, 1971
Chile	VI	June 5, 1970	Paris : July 10, 1975
Congo	VII	May 8, 1962	Paris : December 5, 1975
Costa Rica	VII	June 10, 1978	Paris : June 10, 1978
Cyprus	VI	February 24, 1964	Rome : February 24, 1964
Czechoslovakia	IV	February 22, 1921	Paris : April 11, 1980
Denmark	IV	July 1, 1903	Paris : June 30, 1979
Egypt	VII	June 7, 1977	Paris : June 7, 1977
Fiji	VII	December 1, 1971	Substance : Administration : Brussels : December 1, 1971 Stockholm : March 15, 1972
Finland	IV	April 1, 1928	Substance : Administration : Brussels : January 28, 1963 Stockholm : September 15, 1970
France	I	December 5, 1887	Substance : Administration : Paris : October 10, 1974 Paris : December 15, 1972
Gabon	VII	March 26, 1962	Paris : June 10, 1975
German Democratic Republic	IV	December 5, 1887	Paris : February 18, 1978
Germany, Federal Republic of	I	December 5, 1887	Substance : Administration : Paris : October 10, 1974 Paris : January 22, 1974
Greece	VI	November 9, 1920	Paris : March 8, 1976
Guinea	VII	November 20, 1980	Paris : November 20, 1980
Holy See	VII	September 12, 1935	Paris : April 24, 1975
Hungary	VI	February 14, 1922	Substance : Administration : Paris : October 10, 1974 Paris : December 15, 1972
Iceland	VI	September 7, 1947	Rome : September 7, 1947
India	IV	April 1, 1928	Brussels : October 21, 1958 Paris : January 10, 1975
Ireland	IV	October 5, 1927	Brussels : July 5, 1959 Stockholm : December 20, 1970
Israel	VI	March 24, 1950	Substance : Administration : Brussels : August 1, 1951 Stockholm : January 29 or February 26, 1970
Italy	III	December 5, 1887	Paris : November 14, 1979
Ivory Coast	VI	January 1, 1962	Substance : Administration : Paris : October 10, 1974 Paris : May 4, 1974
Japan	II	July 15, 1899	Paris : April 24, 1975
Lebanon	VI	September 30, 1947	Rome : September 30, 1947
Libya	VI	September 28, 1976	Paris : September 28, 1976
Liechtenstein	VII	July 30, 1931	Substance : Administration : Brussels : August 1, 1951 Stockholm : May 25, 1972
Luxembourg	VII	June 20, 1888	Paris : April 20, 1975
Madagascar	VI	January 1, 1966	Brussels : January 1, 1966
Mali	VII	March 19, 1962	Paris : December 5, 1977
Malta	VII	September 21, 1964	Rome : September 21, 1964 Paris : December 12, 1977
Mauritania	VII	February 6, 1973	Paris : September 21, 1976
Mexico	IV	June 11, 1967	Paris : December 17, 1974
Monaco	VII	May 30, 1889	Paris : November 23, 1974
Morocco	VI	June 16, 1917	Substance : Administration : Brussels : May 22, 1952 Stockholm : August 6, 1971
Netherlands	III	November 1, 1912	Substance : Administration : Brussels : January 7, 1973 Paris : January 10, 1975
New Zealand	V	April 24, 1928	Rome : December 4, 1947

State	Class Chosen	Starting date of membership	Latest Act by which State is bound and effective date	
Niger	VII	May 2, 1962		Paris : May 21, 1975
Norway	IV	April 13, 1896	Substance :	Brussels : January 28, 1963
			Administration :	Paris : June 13, 1974
<u>Pakistan</u>	VI	<u>July 5, 1948</u>	Substance :	Rome : July 5, 1948
			Administration :	<u>Stockholm : January 29 or February 26, 1970</u>
Philippines	VI	August 1, 1951	Substance :	Brussels : August 1, 1951
			Administration :	Paris : July 16, 1980
<u>Poland</u>	VI	<u>January 28, 1920</u>		<u>Rome : November 21, 1935</u>
Portugal	V	March 29, 1911		Paris : January 12, 1979
<u>Romania</u>	VI	<u>January 1, 1927</u>	Substance :	Rome : August 6, 1936
			Administration :	<u>Stockholm : January 29 or February 26, 1970</u>
Senegal	VI	August 25, 1962		Paris : August 12, 1975
South Africa	IV	October 3, 1928	Substance :	Brussels : August 1, 1951
			Administration :	Paris : March 24, 1975
Spain	II	December 5, 1887	Substance :	Paris : October 10, 1974
			Administration :	Paris : February 19, 1974
<u>Sri Lanka</u>	VII	<u>July 20, 1959</u>	Substance :	Rome : July 20, 1959
			Administration :	Paris : September 23, 1978
Suriname	VII	February 23, 1977		Paris : February 23, 1977
Sweden	III	August 1, 1904	Substance :	Paris : October 10, 1974
			Administration :	Paris : September 20, 1973
Switzerland	III	December 5, 1887	Substance :	Brussels : January 2, 1956
			Administration :	Stockholm : May 4, 1970
Thailand	VII	July 17, 1931	Substance :	Berlin : July 17, 1931
			Administration :	Paris : December 29, 1980
Togo	VII	April 30, 1975		Paris : April 30, 1975
Tunisia	VI	December 5, 1887		Paris : August 16, 1975
Turkey	VI	January 1, 1952		Brussels : January 1, 1952
United Kingdom	I	December 5, 1887	Substance :	Brussels : December 15, 1957
			Administration :	Stockholm : January 29 or February 26, 1970
Upper Volta	VII	August 19, 1963		Paris : January 24, 1976
Uruguay	VII	July 10, 1967		Paris : December 28, 1979
Yugoslavia	V	June 17, 1930		Paris : September 2, 1975
Zaire	VI	October 8, 1963		Paris : January 31, 1975
<u>Zimbabwe</u>	VII	<u>April 18, 1980</u>	Substance :	Rome : April 18, 1980
			Administration :	Paris : December 30, 1981

(Total : 73 States)

CONVENTIONS NOT ADMINISTERED BY WIPO

Universal Copyright Convention

State of Ratifications or Accessions as on January 1, 1982

Contracting State	Entry into force		Contracting State	Entry into force	
	Text of 1952	Text of 1971		Text of 1952	Text of 1971
Algeria	August 28, 1973	July 10, 1974	India	January 21, 1958	
Andorra	September 16, 1955		Ireland	January 20, 1959	
Argentina	February 13, 1958		Israel	September 16, 1955	
Australia	May 1, 1969	February 28, 1978	Italy	January 24, 1957	January 25, 1980
Austria	July 2, 1957		Japan	April 28, 1956	October 21, 1977
Bahamas	December 27, 1976	December 27, 1976	Kenya	September 7, 1966	July 10, 1974
Bangladesh	August 5, 1975	August 5, 1975	Laos	September 16, 1955	-
Belgium	August 31, 1960		Lebanon	October 17, 1959	-
Brazil	January 13, 1960	December 11, 1975	Liberia	July 27, 1956	-
Bulgaria	June 7, 1975	June 7, 1975	Liechtenstein	January 22, 1959	
Cameroon	May 1, 1973	July 10, 1974	Luxembourg	October 15, 1955	
Canada	August 10, 1962		Malawi	October 26, 1965	
Chile	September 16, 1955		Malta	November 19, 1968	
Colombia	June 18, 1976	June 18, 1976	Mauritius	March 12, 1968	
Costa Rica	September 16, 1955	March 7, 1980	Mexico	May 12, 1957	October 31, 1975
Cuba	June 18, 1957		Monaco	September 16, 1955	December 13, 1974
Czechoslovakia	January 6, 1960	April 17, 1980	Morocco	May 8, 1972	January 28, 1976
Democratic Kampuchea	September 16, 1955		Netherlands	June 22, 1967	
Denmark	February 9, 1962	July 11, 1979	New Zealand	September 11, 1964	
Ecuador	June 5, 1957		Nicaragua	August 16, 1961	
El Salvador	March 29, 1979	March 29, 1979	Nigeria	February 14, 1962	
Fiji	October 10, 1970		Norway	January 23, 1963	August 7, 1974
Finland	April 16, 1963		Pakistan	September 16, 1955	
France	January 14, 1956	July 10, 1974	Panama	October 17, 1962	September 3, 1980
German Democratic Republic	October 5, 1973	December 10, 1980	Paraguay	March 11, 1962	
Germany Federal Republic of	September 16, 1955	July 10, 1974	Peru	October 16, 1963	
Ghana	August 22, 1962		Philippines	November 19, 1955	March 9, 1977
Greece	August 24, 1963		Poland	March 9, 1977	July 30, 1981
Guatemala	October 28, 1964		Portugal	December 25, 1956	July 10, 1974
Guinea	November 13, 1981	November 13, 1981	Senegal	July 9, 1974	
Haiti	September 16, 1955		Soviet Union	May 27, 1973	
Holy See	October 5, 1955	May 6, 1980	Spain	September 16, 1955	July 10, 1974
Hungary	January 23, 1971	July 10, 1974	Sweden	July 1, 1961	July 10, 1974
Iceland	December 18, 1956		Switzerland	March 30, 1956	
			Tunisia	June 19, 1969	June 10, 1975
			United Kingdom	September 27, 1957	July 10, 1974
			United States of America	September 16, 1955	July 10, 1974
			Venezuela	September 30, 1966	
			Yugoslavia	May 11, 1966	July 10, 1974
			Zambia	June 1, 1965	

HONG KONG : COPYRIGHT ORDINANCE 1973 (No. 5 of 1973)

Offences of possession of infringing copy of a protected work

5. (1) Without prejudice to section 21 of the Act, any person who, at a time when copyright subsists in a work or other subject matter under the Act or this Ordinance, has in his possession for the purposes of trade or business -

- (a) any article that is an infringing copy of such a work or other subject matter ; or
- (b) any plate used or intended to be used for making infringing copies of such a work or other subject matter,

shall, unless he proves to the satisfaction of the court that he did not know and that he had no reason to believe that the article was an infringing copy of such a work or other subject matter or that the plate was used or intended to be used for making an infringing copy of such a work or other subject matter, be guilty of an offence and shall be liable on conviction -

- (i) if it is his first conviction of an offence under this section, to a fine not exceeding five hundred dollars for each article to which the offence relates; and
- (ii) on any second or subsequent conviction of an offence under this section, to such a fine and to imprisonment for twelve months:

Provided that a fine imposed by virtue of this subsection shall not exceed fifty thousand dollars.

(2) The court before which a person is charged with an offence under this section may, whether he is convicted of the offence or not, order that any article in his possession which appears to the court to be an infringing copy of a work or other subject matter in which copyright subsists under the Act or this Ordinance or a plate used or intended to be used for making infringing copies of such a work or other subject matter shall be destroyed or delivered up to the owner of the copyright in question or otherwise dealt with as the court may think fit.

(3) Where an article is seized by a police officer or an authorized officer in connexion with a suspected offence under the Act or this Ordinance a court, on the application of the Attorney General or the Director, may, if it is satisfied that the article is -

- (a) an infringing copy of a work for other subject matter in which copyright subsists under the Act or this Ordinance ; or
- (b) a plate used or intended to be used for making infringing copies of any such work or other subject matter,

order that the article be destroyed or delivered up to the owner of the copyright in question or otherwise dealt with as the court may think fit, notwithstanding that no person has been charged with the suspected offence.

Powers of investigating officers

6. (1) Any police officer not below the rank of Inspector or any authorized officer may -

- (a) (i) subject to section 7, enter and search any premises or place;
- (ii) stop, board and search any vessel (other than a ship of war) or any aircraft (other than a military aircraft);or

(iii) stop and search any vehicle, in which he reasonably suspects that there is an infringing copy of a work or other subject matter in which copyright subsists under the Act or this Ordinance or a plate used or intended to be used for making infringing copies of any such work or other subject matter; and

(b) seize, remove or detain -

(i) any article which appears to him to be an infringing copy of a work or other subject matter in which copyright subsists under the Act or this Ordinance or any plate which appears to him to be intended for use for making infringing copies of any such work or other subject matter; and

(ii) anything which appears to him to be or to contain, or to be likely to be or to contain, evidence of an offence under the Act or this Ordinance.

(2) Any police officer not below the rank of Inspector or any authorized officer may -

(a) break open any outer or inner door of any place which he is empowered or authorized by this Ordinance to enter and search;

(b) forcibly board any vessel, aircraft or vehicle which he is empowered by this Ordinance to stop, board and search;

(c) remove by force any person or thing obstructing him in the exercise of any power conferred on him by this Ordinance;

(d) detain any person found in any place which he is empowered or authorized by this Ordinance to search until such place has been searched;

(e) detain any vessel or aircraft which he is empowered by this Ordinance to stop, board and search, and prevent any person from approaching or boarding such vessel or aircraft until it has been searched;

(f) detain any vehicle which he is empowered by this Ordinance to stop and search until it has been searched.

Restriction
on the entry
and search
of domestic
premises

7. (1) No domestic premises shall be entered and searched by a police officer unless -

(a) a magistrate has issued a warrant under subsection (2);
or

(b) the Director has given an authorization under subsection (3).

(2) A magistrate may, if he is satisfied by information on oath that there is reasonable ground for suspecting that there is in any domestic premises any article which may be seized, removed or detained under section 6(1)(b), issue a warrant authorizing a police officer not below the rank of Inspector or an authorized officer to enter and search the premises.

(3) The Director may, if he is satisfied that there is reasonable ground for suspecting -

(a) that there is in any domestic premises any article which may be seized, removed or detained under section 6(1)(b); and

(b) that unless the premises are entered and searched immediately such thing is likely to be removed from the premises,

authorize in writing a police officer not below the rank of Inspector or an authorized officer to enter and search the premises.

(4) A police officer not below the rank of Inspector or an authorized officer authorized under subsection (2) or (3) to enter and search any domestic premises may call upon any police officer or any authorized officer to assist him in entering and searching the premises.

Obstruction of
investigating

- 8 (1) Without prejudice to any other Ordinance, any person who-
- (a) wilfully obstructs a police officer or an authorized officer in the exercise of his powers or the performance of his duties under the Act or this Ordinance;
 - (b) wilfully fails to comply with any requirement properly made to him by any such police officer or authorized officer; or
 - (c) without reasonable excuse, fails to give such police officer or authorized officer any other assistance which he may reasonably require to be given for the purpose of exercising his powers or performing his duties under the Act or this Ordinance,

shall be guilty of an offence and shall be liable on conviction to a fine of five thousand dollars and to imprisonment for three months.

(2) Any person who, when required to give information to a police officer or to an authorized officer in the exercise of his powers or the performance of his duties under the Act or this Ordinance, knowingly gives false or misleading information to any such police officer or authorized officer shall be guilty of an offence and shall be liable on conviction to a fine of five thousand dollars and to imprisonment for three months.

(3) Nothing in this section shall be construed as requiring any person to give any information which may incriminate him.

Affidavit
evidence

9. (1) An affidavit which -
- (a) purports to have been made by or on behalf of the owner of a work or other subject matter in which copyright subsists under the Act; and
 - (b) states that -
 - (i) at a time specified therein copyright subsisted in the work or other subject matter;
 - (ii) the person named therein is the owner of the copyright in the work or other subject matter; and
 - (iii) a copy of the work or other subject matter exhibited to the affidavit is a true copy of the work or other subject matter,

shall, if it complies with subsection (3), be admitted without further proof in any proceedings under the Act or this Ordinance.

(2) The court before whom an affidavit is produced under subsection (1) shall presume, until the contrary is proved -

- (a) that the statements made therein are true; and

- (b) that it was made and authenticated in accordance with subsection (3).
- (3) An affidavit for the purposes of this section shall be -
 - (a) made on oath -
 - (i) before a magistrate or a notary public if it is made at any place within the Commonwealth; or
 - (ii) before a consular officer of Her Majesty's Government in the United Kingdom or a notary public if it is made at any place outside the Commonwealth; and
 - (b) authenticated, so far as relates to the making thereof, by the signature of the magistrate, notary public or consular officer before whom it is made.

Time limit for prosecutions

10. No prosecution for an offence under the Act or this Ordinance shall be commenced after the expiration of three years after the commission of the offence or one year after the discovery thereof, whichever date last occurs.

APPENDIX III

UNITED KINGDOM : SUPREME COURT ACT 1981 (c.54)

Withdrawal of privilege against incrimination of self or spouse in certain proceedings.

72. (1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person, or his or her spouse, to proceedings for a related offence or for the recovery of a related penalty -
- (a) from answering any question put to that person in the first-mentioned proceedings; or
 - (b) from complying with any order made in those proceedings.
- (2) Subsection (1) applies to the following civil proceedings in the High Court, namely -
- (a) proceedings for infringement of rights pertaining to any intellectual property or for passing off;
 - (b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off; and
 - (c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off.
- (3) Subject to subsection (4), no statement or admission made by a person -
- (a) in answering a question put to him in any proceedings to which subsection (1) applies; or
 - (b) in complying with any order made in any such proceedings,
- shall, in proceedings for any related offence or for the recovery of any related penalty, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the spouse of that person.
- (4) Nothing in subsection (3) shall render any statement or admission made by a person as there mentioned inadmissible in evidence

against that person in proceedings for perjury or contempt of court.

(5) In this section -

"intellectual property" means any patent, trade mark, copyright, registered design, technical or commercial information or other intellectual property;

"related offence", in relation to any proceedings to which subsection (1) applies, means -

(a) in the case of proceedings within subsection (2)(a) or (b) -

(i) any offence committed by or in the course of the infringement or passing off to which those proceedings relate; or

(ii) any offence not within sub-paragraph (i) committed in connection with that infringement or passing off, being an offence involving fraud or dishonesty;

(b) in the case of proceedings within subsection (2)(c), any offence revealed by the facts on which the plaintiff relies in those proceedings;

"related penalty", in relation to any proceedings to which subsection (1) applies means -

(a) in the case of the proceedings within subsection (2)(a) or (b), any penalty incurred in respect of anything done or omitted in connection with the infringement or passing off to which those proceedings relate;

(b) in the case of proceedings within subsection (2)(c), any penalty incurred in respect of any act or omission revealed by the facts on which the plaintiff relies in those proceedings.

(6) Any reference in this section to civil proceedings in the High Court of any description includes a reference to proceedings on appeal arising out of civil proceedings in the High Court of that description.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Memorandum by
THE GOVERNMENT OF CANADA

Introduction

This paper is intended to provide a brief description of Canada's new Charter of Rights and Freedoms which came into force on 17 April 1982 and some of Canada's early experience in its application.

The Entrenchment of Rights in a Parliamentary System

2. Canada is a Federal State with a Federal Parliament and ten Provincial legislatures. Within their own spheres of legislative jurisdiction these legislative bodies have been recognised as sovereign in the same sense as the United Kingdom Parliament. In accordance with traditional British constitutional theory and practice, prior to the entrenchment of the Charter civil liberties were primarily protected by the principles of parliamentary government. For their part, the courts recognised that provided the legislation was validly enacted and clearly expressed, they could not protect civil liberties from legislative infringement.

3. The Canadian Charter of Rights and Freedoms is designed to provide constitutional protection for the rights and freedoms set out therein by providing that any legislation that is inconsistent with the Charter is, to the extent of the inconsistency, invalid and of no force or effect. To the extent that this gives the courts the constitutional authority to pass judgment on the substance of legislation in light of constitutionally entrenched rights and freedoms, this is a fundamental change in Canada's Constitution.

Rights and Freedoms Protected by the Charter

4. These include:

"Fundamental Freedoms"

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peace assembly; and
- (d) freedom of association."

"Legal Rights"

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefore;
- (b) to retain and instruct counsel without delay and to be informed of that right;
- (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

11. Any person charged with an offence has the right

- (a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
 - (e) not to be denied reasonable bail without just cause;
 - (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
 - (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations;
 - (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
 - (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.
14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter."

"Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
5. Section 15 does not come into effect until 17 April 1985 in order to provide time for governments to review and amend any possibly inconsistent legislation or practices.
6. Other rights included in the Charter are "Democratic Rights" (e.g. every citizen has the right to vote), "Mobility Rights" (e.g. every citizen has the right to enter, remain in and leave Canada and move about within Canada), "Official Languages" (e.g. the right to use English and French in courts established by Parliament) and "Minority Language Education Rights" (e.g. the right to an education in English or French). The Charter also recognises aboriginal rights, cultural rights and other rights and freedoms.

The Charter and Parliamentary Supremacy

7. The constitutional entrenchment of the rights and freedoms set out in the Charter is reconciled with the concept of parliamentary supremacy in two ways. First, all of these rights and freedoms must be considered in light of section 1 which provides:

"(1) The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

8. In addition, section 33 of the Charter provides that Parliament or a Provisional legislature may expressly declare in an Act that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 (set out above). Unless re-enacted any such declaration ceases to have effect five years after it comes into force or on such earlier date as may be specified in the declaration. Given our parliamentary system of government, including elections at least once every five years as provided by section 4 of the Charter, it is unlikely that any legislature will lightly resort to invoking this provision. However, it preserves the power of the legislature to make the

final determination on fundamental controversial issues involving rights and freedoms in the Charter while ensuring public awareness, debate and accountability.

9. The Charter applies to the Parliament and Government of Canada and to the legislature and government of each Province in respect of all matters within their authority. It is intended to deal with the relationship between the State and the citizen. It is not intended to apply to disputes between private individuals. For example, if a person is unduly subjected to discrimination by a person acting in a private capacity, such as a landlord or employer, his remedy will not be based on the Charter but on the Federal or Provincial human rights legislation which prohibits individuals from engaging in this kind of conduct and provides mechanisms of redress. If a government body were to engage in such conduct then of course the Charter will be applicable.

Remedies

10. The Charter also includes a provision relating to its enforcement:

"24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

11. Subsection 24(2) is intended to be a compromise between the traditional Canadian common law approach and the American constitutional law approach concerning the admissibility of illegally obtained evidence. The Canadian courts have allowed such evidence to be admitted in virtually all cases whereas the American courts have excluded it. Under subsection 24(2) the new test for admissibility of illegally obtained evidence is whether, under all the circumstances, its admission "would bring the administration of justice into disrepute."

Experience With Charter Application

12. Canada's experience has centered on three types of activities resulting from the Charter. One is the Federal and Provincial Governments' own efforts at ensuring implementation of the Charter. This has involved thorough reviews of Federal and Provincial legislation and practices to ensure they are consistent with the Charter. A second and related activity has been educational efforts aimed at the general public and also at lawyers and the judiciary. The third type of activity centres on the litigation to result from the Charter.

Litigation Resulting From The Charter

13. In the first few weeks following proclamation the Charter was not frequently invoked in litigation, no doubt as a result of the widely held view that its provisions could not be applied retrospectively to events which took place prior to 17 April 1982. As well there was perhaps an understandable hesitancy on the part of counsel to make use of a constitutional instrument whose full implications were not generally known, and consequently it may have been thought preferable to engage in a study of the Charter's provisions rather than to receive an education in its meaning at the hands of a court. Since those early days, however, a decided momentum has been building and it can now be said that there are literally hundreds of cases in which a Charter argument has been made, including three cases now before the Supreme Court of Canada. For the most part, these arguments have arisen in criminal proceedings at the trial level, but there has been a gradual expansion in the range of cases and there are now many civil actions in progress, covering diverse subject matters, which involve at least some consideration of the Charter's impact upon the rights of the individual. Perhaps the most noteworthy of these are the challenges to Provincial language legislation (Bill 101) in Quebec, based upon the guarantee of minority language education rights, and the attacks on the citizenship requirements for admission to Provincial bars, premised on violations of mobility rights.

Types of Cases Where The Charter Has Been Invoked

14. Although invocation of the Charter is gradually becoming broadly based, an examination of the early experience reveals a concentration of activity in certain areas. As might be

expected, the actions of the police and the validity of statutes governing the criminal law have received the greatest scrutiny, and while the Crown has generally been successful in defending the challenges there have been some notable achievements by the defence. The major areas of interest to date have been:

- (i) The breathalyzer provisions of the Criminal Code. Numerous attacks have been launched based on the view that the obligation to provide a breath sample compels the accused to be a witness against himself and runs contrary to the concept of fundamental justice. A Provincial Court Judge in Ontario had given effect to these contentions while another Provincial Court Judge in British Columbia had reached the opposite conclusion. The Ontario Court of Appeal has upheld the validity of these provisions.
- (ii) Statutes which impose an onus of explanations on an accused have been called into question on many occasions, principally with regard to section 8 of the Narcotic Control Act (which requires an accused who has been proved to have been found in possession of a narcotic to establish that he did not intend to traffic) and the judicial interim release provisions of the Criminal Code (which places the onus on certain accused persons to show cause why they should not be detained in custody). Central to these cases is a consideration of the application of the presumption of innocence, and while the weight of authority so far tends to support the validity of such legislation there have, again, been exceptions which the Crown will be taking to the appellate courts.
- (iii) Arrest situations have given rise to numerous applications for Charter remedies based upon alleged denials of the right of an accused to be informed of his right to counsel and of the reason for his arrest, and to be secure against unreasonable search or seizure. The results in these cases, of course, turn in large measure on the particular facts but it does appear that the admission in evidence of statements made by an accused who has not been informed of his right to counsel will, from the Crown's standpoint, be in some jeopardy.
- (iv) Exclusion of evidence pursuant to section 24(2) of the Charter has been established as one of the most sought after remedies, in a wide variety of circumstances. Alleged violations of several of the guaranteed legal rights, either alone or in combination, in the course of gathering evidence have been put forward as a ground for the submission that the administration of justice would be brought into disrepute by the admission of the evidence obtained, and the courts have been called upon to examine both the conduct of the police and the validity of the statutes under which their powers have been exercised. In at least three cases at the Provincial Court level, evidence has been excluded and, as a result, acquittals have been secured.

Emerging Principles

15. At this early stage it is not possible to say that any point has been definitely settled, but from a review of the decisions of the lower courts there appear to be some discernible trends, although exceptions do exist:

- (i) The Charter will not be applied retroactively to govern events which transpired prior to its proclamation. However, while the factual basis for a proceeding may have crystallised before 17 April, this does not mean that a consideration of the validity of any applicable legislation will necessarily be precluded and thus, for example, cases have arisen where a defence has been predicted not on the facts of the case but rather on the constitutionality of the charging provision.
- (ii) Generally speaking, reverse onus provisions have been upheld by reference to the principles laid down by the Supreme Court of Canada in pre-Charter decisions, the theory being that such provisions do not affect the ultimate burden on the Crown of proving its case beyond a reasonable doubt but instead are directed towards the secondary burden, that of adducing evidence. So long as it is rationally open to an accused to establish certain facts on a balance of probabilities, a legislative provision requiring him to do so will apparently be sustainable under the Charter, although it must again be emphasised that not all courts have readily embraced this view.
- (iii) The test which the courts seem to be leaning towards for the purpose of determining whether the administration of justice would be brought into disrepute by the admission of evidence obtained in violation of Charter rights is whether

the conscience of the community would be shocked by the admission of the evidence. This is substantially the test proposed by Mr. Justice Lamer in concurring reasons in the pre-Charter case of Rothman, and seems to recognise that the purpose underlying the enactment of section 24(2) of the Charter was to strike a reasonable balance between the traditional Canadian rule of almost unlimited admissibility and the American approach of virtual automatic exclusion.

- (iv) Allied with the "conscience of the community" test has been the recognition that the interests of justice do not require the granting of a remedy in every case in which a violation of guaranteed rights, however trivial, has occurred. For the most part, it seems to have been accepted that a substantial infringement of rights must be made out in order to gain access to the remedial provisions, and from that standpoint it might be said that there has been shown to be no basis for the fear expressed in some quarters that the Charter would become a powerful technical weapon in the hands of the guilty. On the other hand, the serious consideration and occasional acceptance accorded to Charter arguments by the courts provides an indication that substantial transgressions will have consequences, and that the rights of the individual against the State will not be lightly ignored.

The Future

16. Since it is a constitutional document, the Charter was deliberately drafted in general terms and, given the rather open-ended nature of some of the guarantees, it may be that the kinds of arguments that will be brought forward will be limited only by the imagination of counsel. Certainly from the volume and content of the Notices of Constitutional Questions that have been served on the Department of Justice to date it can be seen that the horizons are expanding, and in the coming months the courts will be considering challenges in the following areas:

- (i) Legislation dealing with public morality, such as statutes permitting film censorship or prohibiting the importation of immoral or indecent literature.
- (ii) Legislation empowering administrative agencies such as securities commissions and tax investigators to conduct searches and seizures.
- (iii) The provisions of the Criminal Code prescribing confidentiality for documents used to obtain wire-tap authorisations.
- (iv) Minority language education rights in Provinces other than Quebec.
- (v) Restrictions on the political activities of public servants.
- (vi) Statutory minimum terms of imprisonment.
- (vii) Statutes creating absolute liability offences.

17. As well, the entry into effect of the section 15 equality rights in 1985 will open up whole new vistas in a field which has already established itself as a primary source of litigation.

REFORM OF THE LAW OF DOMICILE

Memorandum by the Commonwealth Secretariat
and a paper by PROFESSOR DAVID McCLEAN of
the Faculty of Law, University of Sheffield
Sheffield

Continuing work in the field of private international law, and in response to the invitation so to do made by Law Ministers in Barbados in 1980, Professor David McClean has prepared the annexed paper on reform in the law of domicile.

2. It is not anticipated that Ministers will wish to deal with the paper in detail when they discuss the activities of the Secretariat in the legal field. However, the paper suggests a lack of co-ordination in the piece-meal reform which has begun in the field of domicile. Not only may Ministers consider that this seems undesirable, particularly in a topic already labelled as "conflict of laws", but that it is all the more surprising when it is taking place in an area of the law which would appear to be devoid of policy considerations and to fall clearly within the category of "lawyers law", and so be avoidable. The subject is one, too, in which a degree of harmonisation would appear to be desirable.

3. The paper points to steps taken in a number of jurisdictions on various aspects of the law of domicile (e.g. domicile of origin; domicile of choice; domicile of dependence for married women and for children: and domicile of children whose parents live apart) and discusses the emergence of "habitual residence" to challenge the concept of domicile. It notes that Nauru, one of the Commonwealth's smallest jurisdictions, has legislated to replace domicile by habitual residence in all conflict of laws matters.

4. The paper appends legislation from Australia, New Zealand and the United Kingdom. It points to the New Zealand model as being perhaps the most appropriate for consideration by other Commonwealth jurisdictions considering reform, and the Meeting may be interested in learning from the Australian delegation the reasons which lay behind their own jurisdiction's variation on the New Zealand model.

5. The Commonwealth Secretariat has for some time been recognised as a force for harmonisation and in this matter, in particular, we would value the guidance of Ministers as to any further action we should undertake.

REFORM OF THE LAW OF DOMICILE

A paper prepared
by
PROFESSOR DAVID McCLEAN, B.C.L., M.A.,
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INTRODUCTION

Domicile has an important role in the conflict of laws rules of Commonwealth countries particularly in the field of family law. The great majority of Commonwealth jurisdictions share a common corpus of law as to domicile, the main features of which were established in the middle years of the nineteenth century. Over the last twenty years or so, this traditional pattern has been disturbed, most radically by the proposal, aired in a few jurisdictions but acted upon in only one, that domicile should be replaced in toto by a different connecting factor such as 'habitual residence'.

2. More insidious have been the actions of the legislatures of a number of jurisdictions in reforming the law of domicile, either generally or in its application in particular contexts, to remedy what are widely seen as unsatisfactory features of the traditional concept. There is of course no reason why the rules as to domicile should be uniform in all jurisdictions and in all contexts, but equally it is possible to foresee difficulties ahead if what appears to be the same concept begins to be governed by different rules in neighbouring jurisdictions as a result of unco-ordinated law reform. It is therefore for consideration whether common principles for a modernised law of domicile could be agreed upon, if indeed it is to be retained as a significant connecting factor.

3. This paper reviews the traditional concept of domicile and the legislation of Commonwealth jurisdictions codifying or reforming it. It also considers the alternative of habitual residence.¹ It first reviews the principal features of the law of domicile, indicating the extent to which case-law or statutory formulations have produced variants within what can be regarded as the traditional rules, and then examines the reforms contemplated or achieved in the last few decades.

THE COMMON LAW RULES

4. The function of domicile. 'Domicile' is a legal concept which links a person, including in some contexts a corporation or other legal person, to a particular country. It identifies 'his' country, the law of which is in some sense proper to him.

5. Individuals are increasingly mobile. They often spend periods of time travelling to different countries. They may own property in several countries, and have family or business links with many more. It is, however, a rare individual who does not have a country which he regards as his 'home' country. Of course there will be individuals who have divided loyalties, whose current way of life points to one country as home, but whose upbringing, family tradition and sentimental attachments are focussed on another; the Commonwealth, better than any other group of countries, knows well the expatriate and his love-hate relationship with his host country. For most people, however, the notion of 'a home country' is a real one, and the law recognises this; the law of domicile

¹The paper is drawn in large part from Professor McClean's forthcoming book The Recognition of Family Judgments in the Commonwealth but omits the comprehensive citation of authority which will be there included.

provides a framework of rules to guide the courts in the identification of an individual's 'home country'.

6. It is not possible to read off from these general statements of the function of domicile any absolute requirements as to its content. Like nationality, a concept serving similar legal purposes, domicile may be differently understood in different countries, though in practice Commonwealth countries do share a common body of domicile law.²

7. Within one particular country, domicile may be given different meanings in different contexts. It is common to find it used, with a special definition, in immigration legislation and domicile for fiscal purposes may well differ from that applying to the same person for the purposes of matrimonial jurisdiction. For most purposes, a person has only one domicile, but some uses of the term domicile do not require it to be exclusive, not precluding double or even multiple domiciles.³

8. The traditional use of domicile is to identify an individual's 'personal law'. It is so used in most common law countries, although religious persuasion is used for the same purpose in the Indian subcontinent and nationality has traditionally been the corresponding connecting factor in civil-law jurisdictions. Roman-Dutch law makes great use of domicile, though on some points the content of the concept may differ from that traditionally adopted in common law countries. Despite the effects of legislation in many Commonwealth jurisdictions, it remains central to the conflict of laws rules relating to the family, in jurisdictional and choice of law contexts and in respect of the recognition of foreign decrees.

9. A basic definition. The facts of a Malawi case, Gray v Gray,⁴ illustrate the factual complexities with which a definition of domicile must cope.

Mr. Gray was born in South Africa in 1906. His father was Scottish. His mother was English and at the time of his birth was actually en route for Malawi (then Nyasaland). After attending schools in both Nyasaland and Rhodesia, Mr. Gray spent the years (1924-1930) in Scotland where he qualified as a veterinary surgeon. In 1930 he took a post in the Sudan, moving to New Zealand in 1934. During his stay in New Zealand he was visited by his mother and decided that he ought to live in Nyasaland to be near her. He applied to join the Colonial Service and after a short spell in Tanganyika was posted to Nyasaland in 1940. At the time of the case he had been in that country for some eight years and hoped to remain there, so far as he was able to refuse transfers within the Colonial Service.

10. It is by no means obvious what was his 'home country',⁵ and the facts certainly demonstrate that an individual's current home can change from country to country quite frequently, too frequently for that notion to be very suitable for the purposes for which domicile is used. For this reason the courts have adopted as the basic content of domicile the idea of a permanent home.

11. This notion of the permanent home involves looking beyond the established facts of a person's residence to his intentions for the future pattern of his life. That in turn requires special rules to govern cases in which the propositus through infancy or mental disorder is unable, or, not being sui iuris, is regarded as not entitled, to have

²See generally Dicey and Morris, The Conflict of Laws (10th edn, 1980), chapter 7.

³Eg Civil Jurisdiction and Judgments Act 1982 (UK) giving effect to the EEC Convention on Jurisdiction and the Execution of Judgments in Civil and Commercial Matters 1968.

⁴1923-60 ALR Mal 160 (Nyasaland H Ct, 1948).

⁵He was in fact held to have acquired a domicile of choice in Nyasaland.

views on the matter. These operate to make it impossible to equate domicile with 'permanent home' in every case, and that equation is further hindered by the special rules as to the domicile of origin, the domicile acquired at birth, which is given special importance.

12. The country identified by domicile. Domicile is used to identify a country possessing a distinct legal system. One implication of this is that it is usually unnecessary to identify a particular place (town, country, province) within the country as the place where the propositus is domiciled. There can be exceptions in particular statutory contexts, and in the special cases presented by boundary changes.

13. An example of the latter is Evans v Evans,⁶ concerning the reconstitution of the Colony of the Leeward Islands in 1940 when one of its five presidencies, Dominica, became a separate Colony. Mr. Evans was born in Dominica before 1940 and claimed to have a domicile of origin in the Colony of the Leeward Islands. The court rejected this argument, holding in effect that his domicile of origin was in Dominica despite its being at the relevant date merely one area of a country; but Mr. Evans' residence in Antigua, a continuing presidency, was the basis of the decision that he had acquired a domicile of choice in the post-1940 Colony of the Leeward Islands.

14. Federal states. Where a federal state is concerned, each component unit having a separate body of law, the unit is the 'country' for the purposes of the conflict of laws. To an immigrant in particular, the boundaries between the various units may be of little significance; he plans to live in Britain, Australia, Malaysia or Nigeria, and may have no attachment to any one unit, and no awareness of whether the legal structure of the federation gives significant legislative power to its component units. He must nonetheless be domiciled in such a unit; to acquire such a domicile as a domicile of choice requires more than the establishment of the necessary links with the federation as a whole. This feature of the law of domicile has been much criticised and has been the subject of legislation in some jurisdictions; the reforming statutes are considered below.⁷

15. This statement of the position in federal states needs to be qualified to take account of the exercise (in the family law area the apparently increasing exercise) of legislative power by federal legislatures, whose Acts supersede the previous legislation of the various units on the same topic.⁸ Until 1967, the relevant Rule in Dicey's treatise read that 'no person can at the same time have more than one domicile'.⁹ Fatayi-Williams J of the Western Nigeria High Court observed in Odiase v Odiase,¹⁰ 'I doubt whether Dicey's proposition...can fit into the modern concept of the exercise of legislative power in a federation'. His view, now widely accepted, was that where the subject-matter is governed by federal legislation, it is proper to speak of domicile in the Federation as a whole; where the relevant law is that of the federal unit, we must still speak only of domicile in the unit. It is a difficult question whether this approach is possible in Kenya, where statutory force has been given to the rule that 'no person may have more than one domicil at any time'.¹¹

⁶(1960) 2 WIR 246 (Sup Ct of Windward Is and Leeward Is).

⁷See para 68, below.

⁸Eg, the Family Law Act 1975 of the Commonwealth of Australia, superseding the legislation of the Australian States, mainland Territories and Norfolk Island on the same subject-matter.

⁹It is now qualified by the insertion of the words 'for the same purpose': Dicey and Morris, The Conflict of Laws (10th edn, 1980), p 104.

¹⁰[1965] NMLR 196 at 198.

¹¹Law of Domicil Act 1970, No 6, s 10(1).

16. The position that a 'federal domicile' can exist has been reached, not without some controversy, in Nigeria,¹² Australia¹³ and Canada.¹⁴ Although the determination of domicile is a matter for the *lex fori*, it is believed that in appropriate contexts a court sitting outside one of these federal states would accept the reality of the 'federal domicile' so introduced, despite a dictum to the contrary in the Zimbabwe case of *Smith v Smith*.¹⁵

17. Domicile of origin. The common law traditionally ascribes to every person a domicile of origin from the moment of his birth. In the standard case of the legitimate child born during his father's lifetime, his domicile of origin will be the country in which the father was then domiciled. Although much else about the domicile of origin is controversial, that much is well established in case law and is reproduced in statutory codes of domicile in Cyprus,¹⁶ India¹⁷ and Kenya.¹⁸ In Barbados and New Zealand, the statutory reform of the law of domicile has effectively abolished the domicile of origin; the reforming legislation is examined below.¹⁹

18. Outside the standard case, the position is less clear cut. A legitimate but posthumous child is usually declared by the text-writers to take the domicile of his mother, but no authority is given for there appears to be none. To the same effect is legislation in Cyprus,²⁰ but both the Indian Succession Act 1925²¹ and the Kenyan Law of Domicil Act 1979²² prefer the law which the father had at the time of his death.

19. The rule that the domicile of origin of an illegitimate child is that of his mother at the date of his birth is universally accepted.²³ In some jurisdictions the status of illegitimacy has been abolished, all children enjoying equal status.²⁴ The effect on the law of domicile is not always clear. The English Law Commission in their examination of a proposal for similar action considered that there was an open choice between (a) applying to all children the principles which now operate in relation to legitimate children and (b) introducing in relation to all children a new rule, namely that a child's domicile should be governed by that of the mother; the Commission preferred the second alternative.²⁵

¹²As a result of the Matrimonial Causes Decree 1970.

¹³By the Matrimonial Causes Act 1959 and the Family Law Act 1975 (both of the Commonwealth Parliament).

¹⁴Divorce Act 1968 (now RSC 1970, cap D-8).

¹⁵1970 (1) SA 146 (Rhodesia H Ct).

¹⁶Wills and Succession Act, RL cap 195, ss 6(a), 7.

¹⁷Indian Succession Act 1925, Act 39 of 1925, ss 7.

¹⁸Law of Domicil Act 1970, No 6 of 1970, s 3(a).

¹⁹See paras 59-61.

²⁰Wills and Succession Act, RL cap 195, s 8.

²¹s 7.

²²s 3(a).

²³For legislative expressions of this rule, see Wills and Succession Act (Cyprus), RL cap 195, s 8; Indian Succession Act 1925, No 39, s 8; Law of Domicil Act 1970 (Kenya), No 6, s 3(b).

²⁴Eg Status of Children Act 1969 (New Zealand) No 18; comparable provisions exist in most Australian jurisdictions.

²⁵Working Paper No 74 (1979), paras 8.3-8.5.

20. The position as to the domicile of origin of a child conceived in wedlock but born after the dissolution of his parents' marriage is unclear. A foundling is regarded as having a domicile of origin in the country in which he is found²⁶ but where this rule is expressed in legislation the domicile attributed to a foundling is not expressly declared to be one of origin.²⁷

21. At common law it would seem that no subsequent event can alter the domicile of origin ascribed to a child at his birth. The child's adoption will only have this effect if statutory provision is made, either in the legislation as to adoption²⁸ or in that on domicile.²⁹

22. Domicile of choice. The acquisition of a domicile of choice is in issue in the overwhelming majority of reported cases, which are very numerous. There is general agreement that two elements must be proved, the factum of residence and the animus manendi, an intention to remain. Perhaps the use of Latin is significant, suggesting a precision which is lacking. Certainly the courts have experienced much difficulty in applying the criteria to the astonishingly varied facts of the cases before them.

23. The factum of residence. It is clear that the propositus must become 'resident' in the country, but this appears to mean nothing more than physical presence other than casually or as an itinerant traveller. Ramaswami J of the Supreme Court of India stated the position in these terms: 'For this purpose, residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material'.³⁰ Residence even for a few hours may be sufficient, but must be proved: an intending immigrant deterred from disembarking from his ship by reports of an epidemic will not acquire a domicile of choice.³¹ If the period of physical presence in a country was intended as a short visit, eg a holiday, it may be disregarded even if the visitor intends ultimately to return to settle in that country.³²

24. It appears that a rather different rule as to the acquisition of a domicile of choice applies in Cyprus. Although the relevant provisions of the Wills and Succession Act³³ appear to be designed to codify the common law, section 9 provides:

'A person acquires a domicile of choice by establishing his home at any place in [Cyprus] with the intention of permanent or indefinite residence therein, but not otherwise...'³⁴

²⁶See Re McKenzie (1951) 51 SR (NSW) 293 (NSW Sup Ct).

²⁷This is the case in Kenya (Law of Domicil Act 1970, No 6, s 4) and also in Barbados and New Zealand where the domicile of origin is effectively abolished; see para 67.

²⁸As in the United Kingdom: Children Act 1975, s 8 and Sched 1, para 3(1) and in most of the Australian jurisdictions (but see now next note).

²⁹See the uniform Domicile Act of the Australian States, s 8(3) and, for the effect of rescission of an adoption, s 8(6).

³⁰Kedar Pandey v Narain Bikram Sah AIR 1966 SC 160 at 163.

³¹The facts are those of Clayton v Clayton 1922 CPD 125 (influenza in Cape Town).

³²IRC v Duchess of Portland [1982] 1 All ER 784.

³³RL cap 195, ss 6-13, applying to regulate succession only (s 5).

³⁴Italics added; for a Proviso to this section, see para 35, below.

Although 'home' is often used as a convenient and readily-understood synonym for domicile, it is not, in normal usage, the same as 'residence'. Arguable a man setting foot on Cyprus intending to remain there permanently, and clearly acquiring a domicile of choice there under the traditional rules, would not do so immediately for the purposes of the Wills and Succession Act; it would have to be proved that he had done something which constituted 'establishing his home'. No authority on the point has been found.

25. Illegal residence. There is Canadian authority for the proposition that a domicile of choice can be acquired even by an illegal immigrant.³⁵ The weight of Commonwealth authority is to the contrary, with reported decisions from two Australian States, England and Zimbabwe.

26. The animus manendi. The element of intention is very much more difficult both to state with precision and to establish in a disputed case. Dicey and Morris's treatise speaks of 'an intention of permanent or indefinite residence' (words reproduced in the Cypriot Act cited above). A South African writer has commented that at least four types of intention can be distinguished:

- (1) An intention to reside in the country for a definite period, eg for the next six months, and then to leave;
- (2) An intention to reside in the country until a definite purpose is achieved, eg until a particular piece of work is completed, and then to leave;
- (3) An intention to reside in the country for an indefinite period, ie until and unless something, the happening of which is uncertain, occurs to induce the person to leave;
- (4) An intention to reside forever'³⁶

An intention falling into classes (1) or (2) will not suffice; that in class (4) is sufficient for the acquisition of a domicile of choice; the problem cases are in class (3).

27. Some judicial formulations. This can be illustrated by presenting a selection of the formulae used by judges, in many different parts of the Commonwealth, to describe the necessary intention. This is not, of course, other than highly selective, and in some cases nothing will have turned on the words used; but it serves to reveal some of the shades of meaning behind a supposedly common concept:

"the intention of residing there for a period not limited as to time";³⁷

"an intention of continuing to reside there for an unlimited time";³⁸

"an intention to remain so firm and positive as to exclude any intention to make an ultimate home in another jurisdiction";³⁹

"a deliberate intention to settle there";⁴⁰

³⁵Jablonski v Jablonski [1972] 3 OR 410.

³⁶W. Pollak, 'Domicile' (1933) 50 SALJ 449 at p 465. For a full discussion of South African law using this typology see C.F. Forsyth, Private International Law (1981), pp 103-107.

³⁷King v Foxwell (1876) 3 ChD 518 at 520 per Jessel MR.

³⁸Udny v Udny (1869) LR 1 Sc and Div 441 at 458 per Lord Westbury.

³⁹Marshall v Marshall (1956) 22 MLJ 122 (Singapore) per Taylor J.

⁴⁰Kedar Pandey v Narain Bikram Sah AIR 1966 SC 160 at 163 per Romaswami J.

"a present intention to reside for ever";⁴¹
 "an intention of remaining [there] permanently";⁴²
 "an intention never to leave";⁴³
 "the intention of permanently settling there: of remaining there, that is to say, as Lord Cairns says, 'for the rest of his natural life', in the sense of making that place his principal residence indefinitely";⁴⁴
 "the establishment of a home in a place where a man intends to reside for an indefinite time is, of itself, of no great importance [for] residence and domicile are two perfectly distinct things";⁴⁵
 "make up his mind to live and die [there]";⁴⁶
 "an intention of living and dying in this country".⁴⁷

28. The grey area. There are a number of factors which contribute to the creation of a 'grey area', identified in part by this range of dicta. The first is the simple observation that a person's attitude and plans can change slowly and imperceptibly. The testimony of a Singapore judge could have been given, *mutatis mutandis*, in very many jurisdictions: 'The vast majority of both officials and businessmen of non-Malayan origin still contemplate ultimate retirement to some other country and therefore do not become domiciled here, however long their residence, but there is a noticeable tendency to remain longer, to return after provisional retirement for further periods of residence and, in a few instances, to settle finally'.⁴⁸

29. The second is the phenomenon of the uncertain future event.⁴⁹ A robust Scottish statement is that of Lord Fullerton in IRC v Gordon's Executors:⁵⁰

'If in order to constitute a domicile there were required an *animus remanendi* so permanent and so absolute, as to be independent of any possible change of circumstances, I do not understand how, in the constant uncertainty and transition of all sublunary events, a domicile ever could be established.'

On the other hand a much harder line was taken in the South African case of Eilon v Eilon.⁵¹

⁴¹Central Bank of India v Ram Narain AIR 1955 SC 36 at 39; Malkiat Singh v State of Punjab AIR 1966 Pun & Har 250 at 254 per Sandhwalla J.

⁴²Sanders v Sanders (1953) 4 Fiji LR 73.

⁴³In re Mrs. Aga Begum 1971 1 Mad LJ 18; Gordon v Gordon [1965] EA 87 at 89 per Reide J (Tanzania H Ct).

⁴⁴Trottier v Rajotte [1940] 1 DLR 433 at 436 per Duff CJC. The reference to Lord Cairns is *semble* to his judgment in Bell v Kennedy (1868) LR 1 Sc and Div 441 but the precise phrase is not used there. Its 'interpretation' by Duff CJC highlights the contrast between 'permanently' and 'indefinitely'.

⁴⁵Donald v Donald [1922] NZLR 237 at 240 per Stringer J.

⁴⁶Linton v Guderian AIR 1929 Cal 599 at 602 per Rankin CJ.

⁴⁷Coombe v Coombe 1923-60 Mal 115 at 119 per Mathew Ag CJ (Nyasaland H Ct, 1945).

⁴⁸Taylor J in Marshall v Marshall (1956) 22 MLJ 122 at 123.

⁴⁹As in class (3) in para 26, above.

⁵⁰(1850) 12 D 657 at 662, cited by Anton in his Private International Law at p 178 as deserving to be better known.

⁵¹1965 (1) SA 703 (AD) at 721.

30. The third is a semantic, but nonetheless important, point, the uncertainty inherent in the use of the word 'permanently' in this context. This was fully analysed by Asprey JA in the New South Wales Court of Appeal in Hyland v Hyland, in a passage which also touches upon the other factors mentioned above and which deserves to be set out in full (omitting the citation of authorities).⁵²

'The contrast in this context between the words "permanent" and "indefinite" was discussed by Langton J. In Gulbenkian v. Gulbenkian where Dicey's use of "indefinite" was held to be justified. There are many shades of "permanence" which are too obvious and well-understood to need detailed discussion here. The Shorter Oxford Dictionary defines "permanent" as "lasting or designed to last indefinitely without change; enduring; persistent; opposite to temporary". It is not synonymous with "everlasting". A very usual sense is that of indefinitely continuing. ... In the context of the principles applicable to a domicile of choice I am of the opinion that the use of the word "permanent" means nothing more than Lord Westbury's phrase "general and indefinite" which, as I understand it, produces the result that the person's intention is one which, when formed, is to remain as a resident of the country of choice for a period then regarded by him as unlimited in point of time and without having addressed himself to the question of giving up such residence and leaving the country of his choice upon the happening of some particular and definite event in the foreseeable future notwithstanding that he may entertain in the phraseology which appears to have been coined by Story a floating intention to return at some future period to his native country. Firstly, it appears to me to be quite unreal to ask the average person who has arrived to settle in a particular place to determine whether his intention is to reside there forever for his answer well might be that he proposes to remain so long as the political climate continues as it is or the economy remains stable or his own financial position or health permits him to do so - and there might be a dozen or more other remote contingencies which, if suggested to him, would place a qualification on the word "permanent" if it were otherwise to mean the duration of that person's life. Secondly, the intention which is necessary to the acquisition of a domicile of choice may be formed without the individual being conscious of having taken any deliberate decision at any particular point of time. Whilst undoubtedly there are many learned judges who have expressed themselves on this subject in terms of a "permanent home", there are others who have preferred a phraseology connoting a term of indefinite residence.'

31. No analysis of the case-law, however exhaustive, can resolve these difficulties. There is clearly a case for a statutory definition of the required intention, to produce at least a common starting point, and some of the reforming statutes considered below include such a provision. It remains to note the provisions of those Commonwealth statutes which aimed to restate rather than reform the common law rules. That in force in Cyprus has already been cited;⁵³ India and Kenya have more elaborate provisions.

32. The Indian Succession Act contains two relevant sections. One introduces a concept of domicile quite different from that existing under the usual common law rules, acquired by the deposit of a written notice to that effect in a government office, subject only to residence for the past twelve months.⁵⁴ A provision much more in line with the common law principles is also included. Section 10 provides that 'a man acquires a new domicile by taking up a fixed habitation in a country which is not

⁵²See also Re Furse [1980] 3 All ER 838 (residence for 39 years; intended to leave if health prevented enjoyment of present way of life; domicile established as this intention too vague and uncertain).

⁵³Para 24 , above.

⁵⁴Indian Succession Act 1925, Act 39, s 11.

that of his domicile of origin'. This seems to lack the requirement of permanence, certainly if that is equated with an intention of life-long residence.⁵⁵

33. The Kenyan Law of Domicil Act 1970 appears to reflect the common law position but with an unusual extra provision. The basic test for acquiring a domicile of choice is 'Where a person... takes up residence in a country... with the intention of making that country his permanent home...'.⁵⁶ It is then further provided:

'A person may intend or decide to make a country his permanent home even though he contemplates leaving it should circumstances change.'⁵⁷

It seems likely that this provision was prompted by the decision of the East African Court of Appeal in Thornhill v Thornhill⁵⁸ where an immigrant from Sri Lanka who had set up in Uganda as a manufacturer of instant tea was held in all the circumstances to have acquired a domicile of choice in Uganda despite 'the hypothetical opinion that if things do not go the way he hopes they will, he might have to leave the country in which he has decided to establish himself and make his home'.⁵⁹ This seems to accord with the generally-accepted position at common law.

34. Particular cases. Even if Commonwealth jurisdictions were more clearly of one mind in identifying the required animus manendi, their courts would still have to apply those criteria. This involves the courts in an examination of an individual's life-story, and often of his family history; the material is utterly fascinating in its endless variety, but, equally, cannot be made the subject of easy formulae. A very large number of cases from the major Commonwealth jurisdictions are analysed to demonstrate relevant considerations in standard treatises such as Dicey and Morris⁶⁰ and there would be little value in a repetition of that exercise, but it may be observed that similar factors have been relied upon in cases reported in other Commonwealth jurisdictions. So the purchase of land, especially the purchase of a retirement home and grave-plot, marriage to a local girl or other local family connections, and a change of religion are factors which have been regarded as evidence of the acquisition of a new domicile. The question of naturalization has been treated as of less importance, though where such cases concern residence in pre-independence times they must be interpreted with caution. Prolonged residence is evidence of domicile and is given more weight than a man's statements as to his own domicile.

35. Statutory provisions in a few jurisdictions draw attention to certain special cases. In Cyprus it is provided that 'no person shall be held to have acquired a domicile of choice in [Cyprus] by reason only of his residing there in Her Majesty's naval, military, air or civil service',⁶¹ a provision remaining on the republican statute book but arguably of little or no current effect. The Indian Succession Act 1925 contains a similar but more extensive provision:

'A man is not to be deemed to have taken up his fixed habitation in India merely by reason of his residing there in the civil, military

⁵⁵For the Exception and Illustrations to s 10, see paras 35-36, below.

⁵⁶Law of Domicil Act 1970, No 6, s 8(1).

⁵⁷s 8(2).

⁵⁸[1965] EA 268.

⁵⁹Per de-Lestang VP at 277.

⁶⁰The Conflict of Laws (10th edn, 1980), pp 115-120.

⁶¹Wills and Succession Act, RL cap 195, s 9 Proviso.

or air force service of the Government, or in the exercise of any profession or calling.'⁶²

It will be seen that this applies only to domicile in India, and not to cases in the Indian courts in which it is argued that a person has lost an Indian domicile of origin and acquired a domicile in, say, Bangladesh. Nor would it apply were it a relevant issue whether the *propositus* was domiciled in a particular part of India. Despite this limitation the reference to 'profession or calling' is of some general importance.

36. Both provisions use the phrase 'merely by reason...'; they do not preclude soldiers, businessmen and others from acquiring a domicile of choice in appropriate circumstances, but do require a positive decision to settle in the country, a decision not governed by the exigencies of service or profession.⁶³ So understood, these legislative provisions are wholly in accord with the position in Commonwealth jurisdictions generally, where what were once seen as 'special cases' are now treated merely as special illustrations of the general rules in operation. This is true in respect of diplomats, other government officials (in the older cases typically colonial officers), members of the armed forces, and members of religious orders. A modern legislative code would accordingly make no special provision for cases of this sort.

37. Loss of domicile of choice and its results. It is well established that a domicile of choice is only lost when the *propositus* both ceases to reside in the country and ceases to have the *animus manendi*. Both are required: the fact that the *propositus* may intend to leave the country, and may even have made travel arrangements and obtained accommodation and employment in another country, is not in itself sufficient to deprive him of his domicile of choice.⁶⁴ Equally a change of residence is insufficient without proof of an unequivocal intention to abandon the domicile of choice, although the evidence required has been said to be less strong than that required to establish the acquisition of such a domicile;⁶⁵ but it has also been held that where it is clearly proved that the *propositus* has lost the intention to return that suffices, without proof of a positive intention not to return.⁶⁶

38. If one domicile of choice is lost without at the same time another being acquired, the domicile of origin 'revives' and becomes the effective domicile so as to prevent there being a 'gap'. This rule, known from its source as the Rule in *Udny v Udny*,⁶⁷ applies however remote the links between the *propositus* and his domicile of origin.⁶⁸ It is accepted in many Commonwealth jurisdictions but, as will be seen below has attracted much attention from law reform agencies.

39. Domicile of dependence. Certain categories of persons are for the purposes of the law of domicile *alieni iuris*. That is, they are not capable of acquiring an independent domicile of their own and are instead

⁶²s 10, Exception.

⁶³See the Illustrations to s 10 of the Indian Act: Illustrations (iv) and (v) concern a man travelling to India solely to attend to the affairs of a dissolved partnership and planning to leave having dealt with that business (no domicile acquired), then changing his intention and deciding to take up a 'fixed habitation' in India (domicile acquired).

⁶⁴The facts are those of *Foo v Foo* (1956) 40 HKLR 112 (refugee placement in the United States accepted just prior to case).

⁶⁵*Re Eu Keng Chee* (1961) 27 MLJ 210 (Singapore).

⁶⁶*Re Flynn* [1968] 1 WLR 103 at 113-115 per Megarry J.

⁶⁷(1869) LR 1 Sc and Div 441.

⁶⁸Eg that of Mr. Gray (semble Scottish) in the case stated in para 9, above.

deemed to share the domicile of some other person, their domicile changing as his changes. There is general (though not always wholly unqualified) acceptance of this proposition in Commonwealth jurisdictions, but legislatures and law reform agencies have been active in considering two aspects of the matter, the scope of the rule in terms of the categories of persons properly regarded as dependent, and the selection of the person on whom the domicile is to depend; these points are considered in the context of reforming statutes below.⁶⁹

40. At common law, the categories of dependent persons comprise

- (a) children below the age of majority;
- (b) married women; and
- (c) the mentally disordered.

A minor child's domicile follows that of his father, if the child is legitimate, of his mother if he is illegitimate or fatherless. A married woman (even if she is below the age of majority⁷⁰), takes the domicile of her husband or if he is a minor that of her father-in-law; a woman widowed while still under age becomes again dependent upon her father.

41. Although these rules are almost always stated as absolute, there is a trickle of authority from a number of Commonwealth jurisdictions which suggests the existence of exceptions to or a discretionary element within the rules, and (quite apart from the major reforms reviewed below) some adjustments have been made by statute.⁷¹ One possible exception arises in the case of children whose parents have been divorced, custody of the children being awarded to one parent or the other (and, arguably, this could be extended to any other situation in which one parent is given exclusive custody). This view was advanced in Manitoba and adopted in Northern Ireland, but rejected in Scotland. It has been expressly adopted by statute in Kenya.⁷² It has been held in India that a child may retain its domicile of origin in India despite the emigration of its father if the father is in desertion, without any decree of divorce or custody award.

42. The Indian Succession Act 1925 contains a more extensive exception. Section 14 reads:

'The domicile of a minor follows the domicile of the parent from whom he derived his domicile or origin.

Exception. The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of the Government, or has set up, with the consent of the parent, in a distinct business.'

There is virtually no support for an exception in these terms in other Commonwealth common law jurisdictions, although there is occasional discussion of the proposition that a minor may acquire the capacity to select his own domicile on marriage or on 'engaging in trade'.⁷³ There is

⁶⁹See paras 63-66

⁷⁰See Law of Domicil Act 1970 (Kenya), No 6, s 9(2) for a statutory statement of this rule.

⁷¹In Cyprus, the Wills and Succession Act RL cap 195 which contains provisions generally re-stating the law of domicile is wholly silent on the domicile of dependence; semble the common law rules are left wholly intact.

⁷²Law of Domicil Act 1970, No 6, s 9(1) Proviso.

⁷³See Costie v Costie [1947] 3 DLR 541, 542 (Ont) (revsd on the merits [1947] 4 DLR 472).

however a similar approach in the United States, where the influential Restatement of the Conflict of Laws⁷⁴ states

'An emancipated child may acquire a domicile of choice. ... Some states require actual court proceedings [for emancipation], but the majority insist upon no more than that the minor, having attained years of discretion, maintain a separate way of life, either with his parents' consent or because they are dead or have abandoned him. It is frequently held that the contraction of a valid marriage emancipates a minor.'

In Scotland, a minor (ie in Scots law a boy over 14 or a girl over 12) may have legal capacity to choose his own domicile in circumstances very similar to those described in the Restatement as emancipation. Roman-Dutch law as developed in South Africa appears also to regard an emancipated minor as having this capacity.

43. A related question which has arisen in the jurisdictions following the common law is whether the parent has a discretion, whether he can determine the child's domicile independently of any change in his own domicile. It has been held that a widow changing her domicile on re-marriage, or as a result of a change in the domicile of her new husband subsequent to the date of the re-marriage, can decide whether or not the domicile of her children should also change;⁷⁵ Scots law is to the same effect.⁷⁶ In New Zealand it has been held that the mother has this power even in cases where her own domicile is unchanged, Wilson J advancing a general proposition that

'a dependent person's domicile changes when his parent intends it to change and the change is for his benefit, irrespective of whether the domicile of the parent also changes.'⁷⁷

In terms that proposition applies to all parents, whatever the family circumstances, but there appear to be no Commonwealth cases in which such a generous rule has been put into effect.

44. Domicile of married women. There is a clear trend in the law of Commonwealth jurisdictions to abolish or limit the scope of the rule that a married woman takes the domicile of her husband as a domicile of dependence throughout the existence of the marriage. Reforming statutes to this effect are considered below.⁷⁸ Here it is necessary to notice two variants in the Indian and Kenyan legislation.

45. The Indian Succession Act 1925 provides as follows:

'15. By marriage, a woman acquires the domicile of her husband, if she had not the same domicile before.

16. A wife's domicile during her marriage follows the domicile of her husband.

Exception. The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent court, or if the husband is undergoing a sentence of transportation.'

The Exception to section 16 is clearly inconsistent with the common law position expanded by the Judicial Committee of the Privy Council in AG for Alberta v Cook.⁷⁹

⁷⁴Second edn, 1971, s 22, comment (f).

⁷⁵Re Beaumont [1893] 3 Ch 490.

⁷⁶Crompton's Judicial Factor v Finch-Noyes 1918 SC 378, 386.

⁷⁷Re G [1966] NZLR 1028.

⁷⁸See paras 63-64.

⁷⁹[1926] AC 444, PC.

46. The Kenyan Law of Domicil Act 1970 contains provisions of some subtlety:

'7. A woman shall, on marriage, acquire the domicil of her husband.

8. (3) An adult married woman shall not, by reason only of being married, be incapable of acquiring an independent domicil of choice.

(4) The acquisition of a domicil of choice by a married man shall not, of itself, change the domicil of his adult wife or wives, but the fact that a wife is present with her husband in the country of his domicil of choice at the time when he acquires that domicil or subsequently joins him in that country shall raise a rebuttable presumption that the wife has also acquired that domicil.

9. (2) The domicil of an infant female who is married shall change with that of her husband.'

47. The apparent simplicity and elegance of these provisions conceals some points of real difficulty.

(a) An adult woman domiciled in Kenya marries a man domiciled in England. They live together in Nairobi. It is clear that she becomes domiciled in England, even if she would herself regard Kenya as her permanent home notwithstanding the marriage. It is not clear how, or even whether, she can resume a Kenyan domicile.

(b) The facts are as in (a), except that the man has a domicile of choice in Kenya. He later returns to England and resumes his domicile of origin there. What is the effect of section 8(4) which is in terms of a domicile of choice? Semble it is intended to apply to any deliberate change of domicile by the husband, but the point is unclear.

(c) An infant wife's domicile changes with that of her husband. It is not clear precisely what is the position on her reaching the age of majority. Would her de facto domicile of choice in another country take effect immediately?⁸⁰

REFORM: PROPOSALS AND ACTION

48. Reform of the law of domicile. A considerable number of Commonwealth jurisdictions have taken action in the last twenty years to reform their law of domicile.⁸¹ In some cases the reforms have been limited in scope, often focussing on a single issue (the domicile of married women) and sometimes on that issue as it arises in a particular context (jurisdiction in matrimonial causes). A number of initiatives by law reform agencies have contributed to this process.

49. Britain 1954-63. One of the earliest, and in the event least fruitful, initiative took place in England. The First Report of the Private International Law Committee⁸² was concerned with the Draft Convention to Regulate Conflicts between the Law of the Nationality and the Law of the Domicile negotiated at The Hague Conference. It advised

⁸⁰Cf Re Scullard [1957] Ch 107.

⁸¹The Domicile Ordinance 1948, No 18 (Seychelles) (now RL cap 92) repealed arts 13 and 102-111 of the Seychelles Civil Code and provided (s 2) that the law of domicile should be the law of England for the time being. Similarly, s 2(1) of the Matrimonial Causes Law 1976, No 9 (Cayman Islands) gives 'domicil' for the purposes of that Law the meaning ascribed to it from time to time in English law.

⁸²Cmd 9068 (1954).

that the law both of England and Scotland should be reformed, and produce a Code of the Law of Domicile as the basis for legislation. The Code largely restated the existing law but would have effected a number of reforms:

- (a) it would have abolished the rule in Udny v Udny as to the revival in certain circumstances of the domicile of origin;
- (b) it would have defined a domicile of choice and provided rules for its ascertainment in Article 2 of the Code:

(1) Subject to the provisions of this Code, the domicile of a person shall be in the country in which he has his home and intends to live permanently.

(2) Unless a different intention appears, the following are rules for ascertaining a person's intention to live permanently in a country:-

Rule 1: Where a person has his home in a country, he shall be presumed to intend to live there permanently.

Rule 2: Where a person has more than one home, he shall be presumed to intend to live permanently in the country in which he has his principal home.

Rule 3: Where a person is stationed in a country for the principal purpose of carrying on a business, profession or occupation and his wife and children (if any) have their home in another country, he shall be presumed to intend to live permanently in the latter country.

(3) Paragraph (2) shall not apply to persons entitled to diplomatic immunity or in the military, naval, air force or civil service of any country, or in the service of an international organisation.

- (c) it would, while preserving the general rule as to the domicile of a married woman have entitled a woman separated from her husband by a competent court to acquire an independent domicile; and
- (d) it would have enabled a court to vary in certain cases the domicile of an infant or of a lunatic.⁸³

50. A Bill to implement the Report's recommendations on domicile failed in 1958, principally as a result of fears expressed on behalf of the expatriate business community in England as to the possible consequences upon their liability to tax of the shift in the burden of proof brought about by Article 2 of the Code. A less ambitious Bill in the following session also failed, and the Private International Law Committee was invited to reconsider the matter.⁸⁴ Its Seventh Report⁸⁵ contained a 'businessman's formula' designed to meet the earlier fears but concluded that such a formula would make reform of the law hardly worth while. The Committee also reviewed the whole question of the domicile of married women, reaching the pessimistic conclusion that action on that score would involve legal complications outweighing any advantages that might accrue. Not surprisingly, no legislative action followed.

51. Canada 1961. The Committee did not refer to the work of the Canadian Uniform Law Commissioners undertaken between the dates of the two British

⁸³For discussion see B Wortley 'Proposed Changes in the Law of Domicile' (1954) 40 Grotius Society Transactions 121; R H Graveson, 'Reform of the Law of Domicile' (1954) 70 LQR 492.

⁸⁴For the background, in which the correspondence columns of The Times played an important part, see M Mann, 'The Domicile Bills' (1959) 8 ICLQ 457.

⁸⁵Cmnd 1955 (1963).

reports. If the British initiative erred on the side of caution, the Canadian Commissioners were ahead of their time. They produced a draft model Act, the Domicile Code, which in effect abolished the domicile of origin and the domicile of dependence, and introduced a new definition of domicile with presumptions to aid its ascertainment. Children and married women were to be treated in the same way as adults generally; so were mental incompetents, except for a power vested in the courts to approve a change in their domicile made by their guardian.⁸⁶ The principal provisions of the proposed Act were as follows:

4. (1) Every person has a domicile.
(2) No person has more than one domicile at the same time.
(3) The domicile of a person shall be determined under the law of the province.
(4) The domicile of a person continues until he acquires another domicile.
5. (1) Subject to section 6, a person acquires and has a domicile in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely.
(2) Unless a contrary intention appears,
(a) a person shall be presumed to intend to reside indefinitely in the state and subdivisions where his principal home is situate, and
(b) a person shall be presumed to have his principal home in the state and subdivision where the principal home of his spouse and children (if any) is situate.
(3) Subsection (2) does not apply to a person entitled to diplomatic immunity or in the military, naval or air force of any country or in the service of an international organization.
6. The person or authority in charge of a mentally incompetent person may change the domicile of the mentally incompetent person with the approval of a court of competent jurisdiction in the state and subdivision thereof in which the mentally incompetent person is resident.

No Province has adopted the model Act.

52. Australia and New Zealand 1970-82. Almost ten years later another initiative got under way, this time in Australia. The Standing Committee of Federal and State Attorneys-General (a body which has close links with officers in neighbouring jurisdictions such as Papua New Guinea and, especially relevant in this context, New Zealand) considered the reform of the law of domicile at its 1970 meeting. The matter was considered within the several jurisdictions,⁸⁷ and by a further meeting of Ministers and Law Officers in 1974, which approved a draft Bill prepared in New Zealand. A revised version of this Bill was enacted in New Zealand as the Domicile Act 1976, though its coming into effect was postponed in the expectation of parallel action in the Australian jurisdictions; it eventually came into force on 1 January 1981. In Australia there was a very limited reform in the context of the Family Law Act 1975 but it was only in 1982 that uniform legislation was brought into force for a general reform, and that legislation is not identical with the New Zealand model.

⁸⁶See the Commissioners' Proceedings for 1957 (p 153), 1959 (pp 24, 91), 1960 (pp 29, 104), 1961 (pp 23, 139) and 1964 (p 92) and, for commentary, W S Tarnopolsky 'The Draft Domicile Act - Reform or Confusion' (1964) 29 Sask BR 161.

⁸⁷See, eg, the published report of the (Victorian) Chief Justice's Law Reform Committee on the Reform of the Law of Domicil (dated 25 October 1972).

53. The New Zealand Domicile Act 1976,⁸⁸ which has been adopted, save for two provisions,⁸⁹ in Barbados,⁹⁰ effects a comprehensive reform of the law. It is reproduced in Appendix A. The Act

- (a) abolishes, in effect, the concept of a domicile of origin and, expressly, the rule in Udny v Udny as to the revival of that domicile;⁹¹
- (b) abolishes the dependent domicile of married women;⁹²
- (c) enables a child to acquire an independent domicile on attaining the age of 16 or on marrying below that age;⁹³
- (d) makes provision as to the domicile of children below that age, including provision for cases in which the child's parents are living apart;⁹⁴
- (e) restates the rules for the acquisition of a new domicile (ie, in traditional terminology, a domicile of choice), so that, in essence, the propositus must be 'in' the country and intend 'to live indefinitely in that country';⁹⁵
- (f) applies to cases concerning the acquisition of a new domicile the standard of proof formerly appropriate for the abandonment of a domicile of choice and the acquisition of another domicile of choice (ie, a lower standard than is required where the domicile being lost is one of origin);⁹⁶ and
- (g) deals with the special problems of domiciles in federal or composite states (called 'unions' in the Act) by ensuring that a person domiciled in the union as a whole is always domiciled in a country forming part of the union (and providing rules to identify which is that country),⁹⁷ and that a person domiciled in such a country is also domiciled in the union as a whole.⁹⁸

No provision is made concerning the domicile of insane persons, the law on that topic being expressly saved in section 7.

⁸⁸No 17 of 1976.

⁸⁹Those concerning the age at which a child can acquire an independent domicile and domicile in 'unions'.

⁹⁰Domicile Reform Act 1979, No 31.

⁹¹Domicile Act 1976 (New Zealand), s.11.

⁹²s 5.

⁹³s 7.

⁹⁴For the case of children whose parents are living apart, see further para 66 , below.

⁹⁵s 9(c)(d).

⁹⁶s 12.

⁹⁷s 10.

⁹⁸s 13. Sections 10 and 13 are not reproduced in the Barbados Domicile Reform Act 1979, although cases involving domiciles in the United Kingdom or the United States must present themselves in Barbados. For these 'federal' provisions, see further para 68, below.

54. The Australian uniform Domicile Act⁹⁹ is now in force in all Australian jurisdictions.¹⁰⁰ It is slightly less radical than its New Zealand counterpart. It is reproduced in Appendix B. The Act

- (a) abolishes the rule in Udny v Udny as to the revival of the domicile of origin,¹⁰¹ without however abolishing the domicile of origin itself;
- (b) abolishes the dependent domicile of married women;¹⁰²
- (c) enables a child to acquire an independent domicile on attaining the age of 18 or on marrying below that age;¹⁰³
- (d) makes provision as to the domicile of children below that age, including provision for cases in which the child's parents are living apart and for children the subject of adoption orders or whose adoption has been rescinded;¹⁰⁴
- (e) redefines the intention needed to acquire a domicile of choice,¹⁰⁵ but without establishing any presumptions to guide the ascertainment of such a domicile;
- (f) contains a rule as to the evidence required to establish a domicile of choice similar in its effect to that in the New Zealand Act;¹⁰⁶
- (g) contains a provision affecting domicile in a federal 'union', so that a person domiciled in the union is domiciled in one country forming part of the union,¹⁰⁷ but with no provision dealing expressly with the reverse case.¹⁰⁸

No provision is made concerning those lacking mental capacity; the law on this topic is expressly saved in section 7(2).

⁹⁹Or almost uniform: s 8 of the Victorian Act uses a different drafting technique from the other Acts, and the Commonwealth Act, because of some additional material (mainly concerning application to Territories) and further differences in drafting has a variant numbering of the principal sections.

¹⁰⁰Domicile Act 1982, No 1 (Commonwealth), Domicile Act 1978, No 9231 (Victoria), Domicile Act 1979, No 118 (New South Wales), Domicile Act 1979, No 78 (Northern Territory), Domicile Act 1980, No 81 (South Australia), Domicile Act 1980, No 38 (Tasmania), Domicile Act 1981, No 51 (Queensland), Domicile Act 1981, No 91 (Western Australia). For commentary see M Pryles, 'Reform of the Law of Domicile in Victoria', (1979) 5 Monash LR 236.

¹⁰¹s 6.

¹⁰²s 5.

¹⁰³s 7(1).

¹⁰⁴s 8. For the cases of children whose parents live apart, see further para 66, below.

¹⁰⁵s 9.

¹⁰⁶Australian Uniform Act, s 11.

¹⁰⁷s 10. See further para 68, below.

¹⁰⁸A provision which is technically unnecessary but was included in the New Zealand Act because that Act replaces and does not merely amend the common law rules.

55. Britain 1973. As part of its work on family law, the English Law Commission examined questions of jurisdiction in matrimonial causes, reporting on the matter in 1972.¹⁰⁹ It recommended the abolition of the dependent domicile of married women, but for the purposes of jurisdiction in matrimonial causes only. Just before the publication of this Report, a private member's Bill had been introduced to abolish that domicile for all purposes, but it was not given a second reading, the issue being considered by a special Working Party set up by the Lord Chancellor. The outcome was the Domicile and Matrimonial Proceedings Act 1973,¹¹⁰ Part 1 of which introduced reforms in the law of domicile, effective for all purposes. The relevant provisions are reproduced in Appendix C; sections 1 and 4 are in force throughout the United Kingdom, but section 3 is not applicable in Scotland. The Act deals with three matters only; it

- (a) abolishes the dependent domicile of married women;¹¹¹
- (b) enables a child to acquire an independent domicile on obtaining the age of 16 or on marrying under that age;¹¹²
- (c) makes provision as to the domicile of children under that age whose parents are living apart.¹¹³

56. Ontario and Prince Edward Island. The Family Law Reform Act 1978¹¹⁴ of Ontario made a large number of amendments to the relevant common law, including that of domicile. It provides that 'the same rules shall be applied to determine the domicile of a married woman as for a married man',¹¹⁵ and makes fresh provision for the domicile of minors in section 68, which is in these terms:

- '(1) Subject to subsection (2), a child who is a minor,
 - (a) takes the domicile of his or her parents, where both parents have a common domicile;
 - (b) takes the domicile of the parent with whom the child habitually resides, where the child resides with one parent only;
 - (c) takes the domicile of the father, where the domicile of the child cannot be determined under clause (a) or (b); or
 - (d) takes the domicile of the mother, where the domicile of the child cannot be determined under clause (c).

(2) The domicile of a minor who is or has been a spouse shall be determined in the same manner as if the minor were of full age.'

The Family Law Reform Act 1978¹¹⁶ of Prince Edward Island contains identical provisions.¹¹⁷

57. Irish proposals 1981. The Law Reform Commission of Ireland published in 1981 a Working Paper on 'Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws'. It takes serious account of the

¹⁰⁹Law Com No 48. Parallel work was undertaken by the Scottish Law Commission.

¹¹⁰Cap 45.

¹¹¹s 1.

¹¹²s 3.

¹¹³s 4. See further para 66 , below.

¹¹⁴Cap 2.

¹¹⁵s 65(3) (c).

¹¹⁶Cap 6.

¹¹⁷ss 60(3) (c) (married women), 61 (minors).

possible replacement of domicile by habitual residence,¹¹⁸ but also makes detailed proposals for the reform of domicile on the assumption that it will be retained. The proposals are comprehensive, and would

- (a) abolish the rule in Udny v Udny as to the revival of the domicile of origin, without abolishing the concept of a domicile of origin;
- (b) abolish the dependent domicile of married women;
- (c) enable a child to acquire an independent domicile at the age of 16 (or possibly 18) or on marrying below that age;
- (d) make detailed provision as to the domicile of children below that age, both in terms of domicile of origin and of dependence, including provision for cases in which the parents are living apart,¹¹⁹ adopted children and foundlings, and would give a court power to change the domicile of a child on the application of any interested person in certain prescribed circumstances;¹²⁰
- (e) restate the rules for the acquisition of a new domicile in precisely the same terms as are used in the New Zealand Act;
- (f) deal with the problems of domicile in federal states, in terms closely following the New Zealand model;¹²¹
- (g) codify the law as to the domicile of the mentally ill.

The Commission's Paper¹²² proposes that legislation should abolish the rule that a domicile of origin is more difficult to abandon than a domicile of choice; but no provision to this effect is included in their Scheme for a Bill.

REFORM: THE COMMONWEALTH POSITION

58. The great majority of Commonwealth jurisdictions have made no legislative reforms in the field of domicile, and the common law (or Roman-Dutch law) principles remain fully operative. A few jurisdictions have received the effect of United Kingdom legislation by virtue of applying for this purpose 'the law of England for the time being'.¹²³ In the paragraphs which follow an account is given of the changes which have been made, or officially proposed, on particular issues.

59. (a) Domicile of origin. Note has already been taken of the minor variations in the rules as to the domicile of origin of particular groups, principally posthumous children.¹²⁴ The numbers affected are tiny. The principal objection taken to the common law rules concerns the Rule in Udny v Udny as to the revival of the domicile of origin should any 'gap' be threatened in a person's effective domicile. This rule has been abolished in Australia, Barbados and New Zealand,¹²⁵ and the Kenyan Law of

¹¹⁸See para 70, below.

¹¹⁹See further for these cases, para 66, below.

¹²⁰Cf W Binchy (a counsellor of the Commission), 'Reform of the Law Relating to the Domicile of Children: a Proposed Statute' (1979) 11 Ottawa LR 279.

¹²¹See further para 68, below.

¹²²Para 122.

¹²³See para 48, above.

¹²⁴See para 18, above.

¹²⁵Uniform Australian Domicile Acts, s 6; Domicile Act 1976 (NZ), s 11; Domicile Reform Act 1971 (Barbados), s 10.

Domicile Act 1970 appears to achieve the same result by providing¹²⁶ that 'notwithstanding that he may have left the country of his domicile with the intention of never returning, a person shall retain such domicile until he acquires a new domicile in accordance with the provisions of [the] Act'.

60. Although the Udny v Udny rule was to be abolished under the proposal of the English Private International Law Committee in 1954, re-iterated in 1963, no action has been taken in the United Kingdom. Similarly the Canadian Uniform Law Commissioners proposed its abolition in 1961 but no Province has responded. The Irish Law Reform Commission have provisionally made the same proposal, though it also refers to a possible new approach. The Commission sees the disadvantages both in the Udny rule and in the usual alternative which continues the domicile of choice recently de facto abandoned, and considers a new possibility, that during any threatened 'gap' in domicile as a result of the application of the usual rules, a person should be held to be domiciled in the country with which he is most closely connected.¹²⁷

61. Once the Rule in Udny v Udny is abolished, the significance of the domicile of origin is considerably reduced. The traditional rules make the domicile of origin harder to lose than one of choice, but this position is abandoned in Australia, Barbados and New Zealand.¹²⁸ The Barbados and New Zealand Acts go further and cease to make any use of the concept of a domicile of origin, a child's first domicile being one of dependence. There appears to be no disadvantage in this approach which was also taken by the Canadian Commissioners, but it is not adopted in Australia, nor was it proposed by the Irish Law Reform Commission.

62. (b) Domicile of choice. The traditional definition in terms of the factum of residence and the animus manendi is wholly or partially replaced in a number of jurisdictions. In Barbados and New Zealand, the requirements for the acquisition of a new domicile are restated (*inter alia*) as being that the *propositus* "is in that country" and "intends to live indefinitely in that country".¹²⁹ The Irish Law Reform Commission propose the same text, merely substituting 'State' for 'country'. The Uniform Australian legislation addresses itself only to the element of intention: the *propositus* must have 'the intention to make his home indefinitely in that country'.¹³⁰ It remains to be seen whether 'to make his home' acquires shades of meaning different from 'to live'; it is unfortunate that the two models differ at this point where no principle is involved.

63. (c) Domicile of dependence - married women. Although many commentators object on general grounds of sexual equality, to the rule that a married woman cannot have an independent domicile, it has been recognised for many years that there are particular difficulties in respect of jurisdiction in matrimonial causes. Where domicile is the sole basis of jurisdiction, a wife whose husband has always been domiciled abroad, or who acquires such a domicile after deserting her, may be unable to petition. Various techniques have been used to deal with that problem:

- (a) In some jurisdictions, the bases for divorce jurisdiction have been extended to cover at least the second of these cases, without altering the rules as to domicile. This was done, for example, in

¹²⁶s 10(2).

¹²⁷Working Paper No 10 (1981), para 122.

¹²⁸Uniform Australian Domicile Acts, s 11; Domicile Act 1976 (NZ), s 12; Domicile Reform Act 1979 (Barbados), s 11.

¹²⁹Domicile Act 1976 (NZ), s 9; Domicile Reform Act 1979 (Barbados), s 9.

¹³⁰Uniform Australian Domicile Acts, s 9.

England in section 13 of the Matrimonial Causes Act 1937, which was adopted in many other jurisdictions;

- (b) In other jurisdictions, the rules as to domicile have been altered to provide for the wife to be deemed to be domiciled in the jurisdiction in such cases. An early example was section 3 of the Divorce Act 1898 of New Zealand. This technique is used in Nigeria,¹³¹ both in respect of deserted wives and other wives who have been resident in Nigeria for three years, and (in almost identical words) in Papua New Guinea.¹³²
- (c) A third technique is to allow a married woman a separate domicile, as if she were an adult single person, for all purposes of the law of matrimonial causes. This was formerly the position in the Australian jurisdictions¹³³ and New Zealand,¹³⁴ and is the current technique in Bermuda,¹³⁵ Canada,¹³⁶ and Ghana.¹³⁷

64. The final step is of course to abolish the married woman's domicile of dependence for all purposes. This has been done in all the Australian jurisdictions,¹³⁸ Barbados,¹³⁹ Gibraltar,¹⁴⁰ New Zealand,¹⁴¹ Ontario,¹⁴² Prince Edward Island,¹⁴³ Singapore,¹⁴⁴ and in the United Kingdom.¹⁴⁵ Legislation on the Australian and New Zealand models provides that the domicile of a married woman at any time after the commencement of the legislation is to be determined as if the legislation had always been in force;¹⁴⁶ the United Kingdom model provides however that the wife's domicile immediately before the commencement of the Act is retained as a domicile of choice 'unless and until it is changed by acquisition or revival of another

¹³¹Matrimonial Causes Decree 1970, No 18, s 7.

¹³²Matrimonial Causes Ordinance 1963, No 18 of 1964 (sic).

¹³³Family Law Act 1975, (Commonwealth) s 4(3)(b).

¹³⁴Matrimonial Proceedings Act 1963, (NZ) a 3.

¹³⁵Matrimonial Causes Act 1974, No 74, (Bermuda) s 3.

¹³⁶Divorce Act 1968 (new RSC 1970, c D-8), s 6(1), in force throughout the Dominion.

¹³⁷Matrimonial Causes Act 1971, Act 367 (Ghana), s 32.

¹³⁸Uniform Australian Domicile Acts, s 5.

¹³⁹Domicile Reform Act 1979, No 31 (Barbados), s 5.

¹⁴⁰Domicile, Matrimonial Proceedings and Recognition of Divorces and Legal Separations Ordinance 1974, No 23 (Gibraltar), s 3 (in the same terms as the UK Act, below).

¹⁴¹Domicile Act 1976, No 17 (NZ), s 5.

¹⁴²Family Law Reform Act 1978, c 2 (Ontario), s 65(3)(c).

¹⁴³Family Law Reform Act 1978, c 6 (PEI), s 60(3)(c).

¹⁴⁴Women's Charter, RL cap 47 (Singapore), s 45A inserted by the Women's Charter (Amendment) Act 1980, No 26 (in similar terms to the UK Act, below).

¹⁴⁵Domicile and Matrimonial Proceedings Act 1973, c 45 (UK), s 1. Reference has already been made to the modification but not total abolition of the special rules for married women in the Law of Domicil Act 1970, No 6 (Kenya): see paras 46-47, above.

¹⁴⁶This appears to be the intention of the Irish proposals of 1981, but they are not clear on the point.

domicile either on or after' the commencement date.¹⁴⁷ It has been pointed out that the effect is to treat women who were married before the commencement date somewhat less favourably than those who marry after that date,¹⁴⁸ a result which was probably not intended.

65. (d) Domicile of dependence - children. Rather less attention has been paid to the rules as to the domicile of dependence of children. The age at which a person first becomes capable of acquiring a domicile of choice (twenty-one at common law) is expressly lowered to eighteen in the Australian jurisdictions¹⁴⁹ and to sixteen in Gibraltar,¹⁵⁰ New Zealand,¹⁵¹ and the United Kingdom.¹⁵² In some other jurisdictions, the age may have been affected by more general legislation as to the age of majority (though domicile is commonly expressly excluded from such legislation); in Barbados the Domicile Reform Act 1979, while following the New Zealand model in other relevant respects, omits the definition of 'child' which fixes the age at sixteen. All the statutes referred to also provide that a child who is (or has been) married while under the prescribed age can acquire an independent domicile.

66. Children whose parents live apart. A common criticism of the traditional common law rules was that they produced unsatisfactory results where a child's parents were living apart; this is particularly important where married women are able to acquire an independent domicile. Special rules have been introduced by statute in several jurisdictions to deal with this type of case, but unfortunately the approaches adopted are not identical. Most jurisdictions can be considered together, Ontario and Prince Edward Island being the exceptions. Within the major group three different forms of words are used, though in most cases the effect is the same.¹⁵³ If the parents are alive but living apart, a child whose home is with his father (or who had a home with his father and has not since had a home with his mother) takes his father's domicile; a child whose home is with his mother (or who had a home with his mother and has not since had a home with his father) takes his mother's domicile (and on her death retains her last domicile). In Australia, Barbados and New Zealand a child who formerly had a home with his father, who is now dead, and has not since had a home with his mother keeps the last domicile of his father; in Gibraltar and the United Kingdom the common law rules will apply in this situation, and the mother's domicile will be taken. In Barbados and New Zealand, the position of the child whose parents are living apart but who may be held to have a home with both of them is obscure; it is dealt with in the Australian Acts (which use the phrase 'principal home') and in Gibraltar and the United Kingdom (where the father's domicile prevails in such a case). The Ontario and Prince Edward Island statutes, already quoted¹⁵⁴ adopt a rather different approach, not using 'home' and providing

¹⁴⁷Domicile and Matrimonial Proceedings Act 1973, c 45 (UK), s 1(2).

¹⁴⁸IRC v Duchess of Portland [1982] 1 All ER 784, 789.

¹⁴⁹Uniform Australian Domicile Acts, s 7.

¹⁵⁰Domicile, Matrimonial Proceedings and Recognition of Divorces and Legal Separations Ordinance 1974, s 4.

¹⁵¹Domicile Act 1976, s 6(2).

¹⁵²Domicile and Matrimonial Proceedings Act 1973, s 3.

¹⁵³One is the New Zealand model (Domicile Act 1976 s 6(4)(5)) also used in Barbados (Divorce Reform Act 1979, s 6(2)(3)); the second the Australian (uniform Domicile Acts, s 8, but with a further variant form in Victoria); the third is the British (Domicile and Matrimonial Proceedings Act 1973, s 4) also used in Gibraltar (Domicile, Matrimonial Proceedings and Recognition of Divorces and Legal Separations Ordinance 1974, s 5).

¹⁵⁴Ie, Family Law Reform Act 1968 (Ontario), c 2, s 68, and the Family Law Reform Act 1978 (PEI), c 6, s 61; see para 56, above.

directly only for the cases where the parents have a common domicile or where the child habitually resides with only one parent. In other cases the father's domicile prevails, the mother's domicile being applied only if the father's cannot be determined (eg, because he had died).

67. Other points. Legislation which is designed wholly to replace the common law rules as to the domicile of children must deal with the special cases of posthumous children and foundlings, as does that in Barbados and New Zealand. The Australian uniform Act does not cover the whole field, though it caters for posthumous children; it does, however, include full provision in respect of the domicile of adopted children which in other jurisdictions is commonly covered by general provisions in the adoption legislation. The Gibraltar and United Kingdom provisions are limited to children whose parents are alive but living apart; but within that area apply to adoptive as well as natural parents.

68. (e) Domicile in federal or composite states ('unions'). The legislation in Australia and New Zealand deals with this problem, but in different ways. The Australian approach uses the notion of the 'closest connexion', New Zealand that of 'ordinary residence'.¹⁵⁵ So, section 10 of the uniform Australian Acts provides:

'A person who is, in accordance with the rules of the common law as modified by this Act, domiciled in a union but is not, apart from this section, domiciled in any particular one of the countries that together form the union is domiciled in that one of those countries with which he has for the time being the closest connexion.'

The New Zealand provision, section 10 of the Domicile Act 1976, provides:

'A person who ordinarily resides and intends to live indefinitely in a union¹⁵⁶ but has not formed an intention to live indefinitely in any one country forming part of the union shall be deemed to intend to live indefinitely-

- (a) In that country forming part of the union in which he ordinarily resides; or
- (b) If he does not ordinarily reside in any such country, in whichever such country he is in; or
- (c) If he neither ordinarily resides nor is in any such country, in whichever such country he was last in.'

The disadvantage of the latter approach is that in certain cases, where the propositus is for example outside the union for a period of months, his domicile may turn on the identity of the port or airport by which he found it convenient to leave.

69. (f) Domicile of the mentally disordered. There appears to be no legislation on this topic. The common law position is not well established, and cases can arise in which considerable amounts of property are at stake, so the inclusion of provisions on the point in a code of domicile seems very desirable. The Irish Law Commission has proposed¹⁵⁷ statutory provisions modifying what is generally supposed to be the common law position in one respect, to provide that where a mentally disordered minor reaches the age of majority his then domicile remains fixed. The Commission would also give the courts power to alter the

¹⁵⁵The Irish proposals of 1981 are based on the New Zealand text, but use both 'habitual residence' and 'ordinary residence'.

¹⁵⁶Note that this is a stricter test than would be required for domicile in the union, for domicile is acquired when a person is 'in' a country, ordinary residence not being essential: see Domicile Act 1976 (NZ), s 9(c).

¹⁵⁷Working Paper No 10 (1981), paras 123-4 and pp 92-3.

domicile of a mentally disordered person, a similar proposal having been made in 1954 by the English Private International Law Committee.¹⁵⁸

THE REPLACEMENT OF DOMICILE BY HABITUAL RESIDENCE

70. The emergence of 'habitual residence'. Sir Otto Kahn-Freund, the distinguished comparative and conflicts lawyer, described domicile in 1964 as being 'a superannuated concept',¹⁵⁹ but it must be said that domicile is enjoying a very active retirement. Arguably the reforms undertaken since 1964 in several leading common law jurisdictions will have established the concept on a firmer footing. Even a reformed domicile faces determined criticism. Some comes from within the common law tradition but the most persistent critics are those concerned with the negotiation of international conventions, to whom 'domicile' is unsatisfactory on account both of its technical nature and of the variation in its meaning as between the legal systems which make use of it. Recent international legal instruments, especially the conventions produced by the Hague Conference on Private International Law have made use of a different concept, 'habitual residence', and one commentator has claimed that domicile has been 'practically ousted ... in modern Private International Law' as a result.¹⁶⁰

71. The first use of habitual residence, in its French version 'résidence habituelle' appears to have been as a translation of a technical concept of German law, 'gewöhnliche Aufenthalt', in a France-Prussian treaty of 1880. It was first used in a Hague Convention, that on Civil Procedure, in 1895, and has since been used frequently both in Hague Conventions and in draft texts produced by the International Law Association, and in those contexts has repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts. This has not prevented judges and commentators from attempting to analyse and define the scope of the new concept.

72. Towards a definition. It has sometimes been suggested that habitual residence is in essence the same as domicile; it has been interpreted as meaning the 'life-centre' or the 'social domicile' of an individual. German courts, considering the Hague Convention on the Protection of Minors 1961, have interpreted a child's habitual residence as the 'centre of gravity of its life' and a Dutch decision is to the same effect. The English Law Commission, considering the phrase 'habitual residence' in the context of the Hague Convention on Recognition of Divorces and Legal Separations, commented as follows:

'[Habitual residence] is clearly distinguishable from domicile, a necessary element of which is a particular intention as to the future. Such an intention is not needed to establish habitual residence; it can be proved by evidence of a course of conduct which tends to show substantial links between a person and his country of residence. ... To be habitual, a residence must be more than transient or casual; once established, however, it is not necessarily broken by a temporary absence.'¹⁶¹

73. Other official bodies have proposed partial definitions of 'habitual residence', while seeking to preserve its status as a 'notion of fact'. The Council of Europe's Committee of Ministers, responding to proposals

¹⁵⁸First Report (Cmd 9068).

¹⁵⁹(1964) 27 MLR 55, 57.

¹⁶⁰de Winter, (1969) Hague Recueil des Cours III 349 at p 423.

¹⁶¹Report on Jurisdiction in Matrimonial Causes, Law Com No 48, para 16. A footnote adds, 'This does not mean that evidence of intention is irrelevant; it may throw light on particular facts and emphasise a person's degree of connection with a country'.

of CCJ (the European Committee on Legal Cooperation), adopted a Resolution on the Standardisation of the Legal Concepts of 'Domicile' and of 'Residence' on 18 January 1972.¹⁶² The Resolution recommended certain Rules, including the following:

'7. The residence of a person is determined solely by factual criteria; it does not depend upon the legal entitlement to reside.

9. In determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.

10. The voluntary establishment of a residence and a person's intention to maintain it are not conditions of the existence of a residence or an habitual residence, but a person's intentions may be taken into account in determining whether he possesses a residence or the character of that residence.

11. A person's residence or habitual residence does not depend upon that of another person.'

74. The Irish Law Reform Commission has gone further, and proposed a set of guidelines and presumptions which would be given statutory effect were domicile to be replaced by habitual residence in Irish law. These included a provision that the habitual residence of a person should be determined 'having regard to the centre of his personal, social and economic interests', including the duration of those interests and the intentions of the propositus. In the case of a married person, the habitual residence of the other spouse might be taken into account, and if the spouses were living together there would be a rebuttable presumption that they shared a common habitual residence. There would similarly be a rebuttable presumption that an unmarried child has the habitual residence of his parents, or of the parent with whom he has his home.¹⁶³ 'Habitual residence' is already used in Irish law without definition,¹⁶⁴ but the Commission felt that its more widespread use would create a need for a general indication of its meaning; the risk is that a statutory formulation, even in the form of commonsense presumptions, could lead to the development of technical rules.

75. Reference may be made to two English cases in which the meaning of 'habitual residence' has been considered. In Cruse v Chittum¹⁶⁵ Lane J accepted a number of propositions advanced by counsel in an undefended case:

- (a) Habitual residence requires an element of intention, an intention to reside in that country;
- (b) 'Habitual' indicates a quality of residence rather than a period of residence;
- (c) Habitual residence denotes a regular physical presence, not temporary or secondary in nature, which must endure for some time;
- (d) Habitual residence is something more than 'ordinary residence';

¹⁶²Resolution (72) 1, reproduced in the Council of Europe publication European Committee on Legal Cooperation 1963-1973, p 72.

¹⁶³Working Paper No 10 (1981) on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, chapter 12 and pp 102-3.

¹⁶⁴Succession Act 1965, No 27 (Ireland), Part VIII.

¹⁶⁵[1974] 2 All ER 940. See C Hall, 'Cruse v Chittum, Habitual Residence Judicially Explored', (1975) 24 ICLQ.

- (e) Habitual residence is similar to the residence normally required as part of domicile, without the element of animus necessary in domicile.

The relationship between propositions (a) and (e) is far from clear, and proposition (e) seems mistaken given that residence as an element of domicile is little more than presence, and in some cases presence for a very brief period indeed.¹⁶⁶ In *Oundjian v Oundjian*,¹⁶⁷ French J rejected an argument that continual physical presence, subject to de minimis absences, was required, noting the Oxford English Dictionary's definition of 'habitual' as 'in the way of habit or settled practice, constantly, usually, customarily'.

76. Domicile and habitual residence: the relative merits. The merits of habitual residence as a connecting factor have sometimes been overstated. It is not a self-defining concept, and the literature already contains ominous references to 'subjective' and 'objective' tests. On the other hand it has several major advantages over the traditional, or even the reformed, concept of domicile. The main advantage is that there is nothing equivalent to either a domicile of origin or a domicile of dependence, so that the technical rules which surround those concepts, and which have troubled law reform agencies, are swept away. Because the element of intention is of much less importance to habitual residence than to domicile, the uncertainties as to the best formulation of the animus manendi and the practical difficulties in applying any test are both removed.

77. It may be argued that the thorough reform of the law of domicile already achieved in Barbados and New Zealand and proposed in Ireland secures these same advantages while retaining the traditional connecting factor of domicile. The result of such reforms is, however, to produce considerable variety, even as between Commonwealth jurisdictions, in the meaning of domicile. 'Domicile' is not a term readily understood by laymen; lawyers are familiar with the word, but may well be troubled by the variant meanings attached to it. The case for 'starting again' with the concept of habitual residence is a strong one. The Irish Law Reform Commission has indicated its view that, on balance, habitual residence constitutes a more satisfactory connecting factor than domicile; and experience with the new concept in the jurisdictions which use it, notably in connection with the recognition of foreign divorces, suggests that it presents few difficulties.

78. Legislative action. It is to Nauru, one of the smallest Commonwealth jurisdictions, that one must look for a pioneering reform in this field. The Conflict of Laws Act 1974¹⁶⁸ applies the rules of private international law in force in England on 31 January 1968 to cases coming before the courts of Nauru.¹⁶⁹ However this is subject to section 3:

'Where the proper law to which effect would have to be given under the provisions of section 2 [which states the general rule] for the purpose of deciding any question would be the law of the country of any person's domicile, the proper law to which effect is to be given for the purpose of deciding that question is the law of the country in which that person habitually resides.'¹⁷⁰

It remains to be seen whether other jurisdictions will follow the lead set by Nauru.

¹⁶⁶Cf para 23, above.

¹⁶⁷(1979) 1 FLR 198.

¹⁶⁸No 14 of 1974.

¹⁶⁹s 2.

¹⁷⁰Sadly, no explanatory report as to the origins of this Act is available.

1976

Domicile

No. 17



ANALYSIS

Title	8. Domicile to continue
1. Short Title and commencement	9. Acquisition of new domicile
2. Interpretation	10. Deemed intention
3. Domicile before commencement	11. Domicile of origin not to revive
4. Domicile after commencement	12. Standard of proof
5. Wife's dependent domicile abolished	13. Domicile in unions
6. Children	14. Consequential amendments and repeals
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1976, No. 17

An Act to abolish the dependent domicile of married women and otherwise to reform the law relating to domicile

[31 August 1976]

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 and commencement—(1) This Act may be cited as the Domicile Act 1976.

(2) This Act shall come into force on a date to be appointed by the Governor-General by Order in Council.

2. Interpretation—In this Act, unless the context otherwise requires,—

“Country” means a territory of a type in which, immediately before the commencement of this Act, a person could have been domiciled:

“Union” means a nation comprising 2 or more countries.

3. Domicile before commencement—The domicile that a person had at a time before the commencement of this Act shall be determined as if this Act had not been passed.

Public—17

4. Domicile after commencement—The domicile that a person has at a time after the commencement of this Act shall be determined as if this Act had always been in force.

5. Wife's dependent domicile abolished—(1) Every married person is capable of having an independent domicile; and the rule of law whereby upon marriage a woman acquires her husband's domicile and is thereafter during the subsistence of the marriage incapable of having any other domicile is hereby abolished.

(2) This section applies to the parties to every marriage, wherever and pursuant to whatever law solemnised, and whatever the domicile of the parties at the time of the marriage.

6. Children—(1) This section shall have effect in place of all rules of law relating to the domicile of children.

(2) In this section "child" means a person under the age of 16 years who has not married.

(3) A child whose parents are living together has the domicile for the time being of its father.

(4) If a child whose parents are not living together has its home with its father it has the domicile for the time being of its father; and after it ceases to have its home with him it continues to have that domicile (or, if he is dead, the domicile he had at his death) until it has its home with its mother.

(5) Subject to subsection (4) of this section, a child whose parents are not living together has the domicile for the time being of its mother (or, if she is dead, the domicile she had at her death).

(6) Until a foundling child has its home with one of its parents, both its parents shall, for the purposes of this section, be deemed to be alive and domiciled in the country in which the foundling child was found.

7. Attainment of independent domicile—Subject to any rule of law relating to the domicile of insane persons, every person becomes capable of having an independent domicile upon attaining the age of 16 years or sooner marrying, and thereafter continues so to be capable.

8. Domicile to continue—The domicile a person has immediately before becoming capable of having an independent domicile continues until he acquires a new domicile in accordance with section 9 of this Act, and then ceases.

9. Acquisition of new domicile—A person acquires a new domicile in a country at a particular time if, immediately before that time,—

- (a) He is not domiciled in that country; and
- (b) He is capable of having an independent domicile; and
- (c) He is in that country; and
- (d) He intends to live indefinitely in that country.

10. Deemed intention—A person who ordinarily resides and intends to live indefinitely in a union but has not formed an intention to live indefinitely in any one country forming part of the union shall be deemed to intend to live indefinitely—

- (a) In that country forming part of the union in which he ordinarily resides; or
- (b) If he does not ordinarily reside in any such country, in whichever such country he is in; or
- (c) If he neither ordinarily resides nor is in any such country, in whichever such country he was last in.

11. Domicile of origin not to revive—A new domicile acquired in accordance with section 9 of this Act continues until a further new domicile is acquired in accordance with that section; and the rule of law known as the revival of domicile of origin whereby a person's domicile of origin revives upon his abandoning a domicile of choice is hereby abolished.

12. Standard of proof—The standard of proof which, immediately before the commencement of this Act, was sufficient to show the abandonment of a domicile of choice and the acquisition of another domicile of choice shall be sufficient to show the acquisition of a new domicile in accordance with section 9 of this Act.

13. Domicile in unions—A person domiciled in a country forming part of a union is also domiciled in that union.

14. Consequential amendments and repeals—(1) Section 62 of the Administration Act 1969 is hereby amended by inserting, after subsection (2), the following subsection:

“(2A) This section shall not apply to any person who dies after the commencement of the Domicile Act 1976.”

(2) Section 16 (2) of the Adoption Act 1955 is hereby amended by repealing paragraph (g) and the proviso to paragraph (f).

(3) The following enactments are hereby repealed:

(a) Section 3 of the Matrimonial Proceedings Act 1963:

(b) Section 6 of the Domestic Proceedings Act 1968:

(c) Section 22 of the Guardianship Act 1968.

This Act is administered in the Department of Justice.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:—

1. **Short title.** This Act may be cited as the *Domicile Act 1981*.
2. **Commencement.** (1) Section 1 and this section shall commence on the day on which it is assented to for and on behalf of Her Majesty.
(2) Except as provided in subsection (1), this Act shall commence on a day to be appointed by Proclamation.
3. **Interpretation.** In this Act, save where a contrary intention appears—
“Commonwealth of Australia” means the territory comprising the States and the Australian Capital Territory, the Jervis Bay Territory and the Northern Territory of Australia;
“country” includes any state, province or other territory—
(a) that is one of two or more territories that together form a country; and
(b) domicile in which can be material for any purpose of the laws of Queensland;
“union” means any country that is a union or federation or other aggregation of two or more countries and includes the Commonwealth of Australia.
4. **Operation of Act.** (1) The domicile of a person at a time before the commencement of this section shall be determined as if this Act had not been enacted.
(2) The domicile of a person at a time after the commencement of this section shall be determined as if this Act had always been in force.
(3) Nothing in this Act affects the jurisdiction of any court in any proceedings commenced before the commencement of this section.
(4) This Act has effect to the exclusion of the application of the laws of any other country relating to any matter dealt with by this Act.
5. **Abolition of rule of dependent domicile of married woman.** The rule of law whereby a married woman has at all times the domicile of her husband is abolished.
6. **Abolition of rule of revival of domicile of origin.** The rule of law whereby the domicile of origin revives upon the abandonment of a domicile of choice without the acquisition of a new domicile of choice is abolished and the domicile a person has at any time continues until he acquires a different domicile.

7. Capacity to have independent domicile. (1) A person is capable of having an independent domicile if—

- (a) he has attained the age of 18 years; or
 - (b) he is, or has at any time been, married,
- and not otherwise.

(2) Subsection (1) does not apply to a person who, under the rules of law relating to domicile, is incapable of acquiring a domicile by reason of mental incapacity.

8. Domicile of certain children. (1) In this section—

- (a) “child” means a person under the age of 18 years who is not, and has not at any time been, married; and
- (b) references to the parents of a child include references to parents who are not married to each other.

(2) Where, at any time, a child has his principal home with one of his parents but his parents are living separately and apart or the child does not have another living parent, the domicile of the child at that time is the domicile that that parent has at that time and thereafter the child has the domicile that that parent has from time to time or, if that parent has died, the domicile that that parent had at the time of death.

(3) Where a child is adopted, his domicile—

- (a) if, upon his adoption, he has two parents—is, at the time of the adoption and thereafter, the domicile he would have if he were a child born in wedlock to those parents; and
- (b) if, upon his adoption, he has one parent only—is, at the time of the adoption, the domicile of that parent and thereafter is the domicile that that parent has from time to time or, if that parent has died, the domicile that that parent had at the time of death.

(4) A child ceases to have, by virtue of subsection (2), the domicile or last domicile of one of his parents if—

- (a) he commences to have his principal home with his other parent; or
- (b) his parents resume or commence living together.

(5) Where a child has a domicile by virtue of subsection (2) or (3) immediately before he ceases to be a child, he retains that domicile until he acquires a domicile of choice.

(6) Where the adoption of a child is rescinded, the domicile of the child shall thereafter be determined in accordance with any provisions with respect to that domicile that are included in the order rescinding the adoption and, so far as no such provision is applicable, as if the adoption had not taken place.

9. Intention for domicile of choice. The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.

10. Domicile in union. A person who is, in accordance with the rules of the common law as modified by this Act, domiciled in a union but is not, apart from this section, domiciled in any particular one of the countries that together form the union is domiciled in that one of those countries with which he has for the time being the closest connexion.

11. Evidence of acquisition of domicile of choice. The acquisition of a domicile of choice in place of a domicile of origin may be established by evidence that would be sufficient to establish the domicile of choice if the previous domicile had also been a domicile of choice.

DOMICILE AND MATRIMONIAL PROCEEDINGS ACT 1973
(United Kingdom)

PART I

DOMICILE

1. (1) Subject to subsection (2) below, the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

(2) Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section.

3. (1) The time at which a person first becomes capable of having an independent domicile shall be when he attains the age of sixteen or marries under that age; and in the case of a person who immediately before 1st January 1974 was incapable of having an independent domicile, but had then attained the age of sixteen or been married, it shall be that date.

4. (1) Subsection (2) of this section shall have effect with respect to the dependent domicile of a child as at any time after the coming into force of this section when his father and mother are alive but living apart.

(2) The child's domicile as at that time shall be that of his mother if -

- (a) he then has his home with her and has no home with his father; or
- (b) he has at any time had her domicile by virtue of paragraph (a) above and has not since had a home with his father.

(3) As at any time after the coming into force of this section, the domicile of a child whose mother is dead shall be that which she last had before she died if at her death he had her domicile by virtue of subsection (2) above and he has not since had a home with his father.

(4) Nothing in this section prejudices any existing rule of law as to the cases in which a child's domicile is regarded as being, by dependence, that of his mother.

(5) In this section, "child" means a person incapable of having an independent domicile; and in its application to a child who has been adopted, references to his father and his mother shall be construed as references to his adoptive father and mother.

Memorandum by
THE GOVERNMENT OF BARBADOS

Barbados Position Paper

1. As noted at page 16 of Professor David McClean's paper on "Reform of the Law of Domicile" (LMM(83)11), Barbados has substantially adopted the New Zealand Domicile Act, 1976. But paradoxically the Barbados legislation came into operation a full year ahead that of New Zealand: 1 January 1980 as opposed to 1 January 1981.

2. The Domicile Reform Act, 1979 has its origins in a recommendation contained in the Report of the National Commission on the Status of Women in Barbados. The recommendation was that "a married woman be given the right to acquire and retain an independent domicile like any other person of full capacity". This in turn arose from the fact that as the law relating to matrimonial causes then stood, the High Court of Barbados only had jurisdiction in divorce matters if both parties were domiciled in Barbados. This meant that a husband could frustrate a divorce sought by a wife but not vice versa. And although there were certain exceptions to this rule there were other actual and potential difficulties respecting the whole concept of a domicile of dependence.

3. The recommendation of the Commission was accepted by the then Attorney-General, and the Law Reform Division of the Chambers having researched the law, jurisprudence and academic comments on the law of domicile in various Commonwealth jurisdictions decided that the New Zealand legislation was best suited to the particular legal requirements of Barbados. For not only were we reforming the law of domicile generally but also the law relating to children and family law in general including maintenance and certain aspects of the law relating to succession.

4. The Domicile Reform Act, 1979 has undoubtedly introduced radical reforms in the determination of the legal status between the individual and the State of Barbados. Thus far there has not been any litigation under the Act and a number of Supreme Court Judges have indicated that they have so far experienced no difficulty with the legislation. So perhaps at this point in time it can be asserted that the legislation has removed the immediate legal impediments. However a law student writing in Vol. 4 of the University of the West Indies Students Law Review has predicted much litigation in respect of section 3 of the Act. This prediction is based on the fact that in order to provide a starting point for the determination of domicile, the section states that "A domicile that a person had at a time before the commencement of this Act shall be determined as if this Act had not been enacted". This means that resort must be had to the common law rules relating to both dependent and independent domicile. And this can be a complex matter.

5. On the more positive side, Mr. Anthony Bland, Senior Lecturer in Law at the Faculty of Law, University of the West Indies in an article entitled "The Reform of the Law of Domicile" in the October, 1982 issue of the West Indian Law Journal notes that "Trinidad and Tobago has now emulated Barbados... and has substantially followed the terms of the Barbados Act". And having analysed the various provisions of the legislation and the relevant jurisprudence thereon, he concludes on a note of qualified optimism as follows:

It must be said that it is an excellent thing to find statutory enactments in the Caribbean in an area which has for some time been in much need of reform, but ... one hopes that the acts have not in some instances, created more problems than they have solved.

6. Regarding the question of the replacement of domicile by habitual residence in the case of Barbados this would require much mature consideration having regard to our recent reforms of the law relating to domicile. And this is in spite of Professor McClean's argument that domicile is "enjoying a very active retirement" and "the case for 'starting again' with the concept of habitual residence is a strong one". But in discarding the concept of domicile we may also have to discard a whole body of jurisprudence thereon, if not in whole, certainly in part.

LEGAL ARCHIVES: THE NATIONAL
AND CULTURAL HERITAGE

LMM(83)19

Memorandum by the Commonwealth Secretariat and
a paper by LOUIS A KNAFLA, BA PhD, FRHS,
Professor of History, University of Calgary,
Alberta, Canada

From time to time the attention of the Commonwealth Secretariat has been drawn to a lack of appropriate legal archives in some Commonwealth jurisdictions. On occasion, this has been done by practitioners, unable to locate material needed for the preparation of, e.g. a constitutional case. At other times this has been done by academic researchers.

2. It is beyond doubt that properly organised legal archives are a vein rich in a nation's heritage. Not only are the sensational trials of the day encapsulated for posterity, but so, too, (and perhaps more importantly) is the way in which our respective peoples have organised and gone about their daily business. In no other field is the full range of human endeavour, from the executive to the individual, available to be preserved for posterity.

3. It is, of course, easy for the importance of legal archives to be overlooked in the crush of other seemingly more important matters of day-to-day concern. As Professor Knafla's paper notes, some archival systems have been more concerned with destruction than with preservation. Certainly, destruction is an essential component of any archival policy: historians, sociologists and psychologists may wish for everything to be kept, but the constraints on storage space dictate that any archival system be, at least to some degree, selective. There is, however, the always present problem of determining today what may, in the future, be thought to be relevant: and we ourselves are too close to the present and too distant from the future to be able to do this with any degree of certainty.

4. The paper suggests that adequate legal archives are a necessity, and points to recent developments, centred on Malaysia, in the South-East Asian region which are addressed to this need.

5. It is not anticipated that Ministers will wish to discuss the paper in any detail, but it is presented in the context of the Meeting providing an appropriate opportunity for any informal consultations to take place.

LEGAL ARCHIVES: THE NATIONAL
AND CULTURAL HERITAGE

ANNEX TO LMM(83)19

Prepared by LOUIS A KNAFLA, BA PhD, FRHS
Professor of History, University
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Introduction

Legal records have long held a prominent place among the sources for history. Encompassing the records of Ministries of Justice, the offices of Attorneys-General, Solicitors-General and Director of Public Prosecutions (the legal policy-making, advising and prosecutorial arms of the State), the courts of law (central and local), and the legal profession (the link between the institutions of the law and society), these varied legal sources form both qualitatively and quantitatively one of the largest archival groups for the study and interpretation of the past. They are also one of the most difficult sources to organise, preserve and use.

2. Legal records on the one hand provide the only unimpeachable document of what individual members of society have contested in working out human relationships, and on the

other hand reflect the development of the law of the State in relation to society. In these sources also lies development and emergence of nations, thereby preserving the historic landmarks of a nation's heritage for succeeding generations.

3. An axiom of the common law is that law is a growing organism, not a system based on fixed doctrines; that it embodies the character, values, and tensions of a changing society. But we are usually too far from the past to judge ourselves, and too near to appreciate fully the distance.¹ For example, the law is by some regarded in technical terms, as comprising an archaic, complicated world divorced from the language of laymen; to them it does not appear to lie at the threshold of the future. As the famous legal historian has written: "Who shall interest us in contingent remainders, or the Statute of Uses, while Chinese metaphysics remain unexplored?"² Much has been written about legal institutions, and particular branches of the law, but until very recently the use of legal sources for the study of individuals, families and communities, business and commerce, governments, ideology, social forces and culture has not been prevalent.³

4. The law and its records are perhaps the most pervasive sources for the study of a country's people, their institutions and their culture. The legal record is an integral part of the legal system, a tool of judges, lawyers and researchers to apply and develop the law in order to meet the exigencies of the present and ward off the uncertainties of the future. For the historian, legal records provide information concerning persons and places, social and economic developments, crime, the sentencing policies of courts, matters and psychiatric and social welfare, and the interaction of individuals within society.^{4,5}

5. The problem with legal records is that few people really understand them. Files become massive with the growth of modern society and its bureaucracies. Over-stretched and over-worked practitioners both government and private trying to meet the daily crush of clients have come to regard the archives which their work has spawned as a luxury that can be discarded once their immediate use has disappeared. For some, at least, archives' policies are related solely to the periods laid down in their jurisdiction's Limitation of Actions Act.

6. The purpose of this paper is to review the way in which legal archives have become established and maintained in some parts of the common law world, and to provide some interim assessments and recommendations for their future preservation and usage. Against the background of the past, it examines the key guides to the preservation and destruction of court records, the importance of other legal records in the public and private domains, and the problems of preservation, management and accessibility.

Historical Background

7. The concept of a Court of Record means that the documents produced by such a court are a "record", and are thus a part of the law itself. The Public Records Act of 1838 was a landmark statute that brought the records of the English central courts under the purview of the Master of the Rolls, and the Public Record Office was built on the Master's estate in Chancery Lane, London. The original purpose was to bring the records of the courts to a government department in order to establish a system of organising, cleaning, repairing and preserving them, and making lists of contents. The early Victorians developed a deep appreciation for the past, and their purpose was to preserve the records of the courts. The Public Records Act of 1877 changed that. It authorised Inspecting Officers to prepare for the Master destruction schedules for legal records after 1715 (later amended to 1660). This change in attitude was given expression when many central court records were deemed by the 1877 Act to be "without value", and all local court records were called "utterly useless".⁶ The destruction of the heritage of past centuries was put in hand.

8. The results were disastrous. By the early twentieth century many records of the central, circuit, county and borough courts had been destroyed. Precepts, warrants, indictments, recognizances and depositions were scheduled for destruction after thirty years. The minute books were sufficient, it was said, although now we know that this was not the case. A Royal Commission, reporting in 1916, recommended destruction of such records after periods of two to ten years, while a case was still fresh in the docket. This recommendation was followed, in part, by a schedule of 1941 by which whole classes of records were jettisoned. When files were retained, they involved sensational cases of "public" interest, such as murder, treason, sedition and riot. Late Victorian and Edwardian society believed that only "class" crimes such as treason and riot were the foundations of law and history.⁷

9. The problems, however, were real. For example, the Supreme Court (civil side) records transferred to the Public Records Office (PRO) for 1875-1935 comprised four miles of shelving, and the absence of statements of claim and judgments made them unrewarding. At the same time, six miles of original wills were transferred, and these were seldom used because researchers preferred the registered copies. By 1958 the problem was even more acute. The records of magistrates' courts (which heard more than a million criminal cases a year) were being destroyed, while the circuit courts (which heard less than 30,000 a year) were preserved. Thus there were large numbers of legal records growing geometrically which were being systematically destroyed, and many of those that were preserved lacked vital information.⁸ The reliance on minute books was ill-founded. They were not documents "of record", they were not read or signed by judges, and were neither accurate nor complete. Finally, an Act of 1958 repealed several earlier ones, attempted to broaden the scope of what should be kept, and established a thirty-year policy for destruction.

The Denning Report

10. The Report of the Committee on Legal Records (1966) provided the basic framework for the preservation of court records in England. The Denning Report, while considered contemporaneously to be a reform of the previous Public Record Office Acts, was nonetheless in the late nineteenth century tradition in its attitude to record preservation: destroy. Certain "key" legal records were kept, and others were "selected" by specimen files or random sample. The great bulk of records was simply to be destroyed, and that word "destroy" dominates the lists of legal records in the appendices of the Committee's report. There was, however, a complete "system" for the administration of the legal records, and disposals were slated in an orderly and logical manner.⁹

11. The principles established for the destruction of court records were the result of a cost/benefit analysis. Each class of records was evaluated for the cost of keeping and maintaining them over their "probable" future value. Where a class was preserved in part, court officials would apply the criteria of selection, not experts in the field. Only the final selections would be made by a Public Records Office official. Great emphasis was placed on the availability of alternate sources of information such as newspaper accounts of cases, solicitors' files and government documents. Whether parties, lawyers, researchers or historians could locate these alternative sources, and whether their information would be reliable were questions which the Committee avoided. The principles were drafted not for future needs but for the exigencies of the time.

12. In the end, the sources of cases representing "public interest" continued to be given a higher profile than the mass of litigation which stemmed from the public "at large". Destroyed materials included petitions, summonses, writs, oaths, pleadings, motions, affidavits, depositions, cause books, transcripts, judgments, draft papers and correspondence. The materials preserved included documents relating to parliamentary, governmental and municipal concerns, court orders and rolls, minute books, bonds and recognizances, appeal papers and indexes. Often case files were "selected". Groups to be destroyed had specific years preserved by "random sampling". District, municipal and county courts suffered an even harsher fate. Most of their records were slated for destruction. Where the law touched moneyed interests, however, such as probate, divorce, railways, shipping and bankruptcy, the preservation recommendation was positive.

13. Quite rightly, the Denning Report has not been fully implemented. Authorities since that time have come to recognise the fundamental purpose of creating a public records archive: to preserve the legacy of the past. The Denning Report is now regarded by archivists as obsolete. Certainly, no government should rely on a system whose basic tenets were demonstrably unsound, even before the Denning Report was published.¹⁰

14. The only answer to the dilemma is for the disposition of court records to be done with the assistance of an inter-disciplinary body, one which includes representatives not only from government and the legal profession, but also from political, social and economic historians, and relevant constituents from the private sector.

Modern Alternatives

15. The English system has not been followed throughout the Commonwealth. Called a "record type" system, it is based on archival and administrative developments. A record type exists when the records are filed separately according to their provenance, creating, for example, groups of records for writs, affidavits, judgments and pardons. The user,

whether lawyer, litigant, researcher or historian, must canvass all the relevant groups to find information on a particular case or legal problem. A record "dossier" system is based on the activities of the court and a lack of administrative structure. A file, or dossier, is made of all documents concerning a particular case, and these files comprise a single record group for all litigation arising from that court. Thus the dossier is the most useful form of record-keeping for users whether their interest is legal or historical.¹¹ Since the method of keeping court records predetermines their use, alternatives to the records system deserve consideration.

16. The value of the dossier system has been demonstrated in parts of Australia and Canada, where most of the legal records are maintained simply. Duplicate material is not as prevalent, and specimen file selection or random sampling can be used to meet destruction schedules necessitated by lack of funds or space without losing either the breadth or depth of the sources.¹² That this system is a genuine alternative to the record type can be discerned from the Denning Report itself, where the suggestion is made to attempt the gathering of record types into dossiers when record system is itself large, complex and unwieldy.¹³ It must be remembered that the record type system is upheld in the Report (and earlier ones) not because it is a better system for users, but because it is a better system for destroying court records.¹⁴

17. The alternatives within the dossier system are varied. In countries like Malaysia and Singapore, where the historical-legal records are thin and archival staffs are small, a dossier system can encourage the preservation and maintenance of all the legal records in a form simple for users to benefit. And in countries like Indonesia and the Philippines, where there is a vast accumulation of records, the dossier system provides an easy means of destruction by random sampling when there are no other available resources for their preservation. The creation of the South-East Asian school for archivists in Malaysia will undoubtedly advance the historical consciousness of the area and suggest new archival schemes for the unique judicial systems and physical environment of the area.¹⁵

18. While the Denning Report eschewed the use of microfilm and modern technology to meet the demands of legal records, nonetheless these methods are being used successfully elsewhere. In Canada, for example, an ad hoc national legal records committee is being established to co-ordinate the preservation and research of court records.¹⁶ The provinces, too, where the dossier system is predominant, are beginning to respond to the needs of future users. New Brunswick, for example, transfers all court records to the Provincial Archives after five years, and the Archives organises and preserves its legal heritage without destruction of the originals. The New Brunswick system is a model for court records preservation. In Ontario, the Province has begun an ambitious programme of putting case files of the 19th century on computer tape. This not only maintains the records of the courts, but it also enables them to be studied with all the possibilities of computer analysis. Finally, in Alberta the space problem has been resolved by microfilming the case files of the major superior courts to 1972. In this way the court records of the Province are preserved efficiently and effectively in one location, and copies can be made for libraries and research centres. Computer potential is just now being examined, and its general use for indexing records is significant.

Legal Records in the Wider Context

19. The problems which confronted the movement to preserve court records in many countries in the middle decades of this century were problems which have not yet been met in dealing with other legal records in the public and private domains. In the public domain, court records are only one part of the legal processes. Committee, parliamentary and cabinet meetings to discuss, form and frame the law, the relevant correspondence, papers and studies, constitute the original records without which statute law itself would not exist. A general policy in most countries has been to preserve the parliamentary papers, and some of those of Attorneys-General and Solicitors-General, but these policies have not been uniform and rules for access by researchers often have not been made. On occasion officials actually take their papers with them on their departure from office, leaving wholesale gaps in the official record at the highest levels. Minutes of meetings are usually preserved, but these are little more than the shell of the record. Notes, internal memoranda and special studies are paramount for an understanding of how and why laws were made, amended or repealed, and thus crucial to the study of a nation's legal heritage. In addition, sources such as these are also revealing of the formation of national policy and the basis of political decisions in the growth of the nation State.

20. The private domain is perhaps the most overlooked sector of legal records. Its breadth and depth is often misunderstood or forgotten. The papers of law firms provide not only records for understanding the dynamics of one of the foremost professions of modern society, but also one of its major business groups. Correspondence notes and briefs provide the background of cases tried in courts, and also the evidence on which judges and juries have based their verdicts, in the absence of complete court manuscripts. In addition, the readiness today of parties to settle out of court and avoid litigation means that an increasing amount of potentially important material is accumulating in solicitors' offices instead of judicial archives. Their files, too, illustrate with revealing frankness the intimate minutiae of contemporary daily life, down to the detailed weekly expenditure of claimants in maintenance cases. As we look back on past generations, so will those of the future look at us and these files may, if properly preserved, give them unique insights into how we lived and what we did.

21. The records of law firms are perhaps as large in volume as those of the courts themselves, yet little has been done to provide for their preservation. A major reason is the problem of confidentiality. What can be seen, when, and by whom are problems which confront the legal records of the public domain as well as those of the private. What is needed first is a concerted effort to encourage law firms to preserve, and deposit, their records; and second, to determine the rules which will govern access and use. In the meantime, the archival concerns of preserving the records and properly listing them can be placed in motion while ethical and private considerations are being discussed and hopefully resolved.

22. Between the public and private domains of non-court record documents lie the personal papers of judges and legal officers. Many of these potential sources, including trial notes and bench-books, are important for an understanding of how legal process worked, and in providing insights into, and explanations of, decisions made in landmark cases. Many developed countries have made little effort to seek the retention of these valuable records. An ambitious project at Oxford has attempted to gather in one archive the papers of officials in the British Colonial Service, especially those who served in Africa and the Caribbean.¹⁷ The Oxford Colonial Records Project, instituted by the Commonwealth Studies committee in 1962, sent inquiries to thousands of officials who had served abroad.¹⁸ The result was the creation of a large collection which includes judicial correspondence, note-books and bench-books. Attempts by individual countries, perhaps through their law societies, to use this model to collect and preserve legal papers held within the countries would add immeasurably to their legal archives. Lists of these papers, cross-references with court records and other legal documents in the public and private domains, would give the legal heritage of a country the fulfilment of its promise.

User Demands and Archival Responses

23. The disciplines of genealogy, history, political science, philosophy, psychology, sociology, social welfare and environmental design are still in their infancy when it comes to the use of legal records, and it is impossible to foretell what uses will come to be made of them in the future. The major transformation which occurred in the last twenty years may well mark the beginning of a new era.¹⁹ Lawyers, and central and local authorities, need precise details about offences, orders and verdicts, convictions, acquittals, motions, and judicial reasoning. Genealogists require indexes of parties and easy access to the case materials. Historians and researchers need the preservation of everything in a useable format.

24. Where everything in a particular category cannot be kept, a comprehensive cross-section must be retained because the law and matters of public and private interest are constantly changing. Changes in the judicial structure, in criminal and civil procedure, in the character of civil litigation, and in the judicial work of administrative tribunals affect which particular record is important or unimportant as any transportation, commerce, industry, the family and social customs have within themselves broad shifts of interest and relevance. Alternative sources are usually unsatisfactory, and there is little logic in destroying original material in order to preserve the secondary.²⁰

25. Records management will be even more important in the future than it has been in the past. Preserving court records poses important responsibilities for their use. Thus the management of court records must be oriented to the needs of servicing reference and research, communications and scholarship.²¹ Some priority should be given to the development of aids for the explanation of legal jargon and as to the use of the court records. Those who use the archives should be encouraged to add to these. Guides to the

records should be detailed, including a discussion of the history of the records and archival annotation.²² "Calendars" (brief descriptions) of the various kinds of court records are invaluable for amateur and professional researchers who wish to use legal records successfully, as they serve to point the researcher in the direction he or she may wish to go. Given the complex nature of such records, more detailed and comparative studies are needed from the academic disciplines. On the level of the individual country, lists and analyses of legal records must be based not on a single archival source but on those from all sectors of the public and private domains²³ and a guide to related legal records in the Commonwealth would be invaluable for future research.²⁴

26. A major problem for the newly-independent nations, however, is getting started. Having overcome problems inherent in claiming priority insofar as resources may be involved (and any loss in priority may represent opportunities forever foregone) proper storage facilities are required for the particular climatic and environmental concerns of the area. The preservation of records includes adequate sorting, organisation, and listing of the contents. Not only professional archivists are needed in a developing country, but also sub-professional officials in the courts and departments of State who can take into consideration the future disposition of the records when they are originally formed and stored. Courses such as those at the archival schools in London, Liverpool and Wales in the United Kingdom, and the recently-established Institute of Archives Science for South-East Asia at the National Archives of Malaysia are useful examples of what can be done in other regions.²⁵ Courses on subjects such as the history and administration of legal systems, language, diplomatic and interpretative skills, research methods and management are as relevant for legal records as they are for the cultural heritage of a country.²⁶ Preserving legal records is necessary for orderly development and understanding of the law, our historical consciousness, and our social, economic and cultural milieu. Maintaining and facilitating their use will make that possible.

27. The preservation and maintenance of legal records is not merely, however, a Commonwealth phenomenon. Through UNESCO, a National Information Systems (NATIS) is being developed to create international aims for world-wide information systems. NATIS was created largely to assist the archives of developing countries, and it plans to be relevant to archival needs regardless of the country's legal system, social or political structure, or stage of development.²⁷ The emphasis is being placed on devising means for preserving records, and processes to facilitate their use. The concept is one of "autonomous archive administration", a system that will promote records retention and management, and remove it from the area of short-term political or economic expediency.²⁸ These aims are particularly relevant to the problems which confront the preservation and maintenance of legal records. Schemes based on the destruction of whole classes of records are not only detrimental to the legal and cultural heritage of fully developed countries, but they are also irrelevant to the needs of the developing countries.²⁹ Cost-benefit equations are particularly flawed, when the cost can be quantified but the benefit cannot. Natural resources are irreplaceable. What all Commonwealth countries have in common is a living legal system embodying shared traditions, and the preservation of their records assists in an identification and understanding of past, present and future.

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FOOTNOTES

1. J.H. Baker, "The Dark Age of English Legal History", in Legal History Studies, ed. Dafydd Jenkins (Cardiff: University of Wales Press, 1975), pp. 1-27 at p.1.
2. The Collected Papers of F.W. Maitland, ed. H.A.L. Fisher (Cambridge: University Press, 1911), I, 190.
3. See, for example, the pioneering study of Michael Stephen Hindus, Prison and Plantation: Crime, Justice and Authority in Massachusetts and South Carolina, 1767-1878 (Chapel Hill: University of North Carolina Press, 1980)
4. Ikorge L. Haskins, "Court Records and History", (1948)5 William and Mary Quarterly, 547-52; and Edward Dumbauld, "Legal Records in English and American Courts" (1973)36 American Archives, 15-32.

5. Hugh M. Walton, "Destruction Schedules: Quarter Sessions', Magistrates' Courts and Coroners' Records", (October 1965) III Journal of the Society of Archivists, 61-75 at p.61.
6. The legislation was reprinted in a Reprint of Statutes, Rules and Schedules governing the disposal of Public Records by destruction or otherwise, 1877-1913 (London: Her Majesty's Stationery Office, 1914)
7. Walton, "Destruction Schedules", loc.cit. pp.63-5.
8. See I.R. Jacob, "Later Legal Records and the Historian", Archives, VI (April 1964) 135-46; H.M. Walton, "Some Comments on Destruction Schedules", Archives, VI (April 1964), 147-53; and Walton, "Destruction Schedules", pp.61-75
9. Report of the Committee on Legal records, called "The Denning Report" (London HMSO, Command 3084: 1966) pp. 1-16 and appendices I-X.
10. Walton, "Comments on Destruction Schedules", loc.cit. 147-53.
11. Gerald L. Fischer, "Letting the Dust Settle: Some Remarks on the Record Group Concept", (October 1973) IV Journal of the Society of Archivists, 640-5.
12. For example, Fischer, "Archival Development in South Australia", (1969) 18 Australian Library Journal, 69-79.
13. Committee on Legal Records, p.9, where this is suggested for Chancery records.
14. Ibid., p.6.
15. Michael Cook, "The Planning of an Archives School", (October 1975) V Journal of the Society of Archivists, 232-44.
16. The organiser is Dr. Balfour Halevy, Librarian, York School of Law, Downsview, Ontario.
17. Duncan Chalmers; "Computer Indexing in the Public Record Office", (April 1981) VI Journal of the Society of Archivists, 399-413.
18. The collection is located at the Rhodes House Library. The Commonwealth Foundation Conference of African University Librarians at Lusaka in 1969 passed a resolution stating that all former colonies should be encouraged to form projects such as this one for collecting private papers.
19. J.R. Ede, "The Record Office: Central and Local", (October 1975) V Journal of the Society of Archivists, 207-14.
20. Jacob, "Later Legal Records", loc.cit 133-9.
21. The thesis of Michael Cook, Archives Administration (London: Dawson, 1977).
22. For example, Guide to the Records of the Bahamas, ed. D. Gail Saunders and E.A. Carson (Nassau: Government Printing Department, 1973).
23. For example, the excellent guide, Sources of Jamaican History 1655-1838, ed. K.E. Ingram (Zug: Inter-documentation Company, 1976), two vols.
24. A model from the records of business history is that of Britain and the Dominions: A Guide to business and related records in the United Kingdom concerning Australia, Canada, New Zealand and South Africa, ed. Charles A. Jones (Boston: G.K. Hall & Co., (1978)).
25. Cook, "Planning of an Archives School", loc.cit. 232-46.
26. See the stimulating comments of Michael Duchein, "The Archival Revolution: The challenge of modern archives to the archivist", (July 1972) V Southwest Asian Archives, 4-14.

27. J.H. d'Olier and B. Delmas, Planning National Infrastructures for Documentation, Libraries and Archives: Outline for a General Policy (Paris: UNESCO, 1974) .
28. S.C. Newton, "The Archives as Legislator", (October 1973) IV Journal of the Society of Archivists, 654-9.
29. An excellent model for a developing country is that of R.H. Bautier, "Principes de législation et de réglementation des archives", in Manual d'Archivistique Tropicale, ed. Y. Perotin (Paris, 1966).

LAW FOR NON-LAWYERS: SOME PRELIMINARY REFLECTIONS LMM(83)34

Memorandum by the Commonwealth Secretariat
and a paper by Professor WILLIAM TWINING
of the University of Warwick, Coventry

Throughout the Commonwealth there has been an explosion in recent years of interest in the law and of materials designed to increase public awareness of the content of the law and the way in which the legal system may afford solutions to everyday problems.

2. The annexed paper has been prepared by Professor William Twining, who will be known to Law Ministers as a writer on problems in publishing in small jurisdictions and for his work with the Commonwealth Legal Education Association.

3. The paper suggests that there is a wealth of experience throughout the Commonwealth about many aspects of community legal education, and that this could usefully be shared and be evaluated in a more systematic fashion than has been the case to date.

ANNEX TO LMM(83)34

LAW FOR NON-LAWYERS: SOME PRELIMINARY REFLECTIONS

A paper prepared by PROFESSOR WILLIAM TWINING
of the University of Warwick, Coventry

A. Introduction

In recent years in many countries there has been a significant increase in interest, activities and publications connected with communication of and about law to non-lawyers. Law in schools; community legal education; street law; unmet needs for legal services; access to law; know your rights; public participation in law reform; do-it-yourself conveyancing and divorce have become standard phrases in many places. They are all associated with a general trend, by no means yet an "explosion", towards making law more familiar, comprehensible and accessible to ordinary citizens and to particular groups. The means or media of communication are as diverse as the activities suggested by the phrases: semi-popular books; home encyclopaedias; adult education courses; packages of teaching materials; law weeks; radio and T.V. programmes, multi-coloured 'green' papers; pamphlets; posters; leaflets; cassettes; advice columns; new designs for forms; games; songs; comic strips; even T-shirts reminding people of their rights when arrested, are all more or less familiar examples.

2. The idea of communicating about law to non-lawyers is not new; but the scale and the variety of the phenomenon - if it is a single phenomenon - may be. Nearly all of the published writing about the subject tends to deal with particular aspects, such as law in schools or community legal education, but there have been almost no attempts to look at it systematically and in general terms. The nearest to a general approach has been in the context of discussions of the extension of, or alternatives to, the provision of legal services to the general public. "Every man his own lawyer" is a phrase that has had an enduring attraction for nearly everyone except lawyers. In England a book of that title ran to many editions and has been superseded, in many parts of the Commonwealth, by a number of similar works. If such catch-phrases and products were ever thought to pose a serious threat to the livelihood of private practitioners, such fears seem to have largely receded. This is perhaps because it is now widely recognised that increased public awareness about law is as likely to increase as it is to diminish the overall demand for specialised legal services.

3. This focus on extension of, and alternatives to, lawyers' services may have distracted attention from other important aspects of the subject. The object of this paper is to take a fresh, necessarily impressionistic, look at the phenomenon as a whole from a different perspective and to raise for discussion some issues about communicating about law with non-lawyers as part of a national system of legal information provision, which itself is seen as part of the legal system. Thus I propose to concentrate on the information needs of non-lawyers of different kinds within an overall scheme of provision of legal information, leaving open questions about the precise role of private practitioners, governments and others in such a scheme - roles which in any case are likely to vary considerably from jurisdiction to jurisdiction.

B. Some Preliminary Observations

4. The starting point of this paper is a series of studies of law publishing and legal information and of problems of localising legal literature in small jurisdictions of the Commonwealth. The main findings of these studies, some of which were sponsored by the Commonwealth Legal Education Association, have been usefully summarised by Jenny Uglov in her paper Localising Legal Literature (Commonwealth Secretariat, 1981). It is not necessary to repeat these findings here, but it may be useful to restate some general points that have a direct bearing on the present topic. Some of these belong to the category of the 'forgotten obvious'.

5. One of the main lessons of these studies was that it is artificial to concentrate too much on 'legal literature' rather than on the whole range of ways of communicating legal information, including radio and television, taught courses, public meetings, the telephone, computer software, and through making more extensive use of librarians and other specialists in information as channels of communication. This is particularly significant in respect of oral advice with a legal content, much of which is given, in any society, by non-lawyer intermediaries such as priests, elders, advice bureaux, social workers, trade unionists, local government officials, elected representatives and so on. One of the main functions of a legal information system is to serve the needs of such intermediaries rather than to try to communicate directly with the public at large. Furthermore, it is dangerous to assume that lawyers are the best providers of legal information whether in oral or written form. It is salutary to bear in mind that the International Legal Center for Law and Development has found that some of the most successful materials for assisting the rural poor in efforts to improve access to law have been prepared by non-lawyers, who may know less law but may be better communicators. A similar theme is to be found in much recent writing about lawyer-client relations. Lawyers need to learn how to translate legal language into ordinary language as well as vice versa.

(a) The variety of users

6. A related point is that non-lawyer users of legal information vary greatly in their needs, circumstances and comprehension levels. The category of 'non-lawyers' includes almost everyone. Clearly they can be classified in myriad ways, but common sense suggests that some particularly important audiences need to be differentiated in the present context, for example:-

- (i) individuals in their capacities as citizens;
- (ii) individuals in their professional or occupational capacities (e.g. non-lawyer officials, small businessmen, accountants, firemen, journalists, police, social workers);
- (iii) students pursuing courses of general or specialised education;
- (iv) organisations or groups, ranging from foreign corporations to tenants' associations, trade unions, specialised pressure groups and community organisations.

7. It is worth bearing in mind that, despite the differences between these types of user, there is much overlap between their needs. Time and again we have come across publications designed for one audience which have been found useful by others. For example, an excellent general reference work, such as the Legal Resources Book (see below), may be used by businessmen, parents, the fire brigade, housing associations and even practising lawyers.

(b) Different kinds of knowledge

8. Another point to emerge from these general studies was that different kinds of information needs tend to get lumped together rather indiscriminately. Hence it is useful to distinguish between three very different kinds of need:-

- (i) general knowledge or awareness, e.g. as part of the general education of ordinary citizens;
- (ii) specialised knowledge, e.g. most businessmen need to be generally conversant with the general principles of contract and to carry in their heads or to have ready to hand very detailed knowledge about some highly specialised area(s) of law that regularly affect them. This is significantly different from the need for:-
- (iii) immediate practical information bearing on particular (typically one-off, often unexpected) events, transactions, etc. which the users could not be reasonably expected to carry in their heads. Here what is required is not legal knowledge so much as capacity to recognise the need and to know how to obtain the relevant information. This is, of course, one of the most important and most problematic areas of legal information.

(c) Information about what ?

9. It is a common fallacy that the only kind of important information about law is information about the content of substantive rules of law. The fallacy is familiar, but it still has a powerful influence on, for example, the content of books and courses about law for non-lawyers. It is accordingly worth stressing the point that 'information about law' includes information about where to go or whom to ask for advice and help; about procedures; and about the uses and limits of law and lawyers as well as about the detailed rules of substantive law.

10. In this connection it is worth noting a trend in legal education for non-lawyers. Twenty years ago most educational books in the field concentrated on providing basic information - often in a rather dry and indigestible form - about legal institutions and legal doctrine. Modern literature aimed at the same market, following the courses, tends to be much more diverse, often going beyond mere doctrinal description to emphasise the dynamics of the law in action or to raise basic issues about the role of law in society or the limits of law. Whether all such efforts have desirable educational objectives is a matter of opinion; what is clear is that a great deal of educational literature manages to suggest that law is interesting, pervasive and important rather than to project the image of a dry, technical and esoteric subject. It also emphasises procedures and skills as much as the content of substantive law.

(d) Two-way communication

11. Talk about 'law for non-lawyers' often proceeds on the assumption that the problem solely relates to one-way communication by lawyers (whether government departments, legislative draftsmen, private practitioners or law teachers). This is misleading, for one aspect of the problem is extracting information, opinions, etc. from ordinary people. This is a familiar topic in respect of law reform, where in many jurisdictions a great deal of effort and imagination has gone into trying to gauge public opinion and to obtain suggestions and feed-back from those affected and from the public at large (sometimes, one senses, with disappointing results), but it is also worth bearing in mind that without regular two-way communication it is often extremely difficult to gauge what people's problems and information needs are. Just as the problem of unmet needs for legal services is partly a function of the legal profession becoming out of touch with the actual problems of ordinary people so producers of legal information often have to proceed in the dark about what kinds of information are likely to be most useful to various kinds of 'user', and they may be wildly wrong unless they keep in close touch with their audience.

(e) Two intractable problems

12. It is worth mentioning two problems that recent studies have brought to attention as being both important and intractable. The first is the problem of improving provision of information about local laws, procedures, and institutions. This paper concentrates on communication about local law in a given jurisdiction, but it must be acknowledged that

many jurisdictions are still likely to continue to be heavily dependent on foreign publications, especially in respect of educational materials.

13. Secondly, although some attention has been paid to the peculiar problems of communication about law in multi-lingual societies (e.g M. Cooray, 1981), a great deal more work needs to be done before effective strategies for tackling these problems can be devised. This paper assumes that this is an especially urgent and difficult problem in respect of provision of legal information to non-lawyers in many jurisdictions of the Commonwealth

C. Why is it thought to be important?

14. No doubt one reason for increased activity has been an increase in the demand for information and education about law. Nowhere is that more apparent than in the international phenomenon of the enormous expansion of legal education at all levels. The proliferation of law in schools, of community legal education and of some kinds of popular legal publication to some extent represents a response to popular demand; but initiatives have also been taken by governments, the legal profession and others, to stimulate interest for a variety of reasons.

15. Several different kinds of justification have been advanced for encouraging the spread of legal information and knowledge among non-lawyers. For example, in his book The Law in Crisis, Professor Weeramantry emphasises the importance of "law consciousness" among citizens as a necessary ingredient of increased participation in

"To shut out law from our ken is to ignore a large part of human experience. It is time the law's beneficiary, the common man in every jurisdiction, entered upon his inheritance with a fuller realisation of its richness, its importance and its power. It is time for a more general realisation that lawyers have no rights of proprietorship over this inheritance but are only trustees. Trustees and beneficiaries must meet in discussion. There must be a freer exchange of views and a greater readiness to understand."

16. Others have emphasised the importance of citizens and groups knowing about the laws that affect them directly. Thus one of the functions of the Australian Commonwealth Legal Aid Commission is given statutory expression as follows:-

"to advise the Attorney-General as to the educational programs that would be effective in prompting an understanding by the public, or by sections of the public that have special needs in this respect, of their rights, powers, privileges and duties under laws in force in Australia".
(Commonwealth Legal Aid Commission Act 1977, s.6, Ch.1).

17. Other programmes and groups have emphasised collective action and self-help, especially on the part of under-privileged sections of the community. A report for the International Center for Law and Development on a series of studies of legal professions in Third World countries emphasises the inadequacy of traditional modes of delivery of legal services for the urban and rural poor in terms of collective action as well as individual rights. In order to secure access to legal institutions and processes and, more generally, to government, rural and urban groups, it is argued, need different kinds of legal resources from the kind of legal representation that is normally associated with the legal profession. The report concludes:-

"Legal professions are neither geared or able to provide the kinds of legal resources which are needed by different groups of the poor (e.g. peasants, urban squatters, landless rural workers) in order to press claims for a different distribution of particular resources essential to their needs (credit, water, health services or minimum wages). Rather, legal professions -- viewed as modes of training and of organising legal services -- result in a system of producing and distributing legal resources which is neither intellectually nor economically oriented towards the needs of the poor .

"Legal professions deter development of alternative means of providing legal resources to the poor (i.e. means which do not depend so heavily on the profession). Inherited structures endow the profession with influence

over legal education, certification and regulation of who can provide legal resources. By virtue of training, entrenched professional culture, social orientation and economic or class interests, professions deter development of "paraprofessionals" or other kinds of intermediaries who might serve different kinds of needs of the poor".

18. This kind of approach advocates collective action, self-reliance and the substitution of a concept of developing legal resources within groups rather than the provisions of legal services to groups and individuals from the outside. A proposal for an international project jointly sponsored by the ICLD, the Anne Blaire Harrison Institute for Public Law and the National Street Law Institute stated its objectives as follows:-

- "A. To secure participation and social accountability in institutions which produce, control, regulate, or distribute essential resources.
- B. To facilitate endogenous mobilisation of the rural poor through organisations which will encourage self-reliant and social transformations at grass root levels.
- C. To raise the law-related consciousness, knowledge, and skills of participatory, self-reliant organisations and their membership, as well as of persons of the broader community".

19. These are just some examples of rather different rationales that have been advanced for focussing attention on and devoting resources to systematic provision of legal information to non-lawyers. There is a consensus that this is an important but neglected area; but differences of opinion about needs and priorities are to be expected between those who emphasise individual rights and duties, public participation in government, collective action by under-privileged groups, or simply response to increased demand in the market-place. A similar diversity of opinion is to be expected about the proper role of government in providing or supporting particular kinds of activity in this area. It is also worth remembering that the need for comprehensible information about law, and government responsibility to ensure that it is available, arguably increases as State activity impinges more on the lives of ordinary people and the community.

20. It is beyond the scope of this paper to comment on the relative merits of these different perspectives, let alone to make specific recommendations about needs and priorities. But it may be helpful, in coming to judgements about such matters in particular contexts and in considering possible initiatives, to differentiate between the kinds of functions that legal information provision may serve. The following is an adaptation of a scheme suggested by Professor J.C.N. Paul:-

- (i) to communicate the content of law generally and to specific sectors and groups;
- (ii) to train non-lawyer specialists to administer, implement or use law that affects them directly;
- (iii) to assist non-lawyers charged with administering or implementing law (e.g. police, administrators, other lay functionaries, e.g. village court officials);
- (iv) to assist different kinds of individuals and groups to use law to protect or advance their interests;
- (v) to evaluate critically existing elements (rules, procedures, institutions, etc.) within the legal system, or proposals for change in such elements;
- (vi) to advance understanding of society through law;
- (vii) to entertain members of the public (note: ironically in many societies this may be one of the main social functions of legal information provision; it may, of course, indirectly serve to educate or mis-educate the public about law).

Clearly different types of information and knowledge (see above) are appropriate to each of these functions.

D. Some Particular Areas of Concern

21. In talking about information it is often useful to begin by asking some such question as: Who is seeking information about what from whom for what purposes in what contexts by what means and with what results? Or, switching from users of information to communicators: Who is trying to communicate what about what to whom ...? etc.

22. In the present context such global questions may help to underline the extent and the complexity of the subject. It is not possible here to do more than comment on a few areas that have already attracted special attention.

(1) Communication of legislation and other forms of written law

23. During the past ten years a great deal of attention has been devoted to the subject of statute law, especially to the form of the statute book, styles of drafting, problems of interpretation and, more generally, how to make legislation more accessible, more manageable and more comprehensible to those affected.

24. Naturally most of the writing about the subject has been by lawyers for lawyers. But there seems to be a much greater awareness than there used to be that lawyers are not the only interested parties. An illustration of this is to be found in the Statute Law Society (UK): some of the prime movers in this organisation have been non-lawyers, including politicians, accountants, civil servants and specialists in computer applications, all of whom consider themselves to be 'users' of statute law; some of them are also 'producers'.

25. This general growth of interest has resulted in an increased sophistication in the level of discussion and, rather unevenly, in what might be termed the technology of legislation. It is worth commenting briefly on some aspects of this.

26. Firstly, there has been a proliferation of specialised literature. There have been several excellent books, numerous articles, and a specialised journal, the Statute Law Review, was launched in 1980 (see bibliography in Appendix A). There is also a trend towards devoting more attention to the subject within legal education, although we are some way off the point where legislation is treated as a standard or 'core' subject in law degrees.

27. Secondly, there has been a general improvement in the methods of publishing, updating and revising legislation with some smaller jurisdictions, such as Northern Ireland and the Isle of Man, setting the lead in making imaginative use of 'new technologies' to reduce costs as well as to increase efficiency.

28. Thirdly, one of the most-discussed topics in the whole field of legal information is the relative merits of different styles of legislative drafting. A new impetus and increased sophistication have been given to these debates by bodies such as the Heap Committee (Statute Law Society) and the Renton Committee (UK) and by the writings of experienced legislative draftsmen such as Elmer Dreidger, Francis Bennion and Sir William Dale - the last being perhaps the foremost common law protagonist for civilian styles of drafting. The pages of the Statute Law Review contain expressions of opinion from legislative draftsmen with experience in many jurisdictions.

29. While disagreement is still the order of the day, something approaching a consensus does seem to be near at the level of principle. In 1968 the Heap Committee on Statute Law Deficiencies in the United Kingdom concluded:-

"99. The root of the problem afflicting statute law users lies more in the system by which law is made and expressed than in the substantive law itself. Substantive law must have a secure base and this entails efficient and effective methods of producing and communicating it."

"100. The Procedures by which Statute Law is made and officially promulgated should be governed by the needs of the User."

"101. The user's basic requirements are that:

- (a) all legislation, including Statutory Instruments, on a particular subject be contained in its latest form in one place;
- (b) the statute law be expressed in that place comprehensively: there should be one subject for each Act, and one Act for each subject; and
- (c) a convenient method exists to enable him to find the particular subject-matter sought".

This was given modified support by the Renton Committee which recommended that "in principle the interests of the ultimate users should always take priority over those of the legislators" (para. 10.3). While there is still plenty of scope for differences of view as to who are the primary 'users' of particular statutes and how their interests can best be served by draftsmen, this principle has come to be widely accepted as a desirable aspiration. There is also a growing acceptance of the fact that lawyers are by no means the only 'users' of statutes. How far this aspiration is realised in fact in current practices and in the training of aspiring draftsmen are questions that are worth debating.

30. It is also worth asking how far another lesson has been applied in practice. It is now widely recognised that there is a significant difference between authoritative aids to interpretation and other secondary aids to comprehension of legislation. Whatever the status of particular types of material as sources for resolving disputed points of interpretation in the courts, there is now available a wide range of secondary devices for aiding comprehension of even the most difficult legislative texts. These include not only traditional documents, such as explanatory memoranda and travaux préparatoires, but a wide range of pamphlets, leaflets, posters, etc., some of which use visual techniques of presentation, including algorithms, flow charts, diagrams and pictures. Examples of these are no doubt to be found in every jurisdiction in the Commonwealth. A great deal of thought and imagination has been devoted to preparation of individual examples of this kind of material, but one wonders whether sufficient has been done to exchange information about what can be done, to pool experience and to evaluate the actual effectiveness of different kinds of devices in terms of the objective of making statute law more comprehensible and accessible to different kinds of user. In short: a great deal of effort has been put into improving presentation, but relatively little has been done to study actual impact.

31. There are three further topics about which exchange of experiences and comparison of different models might be of value. The first is forms of drafting of codes, restatements and other written law to be administered and applied by lay magistrates in their own communities. There is an extensive, but very scattered, literature about the experiences of particular jurisdictions - for example about restatement and codification of customary law in East Africa in the sixties; about suitable forms of law and legal information for village courts in Papua New Guinea; about "American Indian Law" and so on. But one senses that this has not often been looked at systematically and comparatively nor as a technological problem of communication, to which non-lawyer experts of different kinds might make a useful contribution.

32. Another, closely related, problem is that of translation (or of other modes of communication) of formal written law - which is, of course, one aspect of the broader subject of law in multi-lingual societies, mentioned above.

33. Finally, increasing attention is being given to the design and redesign of forms and to methods of improving their "readability". This is a field in which the co-operation of psychologists and experts in design can be particularly fruitful. Here, as elsewhere, the lawyer's concern for precision and accuracy regularly comes into conflict with the user's need for simplicity and clarity.

(2) Public participation in law reform

34. Even more attention has been devoted to Law Reform in recent years than to the technology of statute law. No doubt stimulated by the establishment of Law Reform Commissions and like bodies in many jurisdictions, immense efforts have been made to stimulate and to secure greater participation by particular groups and by the public at large in the processes of reform. These go beyond explaining changes that have already been decided to sounding out opinion about existing provisions or already formulated

proposals to seeking and debating fresh suggestions and ideas. Some of these efforts have been described in the literature; an excellent example is a paper entitled "Reforming Law Reform : New Methods of Law Reform in Australia" by Mr. Justice Kirby, Chairman of the Australian Law Reform Commission. This examines and comments on a range of techniques of consultation, both old and new. In addition to such familiar devices as discussion papers and private consultations, the author describes several new methods employed in Australia, including statutory consultants, discussion papers addressed specifically to non-experts, public hearings, use of the media, public seminars, surveys, questionnaires, public opinion polls and efforts to reach special groups such as prisoners and ethnic minorities.

35. Mr Justice Kirby concludes:-

"The justification of this exhaustive effort of consultation can be briefly stated. It permits the gathering of factual information, particularly expert information. It secures a statement of relevant experiences, especially experiences which illustrate and individualise the defects in the law. It procures a practical bias in the law reform proposals because they must be submitted to the scrutiny of those who can say how much the reforms will cost and whether or not they will work. It gathers commentary on tentative ideas which allow the Commissioners of law reform to conform their views, modify them or retreat, if shown to be wrong. It aids the Commissioners in their task by assisting the clearer public articulation of issues and arguments for and against reform proposals. The whole process raises the public debate about law reform, ensures that the antagonists get to know each other, and usually, to respect each other's views. It raises community expectation, both of specific improvements to the legal system and routine on-going consideration of law reform generally. Expectations of the latter may well promote the devotion of more resources to the legal science than has been the case in the past".

36. In addition to these specific advantages to law reformers, Mr. Justice Kirby sees broader political and educational advantages in devoting resources and time to extensive consultation. Other efforts have also been described in the literature, some of them reflecting pessimism or disappointment about the level and quality of public response. Be that as it may, one gains a distinct impression that there is a relatively well-developed informal network of communication about law reform across national frontiers: consultative documents are circulated internationally; law commissioners exchange visits and write about their experiences; the invaluable Commonwealth Law Bulletin and Technical Co-operation provide regular systematic information about law reform activities throughout the Commonwealth; and the occasional meeting of Commonwealth Law Reform Agencies has been held.

37. It seems that, because of the existence of specialised institutions of law reform and for other reasons, there is both a generally greater self-consciousness about problems of communication about law with non-lawyers and more regular international exchange of information and experiences in respect of law reform than of other aspects of the subject of this paper. Whether one should infer from this that there is accordingly less need for systematic comparative study of the technology and impact of this aspect of legal information or that this is worthy of further study because it is more manageable is an open question.

(3) Law in schools and community legal education

37. Since these are planned to be the subject of special papers, it is not necessary to consider them in detail here. However, it is worth noting that there is a wealth of relevant experience and of more or less relevant models in both these areas in the United States - especially in respect of law in schools, which was the subject of a number of major initiatives during the nineteen sixties and seventies. A particularly useful account is a Special Report for the ABA entitled Law-Related Education in America: Guidelines for the Future (West, 1975).

(4) Law in alternative strategies for rural development

39. As was mentioned earlier, for several years past the International Center for Law in Development in New York has concentrated a large part of its efforts on the problems

of mobilising the rural poor for self-reliance in development in, among other places, Maharashtra (India) and the Philippines. These efforts are of interest in the present context for two reasons: first, legal information is perceived to be an important element in any attempts to encourage self-help by legal means by disadvantaged groups; secondly, the approach adopted in these programmes sees the whole subject in a strikingly different perspective from the more orthodox 'top down' view of legal information provision adopted in most discussions, including this paper. The general approach is described in "Alternative Development: A Legal Prospectus" (in Third World Legal Studies - Law in Alternative Strategies of Rural Development, New York, 1983).

(5) Some suggestive models

40. During the course of our studies of problems of localising legal literature in small jurisdictions we encountered a number of examples of particular publications and initiatives in particular jurisdictions that seemed to have potential for imitation or adaptation elsewhere. Since this was not the primary focus of these studies the selection is somewhat random. Nevertheless it is worth drawing attention to a few particularly striking examples:-

- (i) The Legal Resources Book, first published by Fitzroy Legal Service, Melbourne in 1977. An outstandingly successful example of a reliable, practical guide to law addressed to non-lawyers.
- (ii) Servicing the Legal System (Northern Ireland), an imaginatively conceived programme for providing regular and reliable information about local law to a variety of kinds of user in a small jurisdiction, involving co-operation of the legal profession, the judiciary and the Faculty of Law of the Queen's University, Belfast. This is described in another paper and is also the subject of an article by Professor D.S. Greer in a forthcoming issue of the Commonwealth Law Bulletin.
- (iii) The Canadian Law Information Council (CLIC), the Uganda Law Development Centre and the proposed Papua New Guinea Law Information Centre are examples of efforts to institutionalise the provision of legal information at all levels in a particular jurisdiction.
- (iv) The Institute of Public Administration (Dublin) as an example of a 'non-legal' institution that, by virtue of an energetic and imaginative programme of 'in-house' publication was for many years the main publisher of secondary books on law in the Republic of Ireland, often at very reasonable prices.
- (v) "Public Knowledge", a list of publications about Scotland (including Law and the Legal System), produced by the Scottish Information Providers Group to enable groups and individuals to have better access to local information.
- (vi) The Subject Guides (to the Acts of Tynwald, Isle of Man) - an imaginative use of word-processors to make the statute book of a very small jurisdiction more accessible to users.
- (vii) Legal Eagle, a legal newspaper for schools, published by the Law Foundation of New South Wales.
- (viii) R. Summers et al., Law: Its Nature, Functions and Limits (2nd ed.), one of the most imaginative and successful 'pre-law' books by a distinguished American academic lawyer; a simplified version of this, making extensive use of pictures and cartoons, was prepared for use in schools in the State of New York.
- (ix) CANS (Citizens Advice Notes - UK), a good example of an established regular service for providing very basic information about housing, matrimonial matters, etc. to individuals and community groups.

This is, of course, merely a small and random sample. Further suggestive examples could no doubt be found in every jurisdiction in the Commonwealth. Many of these deserve to be better known. Indeed, if this paper has any message it is that there is a wealth of experience about many aspects of the communication about law to and with non-lawyers that could usefully be shared and evaluated in a more systematic fashion than has been done hitherto.

APPENDIX A

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APPENDIX B

INSTITUTIONS

American Bar Association, 1155 E. 60th St., Chicago, Illinois 60637.

Canadian Bar Association, Committee for Public Legal Education and Information.

Canadian Law Information Council, Ottawa.

Constitutional Rights Foundation, 609 Grand Avenue, Los Angeles, California 90017, U.S.A.

International Center for Law in Development, 777 U.N. Plaza, New York, N.Y.10017, U.S.A.

National Street Law Institute, Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington D.C. 20001, U.S.A.

Servicing the Legal System (SLS), Faculty of Law, The Queen's University, Belfast, BT7 1NN, Northern Ireland.

Statute Law Society, Hon. Sec., 186 City Road, London EC1V 2NU.

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LAW FOR THE NON-LAWYER

A paper prepared by the Hon. J.K. McLAY, MP,
Minister of Justice and Attorney-General of
New Zealand

When John Selden stated in the seventeenth century that ignorance of the law excuseth no man he presented the layman with a dilemma which has become increasingly acute with every passing year.

2. In fact very few laymen can be said to understand the law, and in many areas this is equally true of lawyers themselves. That the law is complex and frequently capable of being comprehended only by experts is no doubt to some degree a consequence of the complexity of the society in which we choose to live. But the statement of the Report on the Preparation of Legislation, the Renton Report, published in Great Britain in 1975 on the political implications of a law which has become too intricate for the layman to grasp should be kept in mind. There it was said that:-

"It is of fundamental importance in a free society that the law should be readily ascertainable and reasonably clear..... Whatever may be the pressure to increase the volume and extend the scope of legislation, it is our firm view that legislation which is complex and obscure may for that very reason be oppressive".

3. This passage refers specifically to the law embodied in the statutes.

4. The difficulties of the layman faced with his country's statute law, have been drawn attention to in other Commonwealth countries. In a book entitled Access to the Law, written by M.L. Friedland and published by the Law Reform Commission of Canada in 1975, it is stated that:-

"Statutes are not only the most commonly used source of law and probably the most available source of law, they are the most important source of law. They impose many positive obligations on citizens and regulate much of their daily lives. To respond to these obligations and regulations the citizen must be able to find out the contents of statutes."

5. The Renton Report in examining the causes for the complexity which renders the statutes so frequently impenetrable to the layman, found four reasons. These were (1) the language is frequently gratuitously obscure and complex, (2) the desire for certainty of interpretation leads too often to over elaboration of the text, (3) the structure is often illogical and unhelpful, and (4) the arrangement of Acts and amendments is often confusing.

6. We have so far discussed the law in terms of legislation. I will return in a moment to a discussion of statute law and examine how we are attempting to cope with some of these difficulties in New Zealand. But the layman comes into contact with the law in many other ways. He may for instance come in contact with it in legal documents prepared by his lawyer, in documents such as insurance policies, which he signs in entering into a contract with another layman. Certainly incomprehensibility here may be as oppressive, if in a rather different way, as is obscurity in the statutes: gratuitously complex and obscure language and over-elaboration in pursuit of certainty are applicable to all legal documents and cause similar vexation to the layman.

7. In New Zealand, the language of legal documents has come under sharp criticism from the point of view of both the layman and the lawyer. The former has found in the Consumers Institute a vigorous defender of his right to find in the legal document he signs, texts which he finds comprehensible. And Mr. Ian L. McKay, a Vice President of the New Zealand Law Society at that Society's annual Conference in 1981, presented a paper on "Intelligible Drafting". The Law Society subsequently set up a Simplicity of Drafting Committee under Mr. McKay which is at present examining the problem.

8. Mr. McKay in his paper pointed to the fact that the drafting of documents is one of the most important aspects of the lawyer's work. "The document in most cases", he pointed out, "is intended to give effect to the client's instructions. Once executed it has a life of its own. It takes the place of the client's instructions and even of the draftman's

intentions. It must be construed as to its own meaning. If it is not well drawn it may fail in its purpose, or may cause misunderstanding and expensive litigation". That well drawn in this context means simple and comprehensive to the layman is clear enough when it is considered that, as Mr. McKay further points out, "Most legal documents have to be applied by laymen. The lessee cannot observe his covenants if he cannot understand them. The trustee and the accountant need to understand the will or trust deed if they are to avoid an unwitting misapplication of funds or other breach of trust".

9. Both Mr. McKay and the Consumers' Institute have pointed to numerous specific examples of obscure legal drafting. There is no need to be specific here, except to point to such practices as the use of archaic words, unnecessary synonyms, jargon such as "hereby", "hereinafter" and "hereinbefore", complicated syntax and overlong sentences. Both reject the defence of existing forms as having stood the test of time. The Consumers Institute suggests that if they have been tested at all they must have been badly drafted in the first place. Mr. McKay has stated that, "Many of our precedents represent the accretions made by those who added words out of caution and omitted to delete existing words out of even greater caution. It represents the laziness or lack of time of lawyers who found it easier to follow the known path..." than to find a text that was satisfactory to the client. Lawyers "rely on precedents", he said, "which we do not take time to revise and we follow traditional formulae without stopping to consider whether they could be improved". These words are not intended as criticism of the legal profession which has after all been active in taking steps to put its own house in order.

10. And while Mr. McKay has been primarily interested in improving the service lawyers offer their clients he has no doubt been aware of the threat of injustice to the layman that bad drafting presents and which has been the main concern of the Consumers' Council. It has shown particular concern over those contracts which are one-sided in that the terms are drawn up by one party, and the other party is placed in the position of signing a legal document he may not in fact be able to understand. Many contracts, such as hire purchase and insurance agreements, or carriers' contracts, are of this kind, and it is imperative that in such a situation the party which had no part in the drawing up of the document should clearly understand the contents of what he or she is signing.

11. Simplified language is not of course, by itself, a panacea for consumers. In 1979 in New York the Understandable Language Act came into force. Comparable legislation has since followed in other States. Attempts to enforce statutorily a simplification of insurance policies, in particular, have also been made in the United States. The experience with these attempts to simplify the language of legal documents has not been entirely successful and I am not sure that they offer satisfactory models for adoption in my own country. The trend in the United States is apparently in any case, towards the use of a simpler and better form of legalese rather than towards the colloquial narrative style of writing which is so often offered as a solution to this problem. Paradoxically, the aims of clarity and brevity and simplicity in legal drafting are often inconsistent. Placing too great an emphasis on simplicity can often result in a loss of meaning. Moreover it is clear that simplification gives rise to a number of problems of its own. One of these is that simplified contracts are often considerably longer than the legal documents they displace. Legal phrases are inevitably shorter than any colloquial narrative describing them and the problem of bulk in many standard contracts containing complex terms can often be as great a bar to understanding as the use of legal jargon. Even the best drafted legal documents make far from interesting reading and obviously it would be no more difficult to hide terms of deceptive meaning in the midst of a ten or twelve page document than it would to hide the same terms behind a fog of legalese in a one or two page closely printed form.

12. Even so, the Consumers' Institute's point that "To 'tell' people their rights in a way they cannot understand is absurd, and, more than that, it is unjust", remains valid.

13. In my own department, the establishment in 1981 of the Family Courts has given us an excellent opportunity to break down the barriers which have stood in the past between the layman and the law. This had particularly been the case with the final legal dissolution which takes place two years after the initial separation. As a result of the Family Proceedings Act 1980, the concept of divorce has been replaced by that of dissolution of marriage. The procedure appropriate has also been greatly simplified.

14. In general, working through the stages that can be involved in marriage break-up, I should perhaps explain that at an initial stage there is provision for married people to request a Family Court Registrar to arrange marital counselling. The form for this is simple, and readily available at Courts.

15. If a husband and wife wish to separate by mutual consent, although there is no legal requirement, consultation with solicitors is generally desirable. If the couple cannot reach an agreement and Court proceedings become necessary, particularly if such proceedings include custody, access, maintenance or property issues, it would be expected that people would obtain legal advice, and that the lawyer, as they have in the past, would file applications on their behalf.

16. But in relation to dissolution, while the department has not printed specific application forms, at each District Court a copy of the prescribed wording is available to applicants on request. About half the applicants prepare their own papers, the other choosing to consult a solicitor. Whilst it is recognised that staff are not authorised to give legal advice, they check that documents are complete for filing, and advise applicants of service requirements.

17. At eight major city Courts, throughout New Zealand there is now a Counselling Coordinator, whose responsibilities include educating the public on the work of the Family Court. It is expected that nine part-time co-ordinators will be appointed in March or April of 1983.

18. The need for clarity in the language of legal documents raises the question of the need for greater clarity in what, as has already been noted, are the most important legal documents of all, namely the statutes.

19. This is a matter which has aroused much interest overseas. In 1968 the Statute Law Society was formed in England. Its purpose was to lobby for "technical improvements in the form and the manner in which statutes... are expressed... with the view to making the same more intelligible", and to disseminate information for the public to educate them about legislation, and the legislative process. In the UK the Renton Committee on the Preparation of Legislation was established in 1973 and published its report two years later. The Law Reform Commissions in Scotland and Canada have also in recent years been doing work in this area.

20. In New Zealand, criticism of the language of the country's statutes has been rather more low keyed. It is true that in 1974 Mr Harold White of the Booksellers Association of New Zealand suggested - not entirely seriously, it is hoped - that all legislation should be written at the reading level of a twelve year old child. Whatever the value of his arguments about the incomprehensibility of our legislation it no doubt did not go unnoticed that such a remark was far more insulting to the general populace than to the law draftsmen.

21. That particular criticism received little sympathy from the Minister of Justice at the time, the Hon. Martyne Finlay. In a letter published in the New Zealand Law Journal in the following year, he commented:

"It must be remembered that a Bill must not only do the job it is intended to do, but the draftsman must endeavour to anticipate every possible contingency and draft in such a way that no one will be able, because of a defect in the drafting, to evade responsibility for any breach or obtain a benefit that he was not intended to have. As an eminent English lawyer once said - an Act must be written in such a form that not only must persons reading it in good faith be able to understand it but persons reading it in bad faith must not be able to misunderstand it."

22. The question of expressing legislation in simple language has engaged the attention of experts for years, but the problem permits of no easy answer. But I question whether the position is as bad as many critics would have the public believe. The following extract is from an address on "Public Administrators and Legislation" by Elmer A. Driedger, formerly Parliamentary Counsel in Canada, and a world authority on legislative drafting:

"Despite the popular notion to the contrary, a good draftsman does try to write a statute so that it can be understood by those to whom it is directed and those who have to administer it, and he does try to write it in plain, simple language. Admittedly there are statutes that are complicated and difficult to comprehend, but the draftsman is not necessarily the culprit. Statutes are laws; they are intended to regulate human relationships. If those relationships are complicated, the laws to regulate them must be too..."

23. There has then, in general, been little serious or concerted criticism of the standard of drafting of New Zealand statutes.

24. This might at first be considered surprising in view of the apparent flexibility of approach of law draftsmen to the question of style, in this country. Mr D.A.S. Ward, the Chief Parliamentary Counsel, from 1967 to 1972, saw style as too 'intangible' to categorise and gave five reasons:-

- (i) Acts are drafted by a number of draftsmen who are largely independent once they have shown competence.
- (ii) Any particular draftsman's "style" was subject to change as he progressed.
- (iii) An original draft might have been redrafted by another person.
- (iv) Draftsmen have highly individual personal styles.
- (v) It is not the practice of the Parliamentary Counsel Office to set down standard style policy in the same way as presentation style can be. This is because it is felt desirable to give the individual counsel as much freedom as possible to tackle any draft in the best way to obtain the object of the draft.

25. Thus the very flexibility which many concerned to simplify legal language might wish to curtail, is seen by the draftsmen themselves as ensuring that very simplicity itself.

26. It may further be noted that section 5 of the Statutes Drafting and Compilation Act 1920, places on compilers of statutes a statutory obligation to concern themselves with the quality of legislative language:-

- "b. To report to the Prime Minister or the Attorney-General upon verbal or technical alterations of language which may be adopted for the purpose and in the course of any compilation.
- c. To consider the language and effect of the statutes, compilation whereof is directed, and to state for the consideration of the Prime Minister or the Attorney-General suggestions or proposals for the alteration of the law enacted by such statutes, or for the extension or limitation of the effect of such statutes, or for amendment of the wording of any such statute".

27. Thus neither policy nor legislation relative to the drafting of statutes can be said to lack concern for the need where possible of clear and understandable laws.

28. In fact, New Zealand can, with some justification be proud of the standard of law drafting of its Parliamentary Counsel. When Dean Griswold of Harvard University visited New Zealand in 1951, this was certainly his view. Harvard University then used New Zealand Acts as models for study.

29. And Mr. T.Y. Chan, in an article entitled "Changes in Form of New Zealand Statutes", which has been extensively used for the historical material in this paper, and which was published in the Victoria University Law Review, in 1976, stated that, "In presentation and form the improvements made to New Zealand statutes have probably reached their ultimate... very little else needs to be done to the existing format, which... is both neat and effective. In this, it is as good as any in the world". He did nevertheless go on to make a number of qualifications. He continued:

30. "It must be stressed however, that the present format has been used for over 120 years, and whilst it is the best present format it may need to be changed to suit the requirements of changing time. More and more people without legal training are now seeking to understand statutes for themselves. For this reason... there has perhaps to be some change in emphasis," he continued:

31. "It may well be that their cautiousness for change is to the credit of the draftsmen of New Zealand Acts as they have maintained a style that the profession knows and understands. But outside the field of law, and one need only take the up-dating of the

language used in the Bible as one most striking example, a changed emphasis in favour of attracting lay understanding is apparent. Perhaps the draftsman's work should reflect an appreciation of this," he concluded.

32. Against this statement, however, might be placed that of Mr. Ian McKay, on the occasion of his introducing his paper, already alluded to, on "Intelligible Drafting", at the Law Conference of 1981.

33. There he said that:-

"Some of you when you saw the title of this paper may have thought that I was going to have a tilt at the law draftsmen, because when one talks of intelligible drafting the prime target is usually the poor old law draftsman. I have not mentioned him. That is deliberate, because I think generally in New Zealand the standard of drafting of our statutes is very high, and I do not think that we in the profession set such a high standard in our own documents that we can afford to be too critical. If we had to draft under the sort of pressures that Parliamentary Counsel work I shudder for the results. They do sometimes err, one knows that, but I think those of us who have served on law reform committees, and have worked closely with the draftsmen where they have not been under the same pressure have a very high respect for their skills. I think we could learn quite a lot in many areas from the techniques that they use and which they certainly brought in before many of us followed".

34. The quality of the statutes of New Zealand is the result of the developing history of law drafting in this country.

35. At present almost all statutes in New Zealand are drafted by the Parliamentary Counsel Office. It is a separate office of the Crown under the control of myself as Attorney-General and headed by the Chief Parliamentary Counsel. He has under him three Chief Parliamentary Counsel, and four Parliamentary Counsel. The office has not always had this form or name, but its duties have, since its inception, always been well defined.

36. From 1841, when the first New Zealand enactment was passed, till 1907, there was no separate office for the drafting of statutes. At first, drafting was done by the Attorney-General and then, when New Zealand ceased to be a Crown Colony, by the Solicitor-General or Assistant Law Officers. In 1877, there was created a position of Counsel to the Office of Law Drafting, but it was not until 1907 that it became separate from the Crown Law Office. This lasted for only three years, however, before it was absorbed back again by the Crown Law Office. In 1920, the Statutes Drafting and Compilation Act set up the office as it now is. The Law Drafting Office was to be in two departments - one for the drafting of Bills and the other for the compiling of statutes. Finally, in 1973, an amendment Act changed the name of the Law Drafting Office to Parliamentary Counsel Office, and the law draftsmen became Parliamentary Counsel.

37. The drafting of legislation in New Zealand has been the responsibility of a series of distinguished public servants.

38. The first New Zealand Ordinance, in 1841, was drafted by William Swainson, the first Attorney-General, in collaboration with the first Chief Justice, Sir William Martin.

39. The statutes of those early years were naturally enough modelled on English enactments of the time but Swainson was no mere copier, and he set a high standard from the beginning. It has been said by R.B. Cooke, QC, (now Mr. Justice Cooke), in his book Portrait of a Profession, 1969, that he was a legislator-draftsman of exceptional skill.

40. He combined, "the kind of technical skill which we associate with such draftsmen of the Victorian Age in England as Sir Mackenzie Chalmers... with the creative resourcefulness called for in a pioneer statesman".

41. In 1877, John Curnin appears as the first recorded holder of the office of Law Draftsman. He was succeeded in 1894 by Dr. Frederick Fitchett who was appointed Solicitor-General in 1900. From 1900-1916, William Jolliffe held the office. During this period, he prepared the five volumes of the 1908 Consolidated Statutes, as the Secretary to the Commission set up under the Statutes Reprints Act 1985. It is in these 1908 statutes that the character of New Zealand's law drafting style first began to emerge. Opportunity

was taken at the time to correct many previous faults.

42. No doubt it was to alleviate a heavy work load that in 1907 Professor John W. Salmond was appointed to the new position of Counsel to the Law Drafting Office. He was immediately involved in drafting major legislation, and turned out to be an able innovator and trend setter. With his drafting he laid the foundations for our modern methods and style of drafting, and his influence is apparent even today.

43. Following Salmond in 1918 was James Christie, once described by Lord Bledisloe as one of the finest draftsmen in the Commonwealth. He was Law Draftsman for 20 years, and spent a further seven years as Counsel to the Law Drafting Office. In 1945 he was appointed a temporary judge of the Supreme Court. Christie visited England to study methods of drafting in 1925, and in 1930 went there for consultations over the drafting of the Statute of Westminster and the 1931 Reprints. Christie's principle quality was that of clarity. This attention to detail is revealed in the 1931 Reprints. They are comprehensive and contain meticulous editing.

44. H.D.C. Adams was appointed Law Draftsman in 1938. He was a brilliant, modest, but blunt and direct man. In 1956, he was appointed editor of the voluminous 1957 Reprints. He planned the whole work, and completed the final version of volume 1 before he died in 1958. D.A.G. Ward was then appointed Law Draftsman. In 1967 he became Counsel to the Law Drafting Office, remaining so until 1974. J.G. Hamilton held the post of Law Draftsman from 1967 to 1971 when he was succeeded by J.P. McVeagh. On the latter's retirement in 1975 W. Iles, a member since 1959, was appointed head of the office.

45. At the same time the need for continued vigilance has by no means been forgotten. Particular attention has been given to the question of simplicity of language in such legislation as the Human Rights Commission Act 1977. This Act, which is the most important legal defence of the layman against discrimination on racial, religious, and sexual grounds and is consequently one which he or she might be particularly likely to consult in person, is a piece of legislation where simplicity and case comprehension are of paramount importance.

46. Further, we have been aware in New Zealand that there is often a need in the statutes as much for clear statement of the principles with which the particular Act is concerned, as for an over-elaborate covering of all possible contingencies. This matter has been widely discussed. The Renton Report quotes a parliamentary draftsman as saying "The object is to secure that in the ultimate resort the judge is driven to adopt the meaning which the draftsman wants him to adopt". It will be readily admitted that this principle, and the avoidance of ambiguity which it applies, has been of great importance in the law drafting traditions of this country. We are also aware of the statement of Lords Emslie and Wheatley in the same Report, that the suspicion of the judges, which such an approach implies, may not necessarily be well founded. We have therefore in some recent legislation attempted, while preserving the traditional style of drafting, to introduce clear statements of principle. This can be done for instance by incorporating them on the title of the Act. In the Credit Contracts Act 1981, for example, if you will bear with me for a moment the full title reads as follows:-

"An Act to reform the law relating to the provision of credit under contracts of various kinds in order to -

- (a) Prevent oppressive contracts and conducts;
- (b) Ensure that all the terms of contracts are disclosed to debtors before they become irrevocably committed to them;
- (c) Ensure that the cost of credit is disclosed on a uniform basis in order to prevent deception and encourage competition; and
- (d) Prevent misleading credit advertisements; and to repeal the Money-lenders Act 1908?"

47. But while the Government has kept a wary eye on the content of statutes, the method it has found most satisfactory for facilitating the layman's understanding of the law has been the providing of adequate supplementary explanatory material.

48. In this context of course the layman includes the parliamentarian and it has since 1950 been the policy for the draftsmen to accompany Bills with a supplementary document explaining for him the purport of each of their sections.

49. In general though, most supplementary material has been supplied after enactment, and has been directed towards the ordinary citizen. The Renton Report summed up well what has been our experience in this area:-

"Such material does not purport to give authorities advice on the legal interpretation of the provisions referred to, or about the legislative intent of Parliament. Those to whom departmental circulars and other similar documents on new Acts are addressed are well aware of the limitations of such papers. But they are nevertheless widely relied upon as practical guides to what may be highly complicated and technical Acts, and they are of considerable value to those who must understand and administer the provision of new legislation".

50. Thus our Transport Department issues a Road Code which, while it is not legally binding, sums up adequately for the layman the content of the various Traffic Regulations it administers.

51. In my own department the Planning and Development Division has produced many pamphlets over the last four years. A brief summary of the subject matter of those pamphlets will perhaps give some idea of the areas of the law which in New Zealand have been found most urgently in need of explanation to the layman.

52. Pamphlets have been produced explaining the following statutes: the Matrimonial Property Act 1976, the Small Claims Tribunals Act 1976, the Human Rights Commission Act 1977, the Property Law Amendment Act 1975, the Layby Sales Act 1975, the Carriage of Goods Act 1979, and the Unsolicited Goods and Services Act 1971.

53. In the area of family law, pamphlets have been produced explaining the law as it relates to separation and dissolution of marriage, guardianship, custody and marriage, and describing the workings and services of the Family Courts. Others have concerned themselves with such subjects as searching a Land Transfer Office title, copyright information, obtaining legal aid - both for people charged with an offence, and for civil cases - and summary instalment orders. Booklets explaining their legal rights are also given to inmates on remand or sentenced in our prisons.

54. Many of these pamphlets are available in translated form in the New Zealand Maori and other Pacific Island languages. Further, in producing new material, particularly that relating to new legislation, we aim to produce also a package that can be used in the social studies, economic studies or clerical studies curriculum in schools.

55. In 1979 I established a number of objectives for the Department of Justice, which included one to improve the law of the country, and the public's knowledge of that law.

56. If our laws are out of date they quickly lose public respect, and when that happens it is likely that they will not be obeyed. That in turn is inevitably a threat to the rule of law itself, and to the peace and well being of the community at large.

57. So it is very important that government should accept a responsibility to improve, modernise and update our law - basically to engage in a moderate but forward looking programme of law reform. This is further the fourth of the means of simplifying the law already mentioned, that of consolidating the statutes.

58. In 1979, as Minister of Justice, I convened for the first time in three years a meeting of the Law Reform Council (the body responsible for co-ordinating law reform in New Zealand). It was my intention that this body should meet more regularly in the future. One of the matters that I put before the Council for discussion was the question of the structure of our law reform bodies.

59. It is perhaps not widely appreciated that New Zealand was one of the first countries in the world to have a formal law reform system. The first Law Revision Committee was established in New Zealand in 1937 with six members. Over the next 25 years the Committee grew in size until it became an unwieldy body of more than 16 members. It was replaced in 1956 by the Law Revision Committee, a body of 12 members under the

chairmanship of the Minister of Justice and with a member of each of the standing committees (By 1975 there were five in all).

60. Like its predecessor the Commission proved to be a large, unwieldy and ineffective body, and it was replaced in 1975 with a two-tiered system comprising the five Law Reform Committees acting under a Law Reform Council, again chaired by the Minister of Justice, who has the overall responsibility for law reform. Other members are the Solicitor-General, the Chief Parliamentary Counsel (or law draftsman), the Secretary for Justice, and the chairmen of the five standing Law Reform Committees.

61. As I have indicated in the past this body had met infrequently and has adopted essentially an advisory role. It was my hope that for the future, the Council would meet more regularly and adopt a more positive role. Specifically, I asked the Council to undertake over-all responsibility for co-ordinating a programme for the review of all laws, whether statutes or regulations, passed more than fifty years ago.

62. As a preliminary to this exercise it is, however, necessary to determine what those laws might be. This has been done by means of a Bill, the Imperial Laws Application Bill, which is at present before Parliament. It attempts to resolve the question - one of considerable uncertainty in New Zealand Law - of which English statutes still have the force of law in this country.

63. The background of the Bill is that when New Zealand became a British colony in 1840 it also became subject to the laws of England. However, there were some doubts as to what English laws had in fact been thus inherited, and in 1858 the New Zealand Parliament enacted the English Laws Act.

64. The Act provided that all Imperial Acts existing on 14 January 1840, as far as they were applicable to the circumstances of New Zealand, were deemed to have been in force in the colony on that date and were to continue to be applied in the administration of justice in this country.

65. A similar provision was included in the English Laws Act 1908. The schedule to that Act also lists a number of Imperial enactments that are to continue in force in New Zealand; and other Imperial Acts have been expressly declared by other statutes to be in force here.

66. However, no definitive list of Imperial Acts that are in force in New Zealand has ever been prepared.

67. Thus, there is considerable uncertainty about which Imperial Acts are in force in this country; and even if it is known that a particular statute is in force, the antiquity of some statutes means that there is often some doubt about what they mean.

68. Accordingly, there is a considerable body of statute law which is not readily ascertainable by, or accessible or intelligible to the legal profession, much less than general public.

69. This Bill has three main features:-

- (a) First, it will repeal, in relation to New Zealand, all obsolete enactments of the United Kingdom Parliament and its predecessors.
- (b) Second, it contemplates the enactment of a definitive list of Imperial Acts that are, in the meantime, to be preserved in force in their existing or an amended form. These include statutes which are important not only from a legal but also from a constitutional and historical point of view. For example, we are preserving such statutes as the Petition of Right, and the Bill of Rights, and more recent statutes such as the New Zealand Constitutional Act 1852 and the Statute of Westminster 1931.
- (c) Thirdly, the Bill contemplates the enactment of revised substituted provisions to take the place of certain Imperial Acts that can appropriately be dealt with in this way. However, this Bill is somewhat unusual, in that it is not intended that it be passed, in its present form.

70. It was introduced in an incomplete form to provide those interested with an opportunity to make representations and suggestions in relation to the proposed legislation at an early

formative stage. This is a large and complicated exercise, and we need all the help we can get from lawyers, both practising and academic, to ensure, as far as possible, that we have complete and accurate information as the basis for us to decide which Imperial statutes we can safely repeal and which we should preserve.

71. Once we have finally determined a definitive list of statute law that is in force in New Zealand we can then proceed to the next stage - which is a review of all those laws that are more than 50 years old.

72. When that is completed it will be possible, perhaps, to reduce the review period down to 40, and then maybe even 30 years, so that each Act of parliament is after a period of time subjected to detailed scrutiny as to its continued effectiveness and utility. This is in itself a major exercise but in my opinion an essential part of any process to modernise and update our laws.

73. As an example of the necessity of such review procedures, I may perhaps point to the consequences of the replacement, in February of 1982, of the Police Offences Act of 1917 by the Summary Offences Act. As a result of that change, it is no longer an offence in New Zealand to allow the eaves of your building to drip onto a street, to beat carpets in public, or allow a horse to serve a mare within view of a public place!

74. Although these facts need not perhaps be taken too seriously, they do remind us that it is important to realise that an improvement of the law need not involve an increase in the amount of law but may equally be achieved by a reduction of the amount of law available.

75. I firmly believe that we must realise that the law cannot remedy all social ills. In fact the law is very often an unsuitable instrument for improving our way of life. In a free and diverse society the law should, in my opinion, emphasise individual responsibility. We must get away from the philosophy that the best way of dealing with an evil is necessarily to pass a law about it. Such an approach quite often debases respect for the law generally. In short, although the reform of the law necessarily involves legislative change, it equally involves a recognition that good law reform may well mean less, rather than more legislation.

76. As an example of the decriminalisation such an approach entails, I will refer again to the Summary Offences Act. There, the old offence of public drunkenness - not associated with any other criminal or undesirable activity - has been done away with. Instead the police now have the power to pick up those people who are obviously drunk, and who are unable to look after or protect themselves, and to take them home, or to a temporary shelter or detoxification centre.

77. Such a change in the law is indicative of changed attitudes within the community - in no way condoning drunkenness, but recognising the fact that the previous law was by and large used, not to protect the community, but rather to protect individuals from themselves, and also recognising the fact that much public drunkenness is in reality a medical rather than a social or legal problem.

78. Further, the purpose of much legislation that is passed by Parliament is frequently misunderstood. Parliament in New Zealand is often accused of passing too many laws and sometimes that there has been a valid criticism. However, many of those who would criticise forget that much of the law that we pass involves the repeal of old laws and the reform, improvement, and modernisation of the legal rules that govern our society.

79. An example of this kind of legislation was the Illegal Contract Act, passed in 1970, which clarified and greatly improved the rules applicable where a contract is treated as illegal because it contravenes either a statute or a rule of public policy embodied in the common law. The law previously had been very rigid and had led to serious injustices where one party who may have been equally at fault had taken advantage of the illegality of an agreement and retained a benefit for which he had refused to pay. The courts now have a discretion to do substantial justice.

80. The existence of specialised law reform committees has also been of assistance in avoiding as far as possible, piecemeal legislation and intricate case law, so as to deal with larger areas of law comprehensively in a single measure. A single piece of legislation replacing a whole segment of the common law is often more intelligible and more acceptable than a series of isolated amendments and it also contributes to the goal of making the law

more rational and ascertainable. Many minor anomalies and irritants can be removed in the process and it is often possible to simplify the law. Examples of legislation where this approach has been followed with advantage are the Guardianship, Illegal Contracts and Minors' Contracts Acts.

81. In 1980, in the area of criminal law, the law on self-defence was simplified by the Crimes Amendment Act, which implemented a Report by the Criminal Law Reform Committee.

82. The Credit Contracts Act, which was passed in 1981 was based on recommendations of the Contracts and Commercial Law Reform Committee. It repealed the Moneylenders Act 1908, and substantially reformed the law on the provision of credit. And as already mentioned the Summary Proceedings Act replaced the Police Offences Act 1927.

83. Subject to minor changes in the use of resources, the Law Reform Council is satisfied - and I believe with justification - that the current procedures for law reform best meet New Zealand's needs.

84. One of the problems with law reform in this and most other countries is the difficulty of obtaining a place in a busy legislative programme in Parliament.

85. Fortunately, perhaps, we cannot pass every law that people want in the time that is available.

86. With that thought in mind I recently decided to introduce a compendium piece of legislation - a Law Reform Bill - which contained a number of less controversial recommendations from Law Reform Committees. This was done for the first time at the end of 1981.

87. The Bill deals with several reports of Law Reform Committees, which contain recommendations for small but useful reforms and which, by themselves, could not command a high priority on a legislative programme.

88. It is intended that in the future, such a Bill will be introduced towards the end of each parliamentary session and studied over the period of the parliamentary recess.

89. Other major changes in the law in the process of being implemented include major freedom of information legislation. The over-riding philosophy of the changes embodied in this legislation is that official information should be made available unless there is good reason for withholding it; the previous presumption was that it should not be made available unless there were special reasons for disclosing it.

90. I regard this law as the most important constitutional innovation in this country since the establishment of the office of the Ombudsman in 1962; because it significantly increases the rights of individuals in their dealings with the State.

91. Domestic violence law is at present being implemented to protect women and children in particular from violence in the home. One of our Law Reform Committees is working on major reviews of the Sale of Goods Act (particularly in the field of consumer warranties) and the Arbitration Act.

92. We will continue to review and update our Companies Act - the legislation that governs the activities of all limited liability companies. The law relating to patents - very important to New Zealand's industrial and technological development - is undergoing a major review. So too is that law which governs the transfer of land. And there will be many other changes to the law besides, all intended to modernise and simplify the law, that is to reform the law.

93. However, I would like to re-emphasise a point I have already made. A change to the law is not necessarily always the best solution to a particular problem. Sometimes the best law reform may be no change in the law at all. That must be said in spite of the fact that I and my cabinet colleagues receive constant requests from individuals and organisations, advocating either a change to the existing law or some completely new law. If every one of those requests was to be actioned, not only would Parliament be inundated, but we would be getting close to the over regulated society that so many people fear. President Reagan recently said, "If it ain't broke, don't fix it", and at least in the file of law making I would certainly agree.

94. We now evaluate every proposal for a change to the law in simple and straightforward terms. Is it really required? Who will benefit as a result of the change? Who might really suffer or might be disadvantaged? Is there a better way of achieving the objective?

95. All in all, the process of law reform is a delicate balancing act between the need to achieve the modernisation, codification and clarification of the law on the one hand, and the danger of over-legislation on the other. Those two conflicting propositions heighten the dilemma that was perhaps best summed up by Henry Brougham, speaking in the House of Commons over 150 years ago:-

"It was the boast of Augustus... that he found Rome of brick and left it of marble; a praise not unworthy a great prince... but how much nobler will be the sovereign's boast, when he shall have it to say, that he found law dear and left it cheap, found it a sealed book - left it a living letter; found it the partrimony of the rich - left it the inheritance of the poor; found it the two-edged sword of craft and oppression -left the staff of honesty and the shield of innocence."

LAW REFORM IN ZAMBIA: EXPERIENCES AND PERSPECTIVES

A paper prepared by Professor M.P. MVUNGA, Director,
Law Development Commission and presented by
The GOVERNMENT OF ZAMBIA

A. INTRODUCTION

The need for systematic law reform has been felt by many Governments in the Commonwealth, no less than ourselves in Zambia. Those older Members of the Commonwealth, who have had the resources, have long established permanent law reform agencies devoted to the work of reviewing and updating the laws to conform with contemporary needs and to be an effective instrument in the development of the country. These law reform agencies have done commendable work from which we have been drawing useful lessons for those of us who have somewhat made a belated beginning in the task of systematic law reform. The 1977 Meeting of the Law Reform Agencies in the Commonwealth held at Marlborough House in London during the period 2-3 August provided a unique opportunity at which various developments in the field of law reform emerged.

Conscious of the important role a law reform agency has in the country's legal system, this Paper attempts to exhibit the Zambian experience if only to evoke discussion of similar experiences throughout the Commonwealth. In this way it is hoped that comparison of notes is bound to augment our own efforts in the field of reform of the law. Indeed it is all the more important for us who share the British legacy in our laws, which in a number of situations still lags behind even when England has made significant strides in renovations of the same laws which still govern many forms of rights and interest in our national life.

B. THE LAW DEVELOPMENT COMMISSION OF ZAMBIA

(i) Functions, structure and composition

The Law Development Commission of Zambia was established in 1974 by the enactment of the Law Development Commission and Institution of Legislative Drafting Act (No. 5 1974). Although the Act establishing the Commission was passed in 1974, the Commission only became functional in 1976.

Initially it was intended that the Institute of Legislative Drafting be established as an adjunct to the Commission. The aim was that although the Institute would be primarily concerned with the training of parliamentary draftsmen, it would make its drafting services available to the Commission. In this way the Commission would have been submitting its completed Projects with draft Bills presented by the Institute appended.

This arrangement would have been very ideal considering that the Attorney-General's Chambers has experienced serious constraints in its establishment of parliamentary draftsmen. This in turn has entailed that not all important legislation could be disposed of as expeditiously as would have been wished. On account of the lack of provision of draftsmen the Commission, until very recently, has also experienced this handicap in its functions. Unfortunately the Institute has remained a concept in the establishing Act and to date has not taken off.

On the functions of the Commission, the establishing Act has inter alia given the Commission this statutory mandate: ".....to take and keep under review all the law with a view of its systematic development and reform, including in particular the codification of such 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 organisation of the law".

In its operations the Commission works primarily under the directives of the Minister of Legal Affairs and Attorney-General. The Minister can and has directed the Commission to carry out specific assignments. Although a matter can be referred to the Commission by a Government Ministry or Department, this has to be approved by the Minister. Similarly although the Commission can and has initiated Projects, these have had to be approved by the Minister.

This arrangement has worked very satisfactorily particularly in the very recent past, because it has afforded the Minister the necessary facility in various law reform Projects. The Minister, as the Chief Legal Advisor to the Government, has increasingly been using the Commission in quite a number of urgent assignments, requiring a review and reform of the law. From the Commission's point of view the Minister has provided a useful linkage between legal research and legislation for it is the Minister who initiates the legislative process.

On the structure of the Commission, although the Commission is a statutory body, administratively it is a Department in the Ministry of Legal Affairs. The Ministry controls and supervises the Commission's budget and votes. The Commission also in turn relies for both financial and administrative servicing on the Ministry. The advantage in this arrangement is that the Commission has access to Government facilities. The disadvantages can, however, be that the Commission's functions can suffer and be retarded by the pace of Government bureaucracy.

On the composition, the Commission has a Council of Commissioners all of whom except for the Director are appointed by the Minister. There is provision for ten Commissioners including the Director, who is *ex officio* a member of the Council of Commissioners. All the Commissioners are part-time and include also laymen. The Council of Commissioners has also a Chairman appointed by the Minister. In recent years the Minister has appointed Chairman the Minister of State in the Ministry of Legal Affairs. This appointment has been influenced by the consideration that the Minister of State being within the Ministry responsible for the Commission, should be able to help the Commission in obtaining Government assistance in its functions.

Of the membership of the Council at this moment, there are nine Commissioners of whom five are lawyers and four are laymen. The Council is a policy making body but the day to day operations of the Commission are run by four full-time research fellows under the direction and supervision of the Director.

The effectiveness of a part-time Commission as revealed in the appointment of Commissioners continues to pose problems since the inception of the Commission. On a number of occasions it has been difficult to constitute a quorum. Indeed at the 1977 Meeting of the Commonwealth Law Reform Agencies the then Director of the Zambia Commission observed that "he could arrange for them (Commissioners) to meet together and it was very difficult to obtain a co-ordinated expression of views."

Ideally what we need is a full time Commission but in our situation this is a very expensive proposition. For a long time to come therefore it appears we will have to use the part-time model of a law reform commission. By contrast it is, however, interesting to note for example that the Australian Law Reform Commission has operated successfully with part-time Commissioners. The incentive for this success may very well be the remuneration given to these Commissioners which the other countries of the Commonwealth cannot afford.

(ii) Projects of the Law Development Commission

(a) Past Projects

Since the Commission became functional the following are some of the important Projects that have been concluded:-

- The Evidence Act
- The Local Government Elections Act
- The Sales Tax Act
- The Land (Conversion of Titles) Act 1975, Report
- The Law of Succession Report
- The Small Claims Courts Report
- The Jurisdictional Structure of Subordinate Courts Report

Legislative action has already been taken on the Local Government Elections Act and the Sales Tax Act. The Bill on the Evidence Act will be presented to Parliament very shortly. The remaining Reports that have been submitted by the Commission to the Minister are very recent and therefore it may be some time before legislative action is taken. The Report on the Land (Conversion of Titles) Act, 1975 has been referred by the Minister of Legal Affairs to the appropriate Ministry to initiate legislative action.

The Report on the Law of Succession submitted to the Minister in 1982 is currently still the subject of a public debate before a Bill is presented to the National Assembly. The Commission would like to take this opportunity to record its gratitude in some limited collaboration it received from the Government of Malawi when preparing the Report on the subject. A field study was made to Malawi to see how the Malawi Wills and Inheritance Act 1967 had been operating.

Useful lessons were drawn from the Malawi experience which are reflected in the Report. The Law Reform Commission of Sierra Leone had also contacted its Zambian counterpart on the subject as the Sierra Leone Commission had just commenced work on the subject in 1981. The Zambian Commission responded to the request from Sierra Leone.

The two last Reports on Small Claims Courts and Subordinate Courts are the very recent submissions by the Commission. But considering the importance attached to these Projects by the Ministry of Legal Affairs we are optimistic that legislative action will not take too long. The two Reports attempt to come out with recommendations in an effort to expedite the administration of justice. Congestion of cases in our courts, particularly the subordinate courts, is an experience which has invited grave concern on the matter.

On the Small Claims Courts Project, opportunity must be seized to record our gratitude to the Commonwealth Secretariat, Legal Division and the Law Reform Commission of Australia in making available to us very useful literature, including model statutes.

(b) Future Projects

We look forward to the future with our programme of work contained in the Five Years Law Development Programme. Our Programme of work covers the years January-December 1982 and January-December 1986. During this period the Commission intends to look at the following Projects:

- The Criminal Procedure and Penal Codes Amendments
- The Law of Defamation
- The Sentencing Policy and Treatment of Offenders
- The Companies Law
- The Affiliation and Maintenance Orders
- The Land Law Consolidation
- The Planning Law and Land Development
- The Commercial Law
- Civil Procedure

On the Criminal Procedure and Penal Codes, it is felt that there is need to constantly review this area of law to keep abreast of times when new forms and styles of crimes are emerging.

On the Law of Defamation, there have been persistent requests, particularly from the Press, to review this area of the law. It has been argued that the present state of the law prohibits investigative journalism which should uncover the rot of society. The Commission wants to assess whether there is any imbalance between public and private rights to justify any changes in the law.

The Sentencing Policy and Treatment of Offenders Project has been found immediately necessary in view of the rising prison population and competing theories on alternative forms of punishment. Considerable work has already been done on this project.

Review of the Company Law is long overdue, considering that our Company Law represents the United Kingdom Law in 1908. England has since continued updating its law up to as early as 1981. We have no choice but to conduct a review which should also take account of the post independence business reorganisations. Ghana's experiences as initiated by the Companies Code of Ghana, 1967 may be quite useful.

The Law relating to Affiliation and Maintenance Orders has also attracted attention on account of its state which is not in keeping with contemporary times. Hence the Affiliation and Maintenance Orders Project will attempt to come out with a review that should minimise the risk of an increasing number of destitute dependants.

The Land Law Consolidation Project will attempt to rationalise the various categories of interests in the land and the law relating thereto. Ultimately it is hoped

to have one consolidated source of law. At the moment the sources of law are local and English as found in the common law and English statutes of general application prior to the year 1911. Related to Land Law, is Planning Law which needs to be simplified and made local to facilitate land development.

On Commercial Law, the law in Zambia needs to be compared with other contemporary trends. Unfortunately the candid suggestion made at the 1977 Meeting of Law Reform Agencies in the Commonwealth that regional co-ordination say between East and Central African countries could achieve a uniform Commercial Code has never taken ground in practice. Perhaps the call could be made yet again, and the suggestion extended to other regions of the Commonwealth.

Civil procedure is yet another field of concern in as far as justice has been made cumbersome and unduly expensive to realise in civil litigation. The Commission intends to look for simplicity in this area of the law.

C. CONCLUSION

These are the Zambian experiences and perspectives we have wanted to share with others in the Commonwealth. But perhaps a note to end on is to call for more active collaboration between law reform agencies in the Commonwealth. The older law reform agencies have obviously proved of much assistance. We have continued to be beneficiaries of their publications. This is particularly true of the Australian, Canadian, English and Papua New Guinea Law Reform Commissions. Collaboration should be extended beyond these Commissions and should be particularly active on a regional basis. This would make research easier and more enjoyable from which we could all benefit as the environment is generally similar in countries within the same region.

However, a recent visit by the Minister of Legal Affairs and Attorney-General to socialist countries has shown also that there are many areas which might provide useful sources for research and development of the law in general.

This opportunity should, however, be taken to emphasise the importance of regional co-operation in law reform. Perhaps it can here be said, at least for the East, Central and Southern Africa countries within the Preferential Trade Area (PTA) and the Southern African Development Co-ordinating Conference (SADCC) that regional co-operation in law reform can in the long run come out with uniform laws in the regional development context. This should not only be the objective but should be encouraged.

And to these areas of collaboration, we might add that an exchange of national statutes and law reports between Commissions is bound to enhance their libraries which should be well stocked for comparative research. To a good lot of the young Commissions the inadequacy of the Library has proved a serious handicap, forcing some of them to avoid research into the lawyer's law subjects.

And lastly another area of collaboration within the Commonwealth between the younger and older law reform agencies could be in secondment programmes. If permanent staff on the newly established Commissions could be seconded to work with the long established Commissions, this could greatly enhance the experience and expertise of the young researchers.

**RECENT ACTIVITIES OF THE LAW ASSOCIATION
FOR ASIA AND THE WESTERN PACIFIC
(LAWASIA)**

Memorandum by the Commonwealth Secretariat and
a paper by Mr. DAVID GEDDES, Secretary-General
of LAWASIA, Sydney, N.S.W. Australia

The annexed paper has been prepared at the invitation of the Secretariat to advise Ministers of the recent activities and areas of interest of LAWASIA, a major regional grouping of lawyers with an interest in promoting the Rule of Law, development, judicial assistance and professional co-operation.

2. As well as attracting a considerable individual membership both within and beyond the region, LAWASIA has succeeded in attracting private funds for its work from commercial concerns which see special benefits for international trade in LAWASIA's activities in the commercial field.

3. Ministers from within the LAWASIA region may be particularly interested in the Organisation's initiative in preparing a Code concerning the recognition and enforcement of foreign judgments, an area in which the Secretariat itself, has been particularly active in recent years.

ANNEX TO LMM(83)13

**RECENT ACTIVITIES OF THE LAW ASSOCIATION
FOR ASIA AND THE WESTERN PACIFIC
(LAWASIA)**

Prepared by
Mr. DAVID GEDDES, Secretary-General of
LAWASIA, Sydney, N.S.W. Australia

LAWASIA is a non-governmental organisation, an association of lawyers - private lawyers, government lawyers and law teachers. It is a regional organisation, membership being restricted to Asia and the Western Pacific. Membership is open to lawyers and associations of lawyers in countries which are members of ESCAP (Economic Commission for Asia and the Pacific). Other Asian and Pacific countries may be included by decision of the Council. Lawyers outside the region may be enrolled as Friends of LAWASIA and there is also provision for enrolling corporate subscribers and benefactors.

2. LAWASIA is a purely professional organisation and is controlled by the representatives of the member associations of practising lawyers in the member countries. Such associations nominate a member for their country on the Council of LAWASIA. Should more than one such association in a country be a member they jointly nominate the councillor for the country. LAWASIA is not governmental and does not engage in political activities.

3. LAWASIA was formed at a conference called by the Law Council of Australia in Canberra in August 1966. Representatives of 18 countries in the then - ECAFE (Economic Commission for Asia and the Far East) region attended the conference. A constitution and bylaws were adopted and subsequently ratified by the association of lawyers representing the countries which are now members. A list of member organisations appears at Appendix I.

4. LAWASIA holds conferences of members, conducts research projects into legal problems in the region, promotes contact between individual lawyers, and works through national bar associations and national committees for LAWASIA. It publishes a journal, LAWASIA, and has published a number of books resulting from its conferences and research projects.

5. LAWASIA has, in recent years, continued its traditional activities and has embarked upon activities in a number of new fields. In respect of the former, LAWASIA has continued to stage its biennial conferences, at which topics of concern in both the commercial law and social law areas have been discussed.

6. Conference topics in recent years include:-

(i) 1979, at Colombo, Sri Lanka.

- (a) International Institutions for the Protection of Human Rights
 - The observance of Human Rights in the LAWASIA Region
 - European Convention on Human Rights
 - The American Convention on Human Rights
 - United Nations Convention on Human Rights
 - Adoption of Existing Conventions on Human Rights in the LAWASIA Region
 - The establishment of appropriate international machinery for the Enforcement and Protection of Human rights in the LAWASIA Region.
- (b) Protection of Industrial and Intellectual Property in the Asian Region
 - Legislative rights and Relief -
 - Patents
 - Petty Patents (Utility Models)
 - Industrial Designs
 - Trade Marks
 - Service Marks
 - Copyright
 - Restrictive Trade Practices
 - Common Law Torts
 - Passing Off
 - Unfair Trading
 - Local Legislation and International Treaties
- (c) A Comparative Study of Defences and Defence Procedures in the LAWASIA Region
 - Defences -
 - Insanity
 - Duress
 - Provocation
 - Self Defence
 - Burden of Proof - has it changed in respect of substantive Offences?
 - Defence Procedures -
 - Plea Bargaining
 - Pleas of Guilty and Advice in respect thereof
 - Burden of Proof - shifting burdens (for example, in respect of drug offences and Security Act offences)
 - Procedures in respect of the use of insanity as a defence
 - Move towards codification in common law countries
- (d) Regional Co-operation in Legal Education
- (e) Application to the LAWASIA Region of the Law of the Sea Conference Resolution

The programme also include Meetings of the LAWASIA Standing Committees in the areas of Legal Aid, Commercial Arbitration, Environmental Law, Enforcement of foreign Judgments, and Law and Drugs, together with Meetings of the LAWASIA Judicial Section, the newly formed ASEAN Lawyers Section, and Interest Groups in the areas of Commercial Law, Family Law and Legal Practice Abroad.

- (ii) 1981, at Bangkok, Thailand:
 - (a) Commercial Law
 - Role of Multinational Corporations in the LAWASIA Region
 - International Commercial Arbitration and Enforcement of Foreign Judgments
 - (b) Criminal Law
 - Abortion
 - Corporate Criminal Responsibility
 - Criminal Sentencing and Procedure Criteria
 - (c) Investment Law
 - Co-operation in trade and investment between free enterprise and socialist countries and the examination of the role of State Trade Corporations
 - (d) Social Law
 - Labour Protection
 - Children and parental Rights
 - International Protection of Refugees
- (iii) 1983, Manila, Philippines (to be held between 9-13 September 1983 with the theme "LAWASIA and the New Dimensions of Development"):
 - (a) The Legal Aspects of the Changing International Economic Order: An Overview on the New Dimensions of Development in the context of the LAWASIA Region
 - (b) Law and Economic Development in the LAWASIA Region -
 - The role of law in providing the financial resources for development in the LAWASIA region
 - The legal control of restrictive business practices of transnationals: development and corporate accountability
 - The legal protection of foreign investments: development and fairness
 - The UN Convention on Contracts for the International sale of Goods: development and mutual benefit
 - Development and the International Legal Code on the Transfer of Technology
 - The 200-mile Economic Zone and its legal implications for development
 - (c) Law and Social Development in the LAWASIA Region -
 - Education and Public Health Laws: the imperatives of human resource development
 - Tax laws for social development in the LAWASIA region
 - Consumer protection laws and social responsibility
 - Land Tenure Laws: the needs of social justice
 - (d) The Institutional Role of Law in the Development of the LAWASIA Region -
 - The International Investments Insurance Agency: An idea whose time has come?
 - The Food Basket: An answer to the food crisis?

- ASEAN: A step in the right direction?
- The International Administration of Criminal Justice

(e) LAWASIA/LES Licensing Session -

This will include a basic licensing course, discussion of the economics of licensing technology into and out of developing countries; discussion of the unlawful appropriation of proprietary interests in industrial and intellectual property; and the Licensing Game.

(f) International Law Practice in the LAWASIA Region: Prospects and challenges

7. LAWASIA has also continued to publish its annual LAWASIA Journal, as well as a LAWASIA Directory of members to assist individuals to keep in touch with each other and co-ordinate in their service of the Rule of Law.

8. New activities have been undertaken by the Association in a number of areas.

Human Rights

9. In 1979, the LAWASIA Council approved the establishment of a LAWASIA Human Rights Standing Committee. Composition of that Committee is as follows:

Co-Chairmen: Mr. Fali S. Nariman, Senior Advocate, Former Additional Solicitor-General, India

Mr. Patrick J. Downey, Chief Human Rights Commissioner, New Zealand

Members: Mr. E.A.G. de Silva, Practising Lawyer, Sri Lanka

Mr. Marcelo Fernan, Former President, Integrated Bar of the Philippines, Philippines

The Hon. Mr. Justice D.L. Mahoney, Supreme Court of N.S.W., Australia

The Hon. Kun Marut Bunnag, Minister of Justice, Thailand

Mr. Param Kumaraswamy, Practising Lawyer, Malaysia

Mr. Noboru Toishi, former Practising Lawyer, Japan

Mr. Anek Srisanit, Practising Lawyer, Thailand

Mr. David H. Geddes, LAWASIA Secretary-General

Secretary: Mrs. Patricia Hyndman, Australia

10. This Committee has been a most active one. It has formulated Ten Basic Principles of Human Rights which it believes are the basic standards which must be adhered to by regional countries at this time. These are set out in Appendix 2.

11. The Committee has also published the first volume of its "Trends in Human Rights", a document which is to be published from time to time, detailing current trends in human rights within the ESCAP region.

12. At the invitation of the United Nations, the LAWASIA Secretary-General submitted one of three background papers to the United Nations Seminar held in Colombo in June 1982, on "National, Local and Regional Arrangements for the Promotion and Protection of Human Rights in the Asian Region". At that United Nations meeting, LAWASIA organised a meeting of non-governmental organisations represented at the Seminar. That meeting resolved that there should be a Coalition

of Asian human rights organisations, which would work towards the establishment of a regional Inter-Governmental Human Rights Commission in the LAWASIA region.

13. As LAWASIA had, in August 1981, organised a meeting with 14 Asian regional human rights groups in Bangkok, LAWASIA resolved that it would call another meeting of regional human rights groups to be held in New Delhi in October 1982. That meeting was held during the period 9-11 October 1982. It was attended by 34 human rights organisations from the ESCAP region. That meeting resolved to establish a Coalition of Asian Human Rights Organisations to work towards the establishment of an Asian Human Rights Commission, and the drawing up of an Asian Human Rights Charter. It also resolved to work towards the establishment of national human rights commissions in regional countries. The appropriate resolutions appear in Appendix 3.

14. It will be seen from those resolutions that the LAWASIA Human Rights Standing Committee has been requested to discharge the liaison role necessary for this coalition.

15. The LAWASIA Human Rights Standing Committee has also been active in the field of Judicial Independence, staging a Seminar in Tokyo in July 1982, which was attended by, *inter alia*, the Chief Justices of India, Sri Lanka, the Philippines and Thailand, and a former Chief Justice of Japan. Further Seminars of this kind, in the area of Judicial Independence, are planned by the Committee.

16. LAWASIA has also sent observers to regional trials and has finalised the translation of the United Nations Blue Book of Human Rights Documents into Thai, Philippino, Hindi, and Burmese and has also completed the translation into Malay. These translations will be distributed to human rights organisations working in countries where those languages are utilised, for subsequent reproduction and distribution by those organisations.

17. The LAWASIA Human Rights Standing Committee will be staging a Seminar on "Women and the Law in Asia" in Kuala Lumpur in May 1983, and will be organising the first major meeting of the Coalition of Asian human rights organisations in Manila in September 1983.

Energy Law

18. Following the successful IBA/LAWASIA Seminar on "Energy Law in Asia and the Pacific" held in Singapore in February 1982, LAWASIA has formed its own Energy Law Standing Committee, the secretariat of which will be based in Singapore. It is planned that this Committee will commission reports on, and arrange seminars on matters relating to aspects of energy law within the ESCAP area.

Intellectual Property Standing Committee

19. LAWASIA has established an Intellectual Property Standing Committee under the Chairmanship of Professor T. Doi of Waseda University in Tokyo. Other members of the Committee are Mr. Des Ryan of Australia and Mr. Rex Phillips of Sri Lanka. This Committee will be staging a Seminar with the World Intellectual Property Organisation in Bangkok in March 1983, on "The Roles of Government Industrial Property Authorities and the Legal Profession in Administering Industrial Property Rights in Asia and the Pacific".

Enforcement of Foreign Judgments

20. LAWASIA has a Standing Committee, under the Chairmanship of Mr. Bradford Caffrey, operating in this area. Mr Caffrey recently completed a doctoral thesis, a portion of which comprises a Draft Code on the Recognition of Foreign Judgments in the ESCAP Region. The Draft Code will be presented by Mr. Caffrey to the meeting of the LAWASIA Standing Committee on Enforcement of Foreign Judgments in Manila, in September 1983.

MEMBER ORGANISATIONS

AUSTRALIA

Law Council of Australia
 Law Society of New South Wales
 New South Wales Bar Association
 Queensland Bar Association
 Queensland Law Society Inc.
 Law Institute of Victoria
 The Victorian Bar
 The Law Society of Western Australia
 Law Society of South Australia Inc.
 Women Lawyer's Association of N.S.W.

FIJI

The Fiji Law Society

HONG KONG

The Law Society of Hong Kong
 Hong Kong Bar Association

INDIA

Bar Association of India

INDONESIA

Mahindo
 Indonesian Jurists Association
 Indonesian Judges Association
 Indonesian Bar Association
 Indonesian Prosecutors Association

IRAN

The Iranian Jurists Association
 The Bar Association of Iran
 The Bar Association of Tabriz
 The Bar Association of Shiraz

JAPAN

The Japan Bar Association

KOREA

The Korean Federal Bar Association
 Korean Law Professors Association
 Korean Legal Centre

MALAYSIA

Bar Council (States of Malaya)

N.B. The Bangladesh Legal Practitioners Association
 is represented among the general membership

NEPAL

Nepal Bar Association

NEW ZEALAND

New Zealand Law Society
 Auckland District Law Society
 Canterbury and District Law Society
 Wellington District Law Society
 Hamilton District Law Society

PAKISTAN

High Court Bar Association, Karachi

PAPUA NEW GUINEA

Papua New Guinea Law Society Inc.

PHILIPPINES

The Integrated Bar of the Philippines
 The Philippine Bar Association
 The Philippine Lawyers Association
 FIDA, Philippines
 The Women Lawyers Association
 of the Philippines

SINGAPORE

The Law Society of Singapore

SRI LANKA

The Bar Association of Sri Lanka

TAIWAN

The National Bar Association
 of the Republic of China
 The Chinese Society of Comparative Law

THAILAND

The Thai Bar
 The Lawyers Association of Thailand

LAWASIA HUMAN RIGHTS STANDING COMMITTEE

Basic Principles of Human Rights

Principle 1

- (a) Everyone has the inherent right to life, and shall not be arbitrarily deprived of his life.
- (b) The death penalty may be imposed only for the most serious crimes, and after fair public trial on evidence presented to a legally competent, independent and impartial tribunal.

Principle 2

- (a) Everyone has the inherent right to liberty and security of person, and shall not be subjected to arbitrary arrest or detention.
- (b) Anyone who is arrested or detained shall be informed of the reasons therefor at the time of his arrest and shall be entitled to communicate the fact of his arrest to a person of his choice.
- (c) Anyone arrested shall be entitled to access to counsel of his choice.
- (d) Anyone charged with an offence is entitled to a fair and public trial within a reasonable time by a legally competent, independent and impartial tribunal.

Principle 3

Everyone is equal before the law and is entitled without any discrimination to the equal protection of the law.

Principle 4

No one shall be held guilty of any criminal offence for any act or omission which did not constitute a criminal offence when it was committed.

Principle 5

- (a) Anyone deprived of his liberty shall be treated with respect for his inherent dignity as a human person.
- (b) No one shall be subjected to torture, or to cruel, inhuman or degrading punishment or treatment.

Principle 6

No one should be subject to preventive detention, but in those countries where preventive detention exists, everyone so detained shall be entitled to prompt, periodic review of his detention by a legally competent, independent and impartial tribunal.

Principle 7

- (a) No one shall be arbitrarily deprived of the right to enter his own country.

- (b) Anyone who is an alien, lawfully in a country, shall not be expelled except pursuant to a decision reached in accordance with the law in force at the time he entered the country.

Principle 8

No one shall be subject to coercion which would restrict his choice of religion or belief. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Principle 9

To ensure the enjoyment of these minimum standards, everyone is entitled to have legal assistance available to him.

Principle 10

These principles have been formulated on the basis that they are the minimum standards to be observed at all times after allowing for the fact that emergencies threatening the life of a nation may occur from time to time.

APPENDIX 3

RESOLUTION PASSED AT MEETING OF THIRTY-FOUR NON-GOVERNMENTAL HUMAN RIGHTS ORGANISATIONS FROM THE ESCAP REGION CALLED AT THE INVITATION OF THE LAWASIA HUMAN RIGHTS STANDING COMMITTEE NEW DELHI - 9-11 OCTOBER, 1982

Resolution Establishing a Coalition of Human Rights Organisations in the ESCAP Region

At this meeting of 34 human rights organisations in the ESCAP region representing 12 countries (following a similar meeting held in Bangkok in August, 1981), both called at the invitation of the LAWASIA Human Rights Standing Committee, it was unanimously resolved to establish a Coalition of human rights organisations in Asia - a Coalition which will work towards the establishment of an Asian Charter of Human Rights and an Asian Human Rights Commission (similar to the Commissions now existing in the continents of Africa, Europe and America).

The meeting :

RESOLVED that the LAWASIA Human Rights Standing Committee be authorised by this meeting to undertake the co-ordinating role for this new Coalition.

RESOLVED that the LAWASIA Human Rights Standing Committee be authorised to take steps in furtherance of this Coalition and to carry out the administrative task of formulating a three-year plan of co-ordinated activities for its members/affiliates.

(Note: Regional representatives of large organisations such as Amnesty International, Lutheran World Service, Red Cross, World Jewish Congress, and the YWCA, which already have the benefit of world-wide organisations, wholeheartedly supported the above resolution).

RESOLVED that as a first activity of this new Coalition, studies and research on regional issues in the field of human rights be conducted and two working papers be prepared for the Manila Conference in September, 1983, on the following subjects, viz:

- (1) Adequacy of laws affecting women in the ESCAP region and how far they are implemented.
- (2) Preventive Detention - law and practice in the ESCAP region.

RESOLVED that LAWASIA should take all steps to organise a regional workshop with the assistance of the United Nations to review the conclusions of the inter-governmental meeting in Colombo held in June, 1982, and to ascertain the role that can be played by NGO's in implementing the decisions taken at that meeting, and to further study what other roles the NGOs can play in promoting the institutionalisation of human rights concerns.

RESOLVED that having regard to the increasing concern of peoples all over the world with human rights and as a step towards the establishment of an Asian Human Rights Commission, this meeting of representatives of 34 human rights organisations representing 12 countries called at the invitation of the LAWASIA Human Rights Standing Committee **RECOMMENDS** that a Human Right Commission should be set up in each of the countries in the LAWASIA region and that this recommendation be sent to the Heads of Government in each of the countries in the region.

**STUDY OF ABORTION LAWS IN THE COMMONWEALTH:
MEDICAL TERMINATION OF PREGNANCY BILL, BARBADOS**

Memorandum by
THE GOVERNMENT OF BARBADOS

POSITION PAPER ON BARBADOS MEDICAL TERMINATION OF PREGNANCY BILL

In May 1974, the Barbados Cabinet authorised the setting up of a National Committee to study the issues related to the liberalisation of the law relating to abortion. The Committee had as its terms of reference:

- (a) the examination of the need for the reform of the law relating to abortion with particular reference to the legal, sociological, economic and religious aspects thereof; and
- (b) making recommendations thereon.

The Committee was to consist of persons from various bodies representing a broad cross section of the Barbadian public.

2. The Committee submitted its report in April 1975. The Committee pointed out that although abortion is illegal in Barbados, whether by the administration of drugs or the use of instruments, the local courts have followed certain judicial decisions in the United Kingdom that permit abortions where the continuance of the pregnancy is likely to endanger the life or health of the woman.

3. The existing law relating to abortion is contained in sections 59 and 60 of the Offences Against the Person Act, 1868 and these follow closely the provisions of sections 58 and 59 of the UK Offences Against the Person Act, 1861. These sections make abortion punishable by imprisonment. Because of the illegality of abortions, it was difficult to obtain accurate statistics on the number of abortions performed in Barbados annually but the Committee estimated the figure (at that time) to be in the region of 4,000 and 5,000 in a population of just over a quarter of a million people. The Committee considered the situation of failed contraception and the liberalised attitude in the United States of America where abortion up to the twelfth week of pregnancy is the constitutional right of a woman. Special attention was also paid to the United Kingdom Abortion Act, 1967 and to the attitude of the various local religious bodies towards abortion. The Report favoured liberalisation of the law.

4. The Report was in 1977 circulated for the comment of the National Commission on the Status of Women which was established in 1976 and to the Heads of all recognised denominations and to other interested organisations.

5. The proposals for legislation were amended by those comments of organisations including the local association of medical practitioners, that were acceptable to the Cabinet but as would be expected in a controversial social matter of this nature, all of the differing views could not be reconciled and included in the Bill.

6. The National Commission on the Status of Women was of the view that in addition to modernising the existing law, adequate guidelines regarding requests for pre-abortion counselling, particularly where considerations other than of a medical nature are involved, should be set out.

7. The Commission also recommended that there should be a balance between the concept of making abortion freely available, and the concept of preventing the development of the abortion habit in the community by introducing or upgrading services that may influence women away from the necessity of seeking abortion. In other words a combination of legal, health and welfare services was required.

8. The Churches which commented on the proposed liberalisation of the abortion law upheld the importance and the supreme dignity of human life. Most of them in varying degrees agreed with a limited provision for legalised abortion provided that the continuance of the pregnancy was medically regarded as not being in the interest of the life of the woman. None of the Churches supported abortion on demand.

9. The Council of the Barbados Association of Medical Practitioners pointed out that as a result of illegal abortions, several young women were admitted to hospital daily, seriously ill, in danger of permanent damage to their pelvic organs and sometimes with fatal consequences.

10. It therefore appeared to the Council that women generally were determined to seek termination regardless of the consequences. The medical profession therefore saw the issue as a clear cut choice either to support legislation that would provide for termination under safe conditions or to turn a blind eye to the existing thoroughly dangerous practices that often have disastrous results. Circumstances such as rape, incest and poor socio-economic circumstances might be equally as harmful as certain physical and mental conditions and the extent of this harm was best assessed by experienced health professionals.

11. In Barbados, cases of illegal abortion rate as the fourth highest cause of hospitalisation. The status quo provides an excellent example of discrimination against those who cannot pay. Only women with economic means can escape humiliation by obtaining abortions, confidentially and safely, at home or abroad in the private sector of health care. Indeed, groups representing women's interests in Commonwealth countries increasingly express their dissatisfaction and outrage at what women must endure to maintain their physical integrity and to control their personal and social destinies.

12. The Barbados Abortion Bill does not permit abortion on demand but establishes a clearly defined framework within which the treatment may be administered in a professional setting, thereby reducing the risk of mental and physical injury or even death. The Bill seeks to accommodate abortion through legislation that focusses upon health and welfare and not upon crime and punishment.

13. The Bill sets out certain criteria for the medical termination of pregnancies of up to twelve weeks; over twelve but less than twenty weeks; and over twenty weeks. This division is necessary as the risk to the woman increases as the pregnancy progresses. Special provision has been made for women under sixteen years of age and persons of unsound mind.

14. The Bill accepts the principle of conscientious objection and protects medical and para-medical personnel who are unable to participate in the treatment for the termination of a pregnancy on this ground. However, conscientious objection does not apply if the treatment is immediately necessary to save the life of the woman or to prevent injury to her physical or mental health.

15. The Bill and Regulations place emphasis on counselling as a vitally important factor in providing women with informed opinions as to whether or not termination should be proceeded with. The woman must be advised on courses of action alternative to termination, of possible effects of the termination, of the availability of family planning services and how to deal with the social and psychological consequences of a termination.

COMMUNITY LEGAL EDUCATION IN CANADA

Memorandum by

The GOVERNMENT OF CANADA

Introduction

Community legal education programmes are in existence throughout Canada, providing information to the public about substantive law, the legal process and justice system, and justice issues. The last ten years have seen significant growth in this field with one or more programmes operating in every Province in Canada. The Canadian Law information Council (CLIC) has established a national clearing-house of information on the subject (CLIC is an independent organisation created to improve the quality of legal material available to the profession and the public).

2. Community legal education as practised in Canada encompasses a wide variety of programmes. These include programmes to provide information to individuals with specific problems, schools legal education, and training for such intermediaries as social workers and community leaders. It should be noted that in Canada the increasingly accepted term for community legal education is public legal education and information.

3. The rationale for such programmes is that they enhance individual and public access to the legal system by increasing awareness of the law and of legal procedure. This rationale contains within it three specific concerns. the first is to ensure that citizens have sufficient knowledge of the legal system, including the creation, enforcement and adjudication of laws, to be able to exercise meaningfully their rights as citizens and to maintain the vitality of public life essential to the health of a democracy; this is the "civics" rationale.

4. The second goal is to assist individuals in gaining sufficient knowledge of the law to guide them in their day-to-day affairs. This "lifeskills" rationale involves the acquisition of practical knowledge to avoid legal problems, to identify legal problems, to practice self-help where appropriate, and to assist in obtaining appropriate legal assistance if needed.

5. The third rationale is that of meeting the information needs of groups with their own specific legal problems, such as natives, tenants or immigrants; this is the "social action" rationale. Many social interactions occur at the group level, and the acquisition of legal knowledge pertaining to the group's circumstances, at least by the group leaders, is essential to the group pursuit of legal solutions to its situation. For example, citizen's organisations created to protect the environment realise that they must acquire, as a group, information on environmental law to achieve their goals.

6. Central to these three goals is the provision of help to citizens to enable them to understand the law and legal system sufficiently to make it work for them.

Responsibilities

7. Government responsibility with respect to community legal education is divided between the federal and provincial levels. Each level of government provides information on laws pertaining to its jurisdictions, such as information on citizenship and unemployment insurance by the Federal Government, and on highway traffic laws or family property by the Provincial Governments. Further, the Provinces have constitutional responsibility for the administration of justice and for education, thereby providing broad bases for their involvement in the provision of information on the legal system in general. The Federal Government has the spending power which can be used to attain national standards, and for supporting research and pilot projects in this field.

8. Of equal importance to the role of government, is the involvement of the non-governmental sector. In Canada, a number of independent agencies exist that specialise in community legal education. An example is the Legal Resource Centre, an organisation affiliated with the University of Alberta providing quality community legal education

programmes to the Province of Alberta. As well, organisations created to meet the needs of specific constituencies, such as consumer protection groups, provide significant amounts of legal information about the issues with which they are concerned.

Who is Involved?

9. Involvement in the field includes independent agencies, the Provincial Governments, the Federal Government, the Canadian Law Information Council, the legal aid plans and the professional bar. These bodies are inter-related in their funding, board membership and planning of community legal education programmes.

(a) Independent Agencies

10. There are approximately twelve independent organisations in Canada specialising in community legal education as their sole or major function. These include the Continuing Legal Education Society of Nova Scotia, Community Legal education Ontario, the Public Legal Education Association of Saskatchewan and the People's Law School of British Columbia. Together, these community legal education agencies spend approximately \$1.5 million annually.

11. The programming of these services is varied, each programme designed to suit the needs of its particular audience. Books and pamphlets are produced and distributed, describing in layman's language specific areas of the law such as family law, immigration and landlord/tenant law. Several services operate telephone legal information lines which allow a person to call with a specific legal problem and receive basic legal information and appropriate referrals for further legal assistance. Public lectures are provided. Some agencies run newspaper columns on the law in weekly and daily papers. Radio and television programming is also used, although to a lesser degree given their high cost.

12. Most of these independent organisations are also concerned with the civics aspect of community legal education, conveying information on the governmental and legal systems, and on citizens's rights and duties. Some of the agencies, such as Community Legal Education Ontario, have advanced the teaching of law in this regard in schools, through curriculum development and teacher training.

13. Increasingly, non-governmental organisations are directing their efforts to meeting the needs of specific groups with serious problems of access to legal information. For example, the Public Legal Education Association of Saskatchewan is developing educational programming for natives on reserves, with the co-operation of the band councils.

(b) Provincial Governments

14. The involvement of Provincial Governments in community legal education tends to vary with each jurisdiction, but most governments have played significant roles. Provincial Governments generally undertake community legal education to provide information on government legislation and programmes. The most commonly used medium is that of pamphlets explaining areas of the law such as criminal injuries compensation, family law, or highway traffic law.

15. Some Provincial Governments have gone further in their involvement in this field and have conducted general reviews of the need for community legal education. Newfoundland has developed a school curriculum, including two law courses, one of which is required for graduation from secondary school. Prince Edward Island is co-ordinating government and non-government resources in the field, and operating with the co-operation of the Federal Government a criminal law information centre. Québec has both a school curriculum and sophisticated public programming, including a magazine for the public about justice issues, appropriately entitled Justice. The Ontario Government has recently authorised the Cabinet Justice Secretary to review the government's responsibilities in this area. Both the Saskatchewan and British Columbia Governments fund independent community legal education agencies having broad mandates to provide legal information to all Provincial citizens.

(c) The Federal Government

16. The Federal Government has directed its efforts in this area both to meeting the information needs of individual departments and to meeting some of the needs of the community legal education field in general, such as research. As an example a film on crime victimisation has been developed by the Department of the Solicitor General. The

The Secretary of State produces information materials for new citizens. Government agencies such as the Unemployment Insurance Commission are also acting to meet this need. The Commission has produced a series of pamphlets describing entitlement of services, procedures and other matters.

17. The Department of Justice has funded research into this field, including a study of the readability levels of materials published on Federal laws, which concluded that the reading levels of the material were almost universally too high to allow comprehension by the general public. The Department also funds approximately forty independent groups to operate summer projects producing a wide variety of information materials, including a legal training manual for journalists, a series of illustrated booklets for native reserves and legal education materials for women on social assistance.

(d) The Canadian Law Information Council

18. The Canadian Law Information Council (CLIC) was established in 1973 to improve the quality of legal materials available to the profession and the public. With respect to community legal education, CLIC has taken on the role of a national clearing-house, systematically gathering and distributing information on community legal education programming, publications, ideas and trends in Canada. The materials produced by CLIC, such as Network News (a current events newsletter) and the Legal Materials Newsletter (a review of community legal education publications), facilitate the routine exchange of information, co-operating amongst agencies and governments, and public awareness of community legal education.

19. CLIC also has a research role and is currently conducting a review of research in the community legal education and related fields (see below). In addition, it develops materials that meet commonly defined needs, such as its information kit for high school law teachers. This project was developed in co-operation with Provincial agencies and will contain common information for all the Provinces on how to teach law, supplemented by additional material for each individual Province.

(e) Legal Aid

20. Each Province in Canada has established a legal aid plan, with the Federal Government sharing the cost of criminal legal aid. Several Provinces deliver legal aid in whole or in part through legal aid clinics, and most of these clinics provide community legal education. Some of the plans also provide community legal education as a service of the head office, such as the Quebec Legal Services Commission. The work of the Quebec Plan and its clinics includes the production of a popular television show on the law, media information spots, and superior legal information publications.

21. The Native Courtworker programmes were established in 1972 to provide assistance to natives charged with offences. The Courtworkers work with natives to help them better understand the charge against them, criminal law powers, and how to obtain legal aid, amongst other matters. Community legal education programming is operated by the Native Courtworker programmes to help native communities better understand the criminal justice system, thereby complementing the work of Legal Aid and of the Courtworkers.

(f) The Legal Profession

22. Literally thousands of lawyers volunteer their time and experience for community legal education programming, and many lawyers sit on the boards of community legal education agencies. Further, various Provincial law societies, law foundations and the Canadian Bar Association (CBA) are involved in community legal education by providing funding and by promoting specific projects, such as pamphlets on how to choose a lawyer.

Issues

(a) Need

23. There exists in Canada a growing acceptance of the importance of community legal education. What is less certain is the extent of and nature of the needs. What are the needs that can be successfully met by such programming; what is the priority to be attached to meeting these needs? To refine our understanding in this area, the Federal Department of Justice is funding research which will indicate the extent of the need for community legal education by individuals and specific groups. This work is a

co-operative effort involving an advisory board with representatives from the Law Society of Manitoba and Legal Aid Services of Manitoba. The preliminary study has already distinguished between individual lifeskill needs and the special needs of groups such as natives, immigrants or the disabled. While there is a need to expand our knowledge with respect to all needs for community legal education, special attention must be paid to defining and meeting the needs of such special groups. Such work should take place with the cooperation and involvement of the affected groups.

(b) Priorities

24. Closely related to the issue of needs is the determination of our priorities in meeting these needs. Should the focus of programming be directed at individuals with specific lifeskill needs, should it be general civics education, or should programming be focused at community and groups leaders to assist in the development of social action programmes? The developing programmes appear to be favouring meeting priorities within all three types of needs. This requires a combination of programming approaches; no one method of delivering this service being suited to meeting all needs. Consequently, classes in the schools, written material for the public, telephone legal information lines, training programmes for tenants organisations, to name but a few approaches, have all proven their validity.

(c) Distribution and Delivery

25. Work is required to improve our knowledge on how to distribute community legal education materials and on how to deliver programmes in a fashion designed to attract the attention of the intended audience. While the quality of information materials and programmes has risen significantly in the last few years, problems of inadequate marketing and of assessment of audience needs still remain. Development is required of a model marketing strategy and of methods of evaluating the impact of the programmes.

(d) Nature of the Service

26. Community legal education is a multi-disciplinary profession, not simply a legal service. It requires as well the communication skills of writers, film-makers, librarians and market analysts. It requires the social service skills of community organisers and social workers and the educational skills of teachers and of adult educators. Only by drawing upon the skills of all these disciplines and more are truly successful programmes developed. The perception of the nature of the service is an important issue, for how it is perceived affects the talents brought to bear upon it, the questions asked to design it, and the nature of the product produced by it. There is a role for lawyers in this service but it is only one role.

(e) Funding

27. Services must examine their programmes to determine the most cost-effective method of achieving their goals. Further, there remains a need to justify overall funding in the area as opposed to other social and legal programmes. In response to such concerns, services and governments have justified the costs involved from an awareness of the need to provide access to the citizen's justice system, and because to date the costs involved have been minimal in comparison to such matters as legal aid. Nonetheless, further growth in this area will depend upon finding answers to the theoretical and operational issues outlined above.

Educating the Profession

28. Community legal education is perceived as a discipline blending law, education, communication and other skills. While many lawyers have a keen interest in the area, it cannot be said that law school or other professional training prepares lawyers in the particular skills needed to convey legal information to the public.

This need for lawyer training has been recognised by individuals, community legal education agencies, and more recently by the Public Legal Education and Information Committee of the Canadian Bar Association. The Committee has proposed the establishment of training programmes for lawyers to develop an awareness of community legal education and the skills necessary to most effectively assist in the delivery of this service.

Community Legal Education and the Commonwealth

29. While clearly the needs and resources of member countries will vary with respect to community legal education, it may be useful to explore the idea of an exchange of information, and particularly of research, in this field. The Canadian Law Information Council is currently conducting a review of research undertaken in Canada and other jurisdictions with respect to community legal education and related fields. The goal is to synthesize what it is we know of the area, and to determine future research needs. This duty is an example of the sort of information that might be exchanged amongst Commonwealth countries.

Conclusion

30. The last decade has seen in Canada considerable increases in the quality and quantity of community legal education programming. The underlying beliefs supporting this growth include a perception that the provision of such information is essential to the effective functioning of a democratic society, and that there is a need to enhance individuals' access to the justice system by means of the provision of law-related information.

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