1996 Meeting of Commonwealth Law Ministers

Kuala Lumpur, Malaysia
15-19 April 1996

Memoranda



Commonwealth Secretariat

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Preface

Commonwealth Law Ministers from 42 jurisdictions met at Kuala Lumpur, Malaysia, from 15 to 19 April 1996. Most of the Memoranda prepared for the Meeting, together with the Meeting's Annotated Draft Agenda (which was adopted as the Meeting's Agenda) and the Communiquè are published in a separate volume from the Minutes, and which is available to the public.

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

Commonwealth Law Ministers meet regularly at approximately three-yearly intervals. They are scheduled to meet next in Trinidad & Tobago in 1999. Previous Meetings have been held in London (1966 and 1973), Lagos (1975), Winnipeg (1977), Bridgetown (1980), Colombo (1983), Harare (1986), Christchurch (1990) and Mauritius (1993).

Legal & Constitutional Affairs Division
Commonwealth Secretariat
May 1997

Contents

Preface

Communique [LMM(96)38] ix

Revised Annotated Draft Agenda [LMM(96)2] xvi

MEMORANDA

ADVANCING COMMONWEALTH FUNDAMENTAL VALUES

The Independence Quality and Status of the Judiciary in Commonwealth Countries 1
Paper by Mr. Stephen Skehill, Secretary, Attorney General's Department, Australia LMM(96)22

Presentation of Practical Measures, Strategies and Activities in the Field of Crime Prevention and Criminal Justice for the Elimination of Violence against Women 4
Paper by the Department of Justice, Canada LMM(96)36

The Role of the Judiciary in the Promotion of Human Rights of Women 11
Paper by Ms Jane Connors, Senior Lecturer, SOAS, University of London LMM(96)25

The Role of the Judiciary - Paper by the Department of Justice, Canada LMM(96)31 16

THE ROLE OF ADMINISTRATIVE LAW IN THE PROMOTION OF GOOD GOVERNANCE

Commonwealth Fundamental Values - Administrative Law, Human Rights and the Judiciary - Paper prepared for the Commonwealth Secretariat by Professor A.W. Bradley LMM(96)7 23

Good Government and Administrative Law - An Introductory Guide by Professor A.W. Bradley and Dr C. Himsworth LMM(96)16 29

The Role of Administrative Law in the Promotion of Good Governance in Canada - Paper by the Department of Justice, Canada LMM(96)32 52

THE OFFICES OF THE OMBUDSMAN, HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSIONERS

The Courts, the Ombudsman and the Public - Paper Prepared for the Commonwealth Secretariat by Mr William Reid, Parliamentary Commissioner for Administration LMM(96)6 59

The Ombudsman Institution - Paper prepared for the Commonwealth Secretariat by Sir John Robertson, QC LMM(96)11 64

The Commonwealth and Human Rights Education - Paper prepared by the Commonwealth Secretariat LMM(96)15 71

National Human Rights Commissions - National and International Perspectives Paper Prepared for the Commonwealth Secretariat by Mr Brian Burdekin of the United Nations Human Rights Centre LMM(96)27 79

The Canadian Human Rights Commission - Paper by the Department of Justice, Canada LMM(96)33 87

INTEGRITY IN PUBLIC LIFE

Strengthening Integrity in Commonwealth Countries - Paper prepared for the Commonwealth Secretariat by Transparency International (TI) LMM(96)5 91

Integrity in Public Office and Proposed Code for Commonwealth Countries Paper by the Commonwealth Secretariat LMM(96)17 98

Integrity in Public Life - Committee into Standards of Public Life ("Nolan Committee") - Memorandum by the Government of Britain LMM(96)29 119

Integrity in Public Life: Access to Government Information - Paper by the Department of Justice, Canada LMM(96)34 129

Statement on Prevention of Corruption LMM(96)17 135

COMMONWEALTH CO-OPERATION IN THE ADMINISTRATION OF JUSTICE

Simplifying Extradition Procedures - A Proposal to Extend the Scope of the London Scheme on the Rendition of Fugitive Offenders - Paper by the Commonwealth Secretariat LMM(96)8 137

Resource Implications of Mutual Assistance in Criminal Matters Paper by the Commonwealth Secretariat LMM(96)9 164

Survey of Extradition, Mutual Assistance in Criminal Matters and Transfer of Prisoner Laws in Commonwealth Jurisdictions Publication by the Commonwealth Secretariat LMM(96)12 171

Proposals for the Enhancement of the Harare Scheme on Mutual Assistance in Criminal Matters: Reports from the 1994 Oxford Conference on Mutual Legal Assistance and the Meeting of Senior Officials of Law Ministries Paper by the Commonwealth Secretariat LMM(96)13 172

The Modernisation of Extradition Laws of Commonwealth Countries - Paper by the Commonwealth Secretariat LMM(96)14 177

International Co-operation to Combat Crime in the 21st Century - The Role of the Commonwealth in Determining a Balance Between the Individual and Global Interests Paper by the Commonwealth Secretariat LMM(96)20 197

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

Report of the Meeting of Senior Officials of Law Ministries, including a Revised Version of the Statement on Mutual Assistance Between Business Regulatory Agencies LMM(96)10 205

Global Trends in the Area of Mutual Assistance in Business Regulation: A Guide to the Preparation of National Laws to Facilitate the Provision of Assistance to Other Countries - Paper by the Commonwealth Secretariat LMM(96)23 208

MONEY LAUNDERING

The Commonwealth Draft Model Law for the Prohibition of Money Laundering together with Explanatory Documentation - Document prepared by the Commonwealth Secretariat LMM(96)18 213

Self Evaluation of Progress in Implementing Measures in the Legal Sector to Combat Money Laundering: A Compilation by the Commonwealth Secretariat of National Responses to the 1995/96 Survey LMM(96)24 215

TRANSBORDER INSOLVENCY

International Co-operation on Cross-Border Insolvency Issues - An Important Legislative Initiative by UNCITRAL - Paper by Mr. S. A. Sahaydachny, Senior Legal Officer, UNCITRAL LMM(96)26 217

Cross-Border Insolvency: A need for Commonwealth Action? Paper by the Commonwealth Secretariat LMM(96)28 220

INTELLECTUAL PROPERTY RIGHTS THE LEGAL IMPLICATIONS OF THE AGREEMENT ON TRADE AND INTELLECTUAL PROPERTY RIGHTS ARISING FROM THE CONCLUSION OF THE URUGUAY ROUND

Legal Issues Arising from the Uruguay Round Agreements - Paper prepared by the Commonwealth Secretariat LMM(96)19 237

Canada's Implementation of the TRIPS Agreement - Paper by the Department of Justice, Canada LMM(96)35 261

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

Review of the Activities of the Commonwealth Secretariat in the Legal Field: Memorandum by the Commonwealth LMM(96)4 267

Review of Activities of the Commonwealth Secretariat in the Legal Field: Future of the Commonwealth Legal Advisory Service - Memorandum by the Government of Britain LMM(96)30 336

OTHER INTERNATIONAL DEVELOPMENTS

The Proposed International Criminal Court - Paper by Professor elect Dr William Gilmore, University of Edinburgh LMM(96)21 343

Computerisation activities - Paper by the Department of Justice, Canada LMM(96)37 397

COMMONWEALTH LAW MINISTERS MEETING KUALA LUMPUR, MALAYSIA 15-19 APRIL 1996

COMMUNIQUÉ

1. The 1996 meeting of Law Ministers of the Commonwealth was held at the Istana Hotel, Kuala Lumpur, Malaysia from 15 to 19 April 1996. The meeting was attended by Ministers, Attorneys-General and other law officers and officials from 39 countries and 3 dependencies. It was chaired by the Honourable Dato' Abang Abu Bakar Bin Datu Bandar Abang Haji Mustapha, Minister in the Prime Minister's Department, Malaysia.

2. The Opening Ceremony was addressed by the Attorney-General of Malaysia, the Honourable Dato' Mohtar Bin Abdullah, the Honourable Dato' Abang Abu Bakar Bin Datu Bandar Abang Haji Mustapha, Minister in the Prime Minister's Department, the Secretary-General of the Commonwealth, His Excellency Chief Emeka Anyaoku, and the meeting was officially opened by the Deputy Prime Minister of Malaysia, the Honourable Dato' Seri Anwar Ibrahim. On behalf of Ministers, the Honourable Tevita Tupou, Attorney-General and Minister of Justice of Tonga, expressed to the Government and people of Malaysia their thanks and appreciation for the generous welcome and hospitality extended to them and to their delegations from the time of their arrival in Malaysia.

3. Ministers took the opportunity to extend to the Commonwealth's newest members, Cameroon and Mozambique, a warm welcome to their meeting and took particular pleasure at welcoming South Africa on its return to this forum.

ADVANCING COMMONWEALTH FUNDAMENTAL VALUES

4. Ministers gave priority in their work to a further consideration of the fundamental values identified in the Harare Commonwealth Declaration and to the means by which they could contribute to the realisation of the Millbrook Commonwealth Action Programme on the Harare Declaration which identifies issues of particular concern to them. They recalled that Heads of Government had identified the rule of law as an essential part of the shared inheritance which, in combination with the diversity of its members, is a special strength of the Commonwealth.

5. Good governance involves the whole political structure and its socio-economic context. Although legal rules and procedures in themselves can be misused, the principle of the rule of law is an essential basis for the protection and promotion of fundamental human rights in the context of the well-being of society as a whole. Ministers examined a number of specific issues within their field of concern, all of which touch upon the fundamental political values of the Commonwealth.

a. The Role of the Judiciary

6. Ministers recognised the crucial role of an independent and impartial judiciary in a healthy democracy. The protections enjoyed by judges, including financial independence and security of tenure, are an important defence against improper interference and free the judiciary to discharge the particular responsibilities given it within national constitutional frameworks.

7. However, the requirements of just, honest, open and accountable government referred to in the 1992 Lusaka Statement of Government under the Law place demands upon the judiciary itself, and have implications for the mechanisms used to appoint and promote judges, for their training and for investigating allegations of judicial misconduct. The issues of the composition and accountability of bodies which appoint judges were of concern to many Ministers.

8. Resolving to take a practical step in the context of the Millbrook Action Programme, Ministers appointed a regionally representative Working Party on the Judiciary composed of Australia, Canada, Ghana, Jamaica, Malaysia, Malta, Mauritius, Sri Lanka, Tonga and Zimbabwe. The Terms of Reference for the Working Party which were agreed by Ministers are appended to this Communiqué. They mandated the Working Party to report to their next meeting, through Senior Officials of Law Ministries, on the results of a comparative study to identify matters fundamentally affecting the reality of judicial independence and the actual and perceived status and quality of the judiciary. The group is also to examine practical means, existing and potential, for exchanges among, and training opportunities for, judges and magistrates of member countries.

9. In the context of the independence of the judiciary as a requirement for the effective maintenance of the rule of law, Ministers noted the Victoria Falls Proclamation (for an Independent Judiciary through Judicial Education) adopted by the Commonwealth Magistrates and Judges Association at their meeting in 1994.

b. The role of administrative law in the promotion of good governance

10. Ministers noted the importance of administrative law in checking arbitrary, unfair and unlawful action by those in public office.

11. In recognising the link between the protection of the constitutional rights of the governed and the interest of governments in upholding the principles of sound administrative decision-making, they commended the initiatives taken by the Commonwealth Secretariat in this important field through its programme of administrative law workshops. In this context, they welcomed the publication of the Introductory Guide on Good Government and Administrative Law for public officials as a practical contribution to the promotion of a culture of good governance in a manner that was consistent both with the principles of the Lusaka Statement on Government under the Law and the Harare Commonwealth Declaration.

c. Ombudsmen, Human Rights and Equal Opportunities Commissions

12. Ministers recognised the multi-faceted nature of human rights issues and noted with approval the growing practice in the Constitutional arrangements of many Commonwealth countries to provide for the establishment of separate institutions and mechanisms that support the promotion and protection of specific human rights in the context of the well-being of society as a whole.

13. Ministers noted that in a number of Commonwealth countries the Offices of the Ombudsman, Human Rights and Equal Opportunities Commissions play important roles in enforcing and giving practical meaning to constitutionally protected rights which might otherwise not be realised. Ministers acknowledged that where these Offices existed, they formed an important part of the democratic edifice of the state and contributed to the improvement of the democratic rights of citizens.

14. Ministers recognised the importance of promoting a culture of good governance, and noted many factors that contribute to achieving this goal, including the respect for human rights. They noted the work of the Secretariat in promoting the establishment of Human Rights institutions and capacity building in this field, and in particular the Oxford Declaration and the Agenda and Framework of activities on Human Rights education and acknowledged the utility of the Framework in developing strategies for comprehensive human rights education. They urged the Secretariat to continue providing assistance and training to members in such matters.

d. Violence Against Women

15. In the context of their discussion of Commonwealth fundamental values, Ministers gave special attention to the human rights of women. They recognised that women still experience multiple disadvantages in education, in the workplace and in the home. Women are particularly at risk within a culture of violence, and in many jurisdictions are unable in practice to seek the remedies promised by national legal systems.

16. Ministers acknowledged that violence undermines women's fundamental human rights and freedoms and that no matter what the context, violence against women is unacceptable. They believed that the impact of violence against women extends to their children and that the education of men and women and the sensitisation of children are essential steps on the road to eliminating violence against women.

17. Ministers considered various measures, strategies and activities that could be introduced in the field of crime prevention and criminal justice to address the problem of violence against women.

18. Specifically, Ministers noted the Victoria Falls Declaration for the Promotion of Human Rights of Women adopted in 1994 by the Africa Regional Judicial Colloquium on the Domestic Application of International Legal Instruments that Promote Gender Equality. They followed Heads of Government in warmly endorsing the 1995 Commonwealth Plan of Action on Gender and Development, especially the measures dealing with violence against women, which has an important place in programmes implementing the Platform for Action of the United Nations Fourth Conference on Women held in Beijing in 1995 to deal with several issues related to women, including violence against women.

19. Ministers supported the need for more work to be undertaken at both the national and international

levels to address the issue of violence against women and welcomed proposals setting out a range of practical measures, including a comprehensive review of the criminal justice system, designed to achieve the elimination of violence against women.

INTEGRITY IN PUBLIC OFFICE

20. The acceptance by all citizens of the Commonwealth of the concept of society free from the menace of corruption was considered by Ministers to be an essential pre-requisite to the achievement of the goal of good governance sought by all members. Ministers considered that the achievement of this aspiration involved the highest level of integrity, accountability and leadership by those in public office together with universal condemnation by all people of any culture of corruption. They gave their strongest endorsement to public education programmes, starting at the earliest possible stage, aimed at creating a national ethos which is hostile to corruption and acknowledged the insidious effect of the temptation created by powerful corrupting influences.

21. Ministers recognised the invaluable contribution which can be made to the achievement of a society free from corrupt influence by free and responsible mass media and by guaranteeing accountability and transparency in governance.

22. The positive relationship between efficiency and integrity was recognised by Ministers as was the essential link between economic development and sound financial management practised by a corruption free administration. In this context Ministers recommended for consideration by their colleagues, the Finance Ministers of the Commonwealth at their meetings, the undesirability of the practice in some jurisdictions of the tax deductibility of illicit payments in commercial transactions. They endorsed a proposal that the Commonwealth co-operate with other inter-governmental organisations working in this area. They also recognised the need to extend accountability and integrity standards to the private sector where that sector provides services in the public interest.

23. To ensure appropriate attention is given to this vital issue, Ministers issued a special statement on the subject which underlines their commitment to work to combat corruption, promote integrity in public office, to address the issue of integrity in the private sector where that sector delivers essential services to the community and to seek the co-operation of the Commonwealth Secretariat in advancing understanding of the problem. The Statement is appended to this communiqué.

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

24. At previous meetings, Ministers had recognised that the globalisation of financial markets created a need for effective international co-operation in business regulation. They adopted a Statement on Mutual Assistance Between Business Regulatory Agencies. This Statement, which is an amplification and development of the statement on the same subject made by Ministers at their Mauritius Meeting in 1993, sets out, for the guidance of member countries acting in accordance with their constitutional and general legal systems, general principles, guidelines and considerations pertinent to the subject. The Statement is appended to this communiqué.

MONEY LAUNDERING

25. Ministers received the report on the self-evaluation of progress towards national implementation of the 40 Recommendations of the Financial Action Task Force which have been adopted by the Commonwealth. They noted the substantial progress of many members towards establishing effective anti-money laundering regimes but at the same time noted the significant problems facing some countries as a result of resource constraints. They recognised that these problems occur both at the time of seeking to put in place the necessary laws and regulatory regimes and later as enforcement issues present themselves.

26. In acknowledging that the Secretariat had received significant assistance in conducting the self-evaluation exercise from both the Financial Action Task Force and the Caribbean Financial Action Task Force, Ministers agreed to share the results of the evaluation with these bodies. They endorsed the Commonwealth's practice of co-operating with other international bodies involved in combating the deleterious effects of money laundering and its underlying criminal activity.

27. Ministers reiterated the strong position of the Commonwealth against money laundering and any act what could encourage drug trafficking. In this context they expressed concern over the enactment in 1995 by one member country of a law designed to attract investment which had been widely construed as encouraging money launderers to place funds in that country. They were informed that

assurances had been given by the Government in question that, in pursuance of its commitment to ensure that its laws would not permit investment by money launderers, legislation based on the anti-money laundering principles adopted by Commonwealth member countries, had been passed on 2 April 1996. Ministers commended the Secretariat for the assistance being given to the member country concerned in its efforts to bring into operation money laundering counter-measures called for by Heads of Government, urged the Secretariat to continue this valuable work, and further urged the member country concerned to continue to co-operate with other countries and the Commonwealth Secretariat to combat money laundering.

28. Ministers took note of the Model Money Laundering Bill prepared by the Secretariat to assist member states in the preparation of laws to give effect to the 40 Recommendations of the Financial Action Task Force. They requested Senior Officials, with the assistance of the Secretariat, to continue their work on the draft and to ensure that it continued to represent the most up to date and relevant practice. In the interim Ministers acknowledged that the current draft would be a useful tool in assistance initiatives.

MUTUAL ASSISTANCE IN THE ADMINISTRATION OF JUSTICE

29. Ministers considered the topic of Commonwealth co-operation in the administration of justice, sharing experience and reflecting on common problems. They received a report of the meeting of Senior Officials who had, at Malta in 1995, reviewed progress made in implementing the Commonwealth Schemes. They also received a survey of laws of Commonwealth countries dealing with extradition, mutual assistance in criminal matters and transfer of prisoners which had been prepared by the Commonwealth Secretariat.

a. Extradition and the Rendition of Fugitive Offenders

30. Ministers reflected on suggestions for further development of the London Scheme for the Rendition of Fugitive Offenders which was the first of the Schemes providing for practical co-operation in the administration of justice.

31. They discussed issues which had been raised at recent meetings of Pacific Island Law Officers and Law Officers of Small Commonwealth Jurisdictions. Among these was the suggestion that, between neighbouring Commonwealth countries, on a bilateral, sub-regional or regional basis, consideration could be given to the adoption of a simplified extradition procedure based on the backing of warrants issued in one jurisdiction for their execution in another. Ministers agreed that it was not appropriate at this time to amend the London Scheme. They did, however, recognise that the backing of warrants procedure was one which had proved useful in those countries where it was already available and could therefore provide an acceptable alternative option for governments to consider. They asked the Commonwealth Secretariat to continue its work on the topic and to provide advice to countries considering the adoption of this procedure.

32. Ministers discussed the capability of members to establish effective extradition relations with non-Commonwealth countries. They also noted that a number of substantive issues addressed in the United Nations Model Extradition Treaty did not feature in the current text of the London Scheme, and that developments in the case-law of Commonwealth countries also suggested that there may be a need to review and modernise Commonwealth extradition practice. They asked the Commonwealth Secretariat to continue its work on this matter and to report as appropriate to a subsequent meeting of Senior Officials.

b. Mutual Assistance in Criminal Matters

33. Ministers examined a number of issues concerning the Commonwealth Scheme for Mutual Assistance in Criminal Matters which was adopted in Harare in 1986 and amended at Christchurch in 1990. They noted recommendations agreed by the 1994 Oxford Conference on Mutual Legal Assistance organised by the Commercial Crime Unit in conjunction with the United Nations International Drug Control Programme and the United Nations Inter-regional Crime and Justice Research Institute. Ministers invited the Commonwealth Secretariat to undertake a full study of the law governing the reception by courts of evidence obtained in response to requests for mutual assistance, and to report to the next meeting of their Senior Officials.

34. Ministers recognised that compliance with requests for mutual assistance in criminal matters by all countries, but particularly by small Commonwealth countries, could impose considerable strain upon their resources, both financial and human, and could involve expenses of an extraordinary nature for countries, and that these resource implications could seriously affect the

effectiveness of the mutual assistance Scheme.

35. They agreed that there was a need in these circumstances first, for serious consideration to be given to the provision by requesting countries of financial, technical or other relevant forms of assistance in appropriate cases to facilitate compliance with resource intensive requests, and secondly that the draft guidelines on the apportionment of costs received by the meeting should be further elaborated by Senior Officials on the basis of additional study to be undertaken by the Commonwealth Secretariat as a matter of priority.

36. They therefore decided that, pending the finalisation of such guidelines, Commonwealth countries making requests should at all times remain sensitive to the resource constraints faced by all countries but particularly by small jurisdictions and be prepared to adopt practical and positive measures to facilitate the giving of assistance thus enhancing the operation of the Scheme.

37. The Meeting also recognised that where agreement was reached to adopt a solution based on the involvement of private sector participants, it was necessary to ensure that there would be no resulting conflict of interest and that the best interests of all countries were protected.

38. Ministers recognised the problems which can arise where a request for assistance seeks the making or enforcement of an order restraining dealings with property suspected of being the proceeds or instrumentalities of crime. Senior Officials should consider whether, where damages may be awarded subsequent to such a restraining order, there should be guidelines on the giving of an indemnity by the requesting country against any loss incurred by the requested country.

39. Ministers also requested that Senior Officials consider the value of asset sharing agreements and the use of personnel and other resources from the requesting country to assist those in the requested country in the execution of any request.

40. The meeting received an account of the arrangements under which international co-operation to combat crime would be conducted in the Hong Kong Special Administrative Region after transfer of sovereignty to the Peoples Republic of China in 1997, and welcomed the statement by the Attorney-General of Hong Kong as to how the provision of comprehensive and effective co-operation under the new constitutional framework would be achieved.

c. Protection of the Cultural Heritage

41. This is a matter that has engaged the attention of Ministers over the years and had culminated in the adoption by Ministers of the Scheme for the Protection of Cultural Heritage within the Commonwealth at the Meeting in Mauritius in 1993. In the successful production of that Scheme, the Secretariat had drawn benefit from its close liaison with UNIDROIT which continues to co-operate with the Secretariat, as evidenced by the provision of a resource person at this meeting. Ministers thanked Australia for its invaluable assistance in preparing a draft model law to implement the Scheme and welcomed the contributions of other member countries to the improvement of that draft. They concurred in the recommendation of Senior Officials that certain questions on the optimum method of implementing all provisions of the Scheme still required consideration. Ministers agreed to establish a Working Group which would seek to resolve these issues and report to the next meeting of Senior Officials. They authorised Senior Officials to finalise the model legislation at that meeting and then circulate it to all members.

d. International co-operation to combat crime in the 21st Century

42. Ministers expressed their belief that the Commonwealth should play an important role in helping the world community to address issues concerning effective co-operation to combat crime in the 21st century and in that context to determine a balance between individual rights and wider societal and global interests. Commonwealth countries have substantial experience both of the impact of bills of rights or fundamental liberties provisions upon the operation of national and international criminal justice and of new patterns of criminality. The latter include those which exploit advances in information technology and the rapid pace of change in financial procedures.

43. The meeting invited the Commonwealth Secretary-General to convene a group of eminent Commonwealth persons to consider these issues. Ministers approved terms of reference for the Group and these are appended to this communiqué.

CROSS BORDER INSOLVENCY

44. Ministers noted the complex problems presented by the insolvency of entities holding assets or carrying out business in, or transferring assets between, two or more jurisdictions, problems

compounded by the variety of approaches taken by insolvency laws of different countries. They welcomed a paper giving an account of the work undertaken by UNCITRAL in seeking to develop a legislative framework for judicial co-operation in this field and recognised the value of the Commonwealth Secretariat continuing its co-operation with that organization which had assisted the Meeting by providing a resource person. They considered that an independent Commonwealth regime on transborder insolvency should not be developed, at least for the time being. The Meeting invited the Commonwealth Secretariat to co-ordinate the Commonwealth contribution to this work, to keep member countries informed of its progress, to assist member countries in law reform initiatives, to provide statistics and to undertake such surveys as may be necessary. In due course there might be a need for the preparation of further material to assist in the enactment and implementation of laws for Commonwealth jurisdictions.

INTELLECTUAL PROPERTY RIGHTS AND THE URUGUAY ROUND

45. Ministers reflected upon the range of legal issues arising from the Uruguay Round Agreements and, in particular, under the Agreement on Trade Related Aspects of Intellectual Property Rights. The preparation of legislation implementing this extensive Agreement would make heavy demands upon the limited resources available in many Commonwealth countries. The Meeting agreed that a most valuable form of assistance by the Commonwealth Secretariat would be the organisation of regional workshops for governments on the revision of existing provisions in national law and the drafting of new legislation to ensure consistency with World Trade Organization agreements. Ministers hoped that it would be possible for this and related technical assistance to be made available by the Secretariat in association with the specialised international and regional organisations. The Meeting also welcomed offers by Australia and New Zealand, subject to available resources, to assist member countries, particularly in their region, in their efforts to comply with WTO Agreements.

ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD

46. Ministers received a full review of the work of the Commonwealth Secretariat in the legal field and expressed in the warmest terms their appreciation of the creative work which had been done since their last meeting. They endorsed the main priorities apparent in the work programme of the Secretariat, the promotion of good governance, human rights and the co-operation in fighting organised crime, and expressed appreciation for the effective work done in these and other areas. Ministers welcomed the extension of established programmes into the Caribbean region and looked forward to their further extension in the Pacific and other regions.

47. Ministers expressed a deep appreciation to the Secretariat for continuing to publish and provide them with the Commonwealth Law Bulletin which has served them well over the years as a vital information link on legal developments throughout the Commonwealth. They urged the Commonwealth Secretary General to take into account the serious damage that would be caused to the capacity of the legal establishments, particularly of developing countries, in the delivery of legal services to governments if the Bulletin were to cease to be published.

48. Ministers noted the work of the Commonwealth Legal Advisory Service and regretted to learn that, as a result of continued uncertainty in being able to attract the level of funds it requires to carry out its work meaningfully and effectively, its future was in doubt.

49. Ministers noted and approved the Terms of Reference for the Commonwealth Legal Computerisation Group and also for the Commonwealth Arbitration Assistance Service, which they had set up on the recommendation of Senior Officials. They expressed their appreciation to Singapore for its work in taking these projects forward.

50. Ministers congratulated the Commonwealth of Learning and the Commonwealth Secretariat on having successfully launched the programme for the distance training of legislative drafters and looked forward to the contribution the programme would make in meeting the needs of governments in this critical area of activity.

51. Ministers discussed various issues of importance arising out of the proposal to create an International Criminal Court and welcomed the report thereon prepared by the Commonwealth Secretariat. Noting that Heads of Government had asked Ministers to keep the subject under review, Ministers expressed the hope that progress in the preparatory work would make it possible to convene a Diplomatic Conference to consider the establishment of the Court on a basis which would

be consistent with and advance the legal ideals to which Commonwealth countries all subscribe. They requested the Secretariat to continue to monitor developments and to be ready to provide advice and assistance on constitutional, technical and policy issues arising.

52. In reviewing activities in the legal field, Ministers expressed appreciation for the wide-ranging programme of technical assistance provided to member governments, for example, the provision and training of legislative drafters and the provision of expert legal advice. They acknowledged the mutually beneficial and fruitful co-operation between the Commonwealth Secretariat and other organisations, both inter-governmental and non-governmental.

APPRECIATION

53. Ministers expressed their warmest thanks to the Government of Malaysia for its most generous hospitality, superlative service and trouble-free administration of their Meeting. They acknowledged the untiring efforts of the Malaysian Organising Committee which had ensured smooth progress of all arrangements from the time of first registration until the departure of delegations for their homes. In recording their appreciation, Ministers made special reference to the skills of their Chairman who had ably guided their deliberations during the week.

NEXT MEETING

54. Ministers accepted with the greatest pleasure the invitation of the Government of Trinidad and Tobago to host their next meeting in 1999 and look forward to continuing their contribution to the achievement of Commonwealth goals at that meeting.

Kuala Lumpur
19 April 1996

REVISED ANNOTATED DRAFT AGENDA

Prepared by the Conference Secretary

References to papers should be read as including the papers contained in the Report of the 1995 Meeting of Senior Officials of Law Ministries, held in Malta.

OPENING CEREMONY

A separate note on the proposed arrangements for the Opening Ceremony will be available for consideration by Senior Officials at their preliminary meeting on Sunday, 14 April 1996.

* * *

AGENDA ITEM 1
ADVANCING COMMONWEALTH FUNDAMENTAL VALUES

Since 1991, a considerable part of the Secretariat's energies and resources have been devoted to pursuing the objectives of the Harare Commonwealth Declaration. In pursuing these objectives, it has become apparent that far from being a mere declaration of words, the Harare Declaration has proved to be a dynamic instrument and an engine for the promotion of good governance, which lies at the heart of the Commonwealth's fundamental values, among member countries. The pursuit of good governance is increasingly seen as an endeavour in which the citizen and the various arms of the state are stakeholders and have a community of interest.

(a) The role of the judiciary

Ministers have at a number of previous meetings discussed the question of the independence of the judiciary, and how this can best be achieved, in the general and wider context of the rule of law. At their meeting in Malta in May 1995, Senior Officials were concerned that there was a serious danger that the Harare objectives would not be fully realised unless adequate recognition was given to the vital role played by the judiciary in upholding the fundamental values that underpin any democratic society, and in particular the rule of law. In this context, in issuing the Millbrook Commonwealth Action Programme at their recent Meeting in New Zealand, Heads of Government reinforced the Harare principles and objectives by, *inter alia,* mandating the taking of measures in support of processes and institutions for putting the Harare principles into practice, including "strengthening the rule of law and promoting the independence of the judiciary through the promotion of exchanges among, and training of, the judiciary".

Ministers may wish to consider what practical measures could be taken to strengthen the rule of law and the independence of the judiciary as well as the promotion of exchanges among, and training of the judiciary.

Papers before the Meeting include:-
LMM(96)22 The Independence quality and status of the Judiciary in Commonwealth countries - Paper by Mr Stephen Skehill, Secretary, Attorney General's Department, Australia
LMM(96)25 The role of the judiciary in the promotion of human rights of women - Paper by Ms Jane Connors, Senior Lecturer, SOAS, University of London
LMM(96)31 The role of the judiciary - Paper by the Department of Justice, Canada

(b) The role of administrative law in the promotion of good governance

Increasingly within the Commonwealth today, concern for the rule of law and an expectation of just and open government requires that those wielding public power should do so in accordance with law, and that private individuals and groups should be able to seek the protection of law when they believe action by public officials to be arbitrary, unfair or unlawful.

Pursuant to the Harare Commonwealth Declaration, the Commonwealth Secretariat commenced a programme for raising the awareness in Commonwealth jurisdictions of the relevance of administrative law to issues of governmental and political development. Beginning in 1992 at Lusaka, the Legal and Constitutional Affairs Division launched a series of workshops to bring together those holding senior office in government and the public service, including the administrative heads of ministries, as well as judges, the legal profession, academic lawyers and representatives of the media with a view to exposing them to the crucial

contribution administrative law makes in the achievement of good governance in a functioning democracy.

As high officers of state responsible for the administration of justice, Ministers clearly have a role to play in creating the right environment in which the Harare and Millbrook objectives could be carried forward and given practical meaning. In this context, Ministers may, for instance, wish to give some consideration to ways of strengthening institutions and capacity building within those spheres of their responsibility regarded as vital to just, efficient and honest government and designed to avoid the degeneration of standards resulting in a loss of credibility and such crises as *coups d'etat.* Central to maintaining standards through the device of judicial review is the judiciary.

Papers before the Meeting include:-
LMM(96)7 Commonwealth Fundamental Values - Administrative Law, Human Rights and the Judiciary - Paper prepared for the Commonwealth Secretariat by Professor A. W. Bradley
LMM(96)16 Good Government and Administrative Law - An Introductory Guide by Professor A. W. Bradley and Dr C. Himsworth
LMM(96)32 The role of administrative law in the promotion of good governance in Canada - Paper by the Department of Justice, Canada.

(c) *The offices of the Ombudsman, Human Rights and Equal Opportunities Commissioners*

At their Meeting in New Zealand, Heads of Government in issuing the Millbrook Commonwealth Action Programme spelt out specific measures which are designed to support the processes and institutions for the practice of the Harare Principles. This included creating and building the capacity of requisite institutions.

The offices of the Ombudsman, Human Rights and Equal Opportunities Commissioners have a relatively recent history in the Commonwealth compared to other great institutions of state for the protection of the citizens rights such as the judiciary. Where these offices have been created, there is ample evidence that they have contributed not only to an enhancement in the protection of the citizens' rights but also to an improvement in the public's perception of the fairness of the administration of justice and of the institutions of government generally.

Among the elements within the sphere of Law Ministers' responsibility appropriate to highlight, and to which Ministers may feel particular attention needs to be paid in their respective jurisdictions are capacity building and strengthening of the institutions which underpin democracy: the offices of the Ombudsman and similar functionaries such as Human Rights and Equal Opportunities Commissions.

Papers before the Meeting include:-
LMM(96)6 The Courts, the Ombudsman and the Public - Paper prepared for the Commonwealth Secretariat by Mr William Reid, Parliamentary Commissioner for Administration
LMM(96)11 The Ombudsman Institution - Paper prepared for the Commonwealth Secretariat by Sir John Robertson, QC
LMM(96)15 The Commonwealth and Human Rights Education - Paper prepared by the Commonwealth Secretariat
LMM(96)27 National Human Rights Commissions - National and International Perspectives - Paper prepared for the Commonwealth Secretariat by Mr Brian Burdekin of the United Nations Human Rights Centre
LMM(96)33 The Canadian Human Rights Commission - Paper by the Department of Justice, Canada

AGENDA ITEM 2
INTEGRITY IN PUBLIC LIFE

Of all the factors that could combine effectively to advance and uphold the Commonwealth's fundamental values, none perhaps is as powerful and pervasive in its potential to strengthen or undermine democratic government as the integrity of those entrusted with public office.

Different Commonwealth countries have approached the question of the strategies for achieving honesty in public office in a variety of ways. Some have "leadership codes" giving constitutional backing to the standards of integrity expected of their leaders. Others have independent commissions and some rely on the more traditional approach based on the ordinary criminal law.

In sharing views and experiences in their discussion of this item, Ministers will be able to add their collective voice to that of many other bodies working in this area to draw attention to the destructive effect of the systematic abuse of public office. Ministers will be invited to consider and to

adopt for issue a draft Statement on the Prevention of Corruption being recommended to them by Senior Officials. The Meeting will also provide Ministers with an opportunity to consider what, if any, other steps in addition to those already in place, might be taken to advance integrity in public life.

Papers before the Meeting include:-
LMM(96)5 Strengthening Integrity in Commonwealth Countries - Paper prepared for the Commonwealth Secretariat by Transparency International(TI)
LMM(96)17 Integrity in Public Office and proposed Code for Commonwealth countries - Paper by the Commonwealth Secretariat
LMM(96)29 Integrity in Public Life - Committee into Standards of Public Life ("Nolan Committee") - Memorandum by the Government of Britain
LMM(96)34 Integrity in Public Life: Access to government information - Paper by the Department of Justice, Canada

AGENDA ITEM 3
COMMONWEALTH CO-OPERATION IN THE ADMINISTRATION OF JUSTICE

Commonwealth co-operation in the very specific form of mutual legal assistance schemes continues to be seen as a practical demonstration of the utility of the Commonwealth. The need for the schemes of mutual legal co-operation between Commonwealth jurisdictions to be kept under constant review has always been a feature of the work of Senior Officials and has also been at the forefront of the activities of the Secretariat in the legal field.

The Meeting will thus provide Ministers an opportunity to review the report of Senior Officials, contained in the Report of the Malta meeting by the Secretariat, regarding implementation and practical experience gained in the working of existing Commonwealth Schemes for co-operation in the administration of justice. This will include a review of the Mauritius Scheme on the Protection of the Material Cultural Heritage and a separate report by Senior Officials, who are scheduled to meet in Kuala Lumpur on Sunday prior to the Ministers' Meeting, on the result of their consideration of the model draft law prepared by Australia.

This may also provide an opportunity for Ministers to consider whether, in the light of recent developments, the time was ripe for a general review of the Commonwealth Schemes, in particular the London Scheme (Rendition of Fugitive Offenders) and the Harare Scheme (Mutual Assistance in Criminal Matters), with a view to their possible amendment to meet the particular challenges to their successful operation. These challenges include the resource implications for small states of providing assistance in the investigation and prosecution of crime and the need to institutionalise the validity of simplified extradition procedures which can be implemented on bilaterally agreed bases. The adequacy of existing systems to address the serious problems of corruption and money laundering is another issue worthy of attention.

The last decade has been a period of rapid growth of co-operative measures of various kinds designed to meet the need of societies to combat serious crime. During this period the world has also seen increased concern for the protection of individuals' rights and liberties. The parallel development of these two streams has resulted in a need for courts and governments to resolve real or apparent conflict between the two objectives - a conflict which must be resolved if society is to protect and further develop both legitimate interests.

The Commonwealth has special expertise in areas relevant to this issue. Its contribution to the entrenchment of democratic values, independent judiciaries and constitutional protections for individual rights is of long standing and its strategies in the field of extradition and mutual assistance in criminal matters provide global benchmarks. Law Ministers may wish to discuss the role the Commonwealth can play in developing a vision for the 21st Century which establishes principles which enhance both fundamental rights and international co-operation to combat crime.

Papers before the Meeting include:-
LMM(96)8 Simplifying extradition procedures - a proposal to extend the scope of the London Scheme on the Rendition of Fugitive Offenders - Paper by the Commonwealth Secretariat
LMM(96)9 Resource Implications of Mutual Assistance in Criminal Matters - Paper by the Commonwealth Secretariat
LMM(96)12 Survey of Extradition, Mutual Assistance in Criminal Matters and Transfer of Prisoner Laws in Commonwealth Jurisdictions - Publication by the Commonwealth Secretariat
LMM(96)13 Proposals for the enhancement of the Harare Scheme on Mutual Assistance in Criminal Matters: Reports from the 1994 Oxford Conference on Mutual Legal Assistance and the Meeting of

Senior Officials of Law Ministries - Paper by the Commonwealth Secretariat
LMM(96)14 The Modernisation of Extradition Laws of Commonwealth Countries - Paper by the Commonwealth Secretariat
LMM(96)20 International Co-operation to Combat Crime in the 21st Century - The Role of the Commonwealth in Determining a Balance Between the Individual and Global Interests - Paper by the Commonwealth Secretariat

AGENDA ITEM 4
MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

At Mauritius, Ministers issued a Statement of Principles which Senior Officials were asked to keep under review. Progress with developing co-operation between Business Regulatory Agencies beyond the Mauritius Statement has been slow and has not achieved the level of consensus where it may be seen as a potential scheme. Specifically in this respect, concerns expressed by Singapore and supported by Brunei Darussalam and Malaysia have not been satisfied. Nevertheless, at their meeting in Malta, Senior Officials reviewed and revised the Statement on co-operation between Business Regulatory Agencies which will be placed before Ministers for their consideration.

Papers before the Meeting include:-
LMM(96)10 Report of the Meeting of Senior Officials of Law Ministries, including a revised version of the Statement on Mutual Assistance Between Business Regulatory Agencies
LMM(96)23 Global trends in the area of Mutual Assistance in Business Regulation: A guide to the preparation of national laws to facilitate the provision of assistance to other countries - Paper by the Commonwealth Secretariat

AGENDA ITEM 5
MONEY LAUNDERING

Pursuant to the concern expressed by Heads of Government at their Cyprus Meeting that Commonwealth countries should join in the international efforts to combat the laundering of the proceeds of all serious crime, Law Ministers for their part had resolved at Mauritius to put in place comprehensive laws to combat money laundering.

Ministers may wish to note the work done by Commonwealth Finance Ministers in this respect and also the draft model law on money laundering as well as the progress made in the administration of the system of self-evaluation in implementing any existing anti-money laundering measures, in particular the 40 Recommendations of the Financial Action Task Force (FATF).

Papers before the Meeting include:-
LMM(96)18 The Commonwealth Draft Model Law for the Prohibition of Money Laundering together with explanatory documentation - Document prepared by the Commonwealth Secretariat
LMM(96)24 Self Evaluation of progress in implementing measures in the legal sector to combat money laundering: A compilation by the Commonwealth Secretariat of national responses to the 1995/6 survey

AGENDA ITEM 6
TRANSBORDER INSOLVENCY

Some Law Officers will share the responsibility with other Ministerial colleagues or other public officers for ensuring that the regime for the enforcement of any existing code for the conduct of business, particularly where corporate bodies are concerned, rests on a proper legal basis and that business is conducted strictly within the confines of the law. The globalisation of business, and particularly the growth of regional and sub-regional trading blocs has highlighted the problems that can arise when multinational trading concerns or businesses run into financial difficulties to the point of being unable to meet their financial commitments and eventual insolvency. Such difficulties are often extremely complicated and large scale. Their resolution will increasingly require the development of law and administrative practices not dissimilar to those in mutual legal assistance arrangements required to resolve other problems which manifest themselves across national borders.

Ministers may wish to consider whether, in the light of the paper before them, there is any scope for work that the Secretariat, in consultation with Senior Officials, can usefully do which would assist member states without duplicating existing activities.

Papers before the Meeting include:-
LMM(96)26 International co-operation on cross-border insolvency issues - An important legislative initiative by UNCITRAL - Paper by Mr S. A. Sahaydachny, Senior Legal Officer, UNCITRAL
LMM(96)28 Cross-border insolvency: A need for Commonwealth action? - Paper by the Commonwealth Secretariat

AGENDA ITEM 7
INTELLECTUAL PROPERTY RIGHTS THE LEGAL IMPLICATIONS OF THE AGREEMENT ON TRADE AND INTELLECTUAL PROPERTY RIGHTS ARISING FROM THE CONCLUSION OF THE URUGUAY ROUND

This item relates to an aspect of the global trade regime which has been of long-standing concern for Heads of Government and consequently for the Secretariat itself. For many states, whether they decide to become party to important multilateral treaties which would serve their national interests well will often depend on an appreciation of the full implications of such treaties. Particularly for small developing states, technical capacity to deal, for instance, with the rapidly growing complexities of international trade is a newly emerging concern. Also in some instances, analysing the full implications of a complex multilateral treaty such as the GATT and the Marrakesh Agreement establishing the World Trade Organisation could be extremely burdensome for some, particularly small states.

As a subject area encompassing a considerable interdisciplinary content and in which a number of Divisions within the Secretariat have undertaken activities, it is envisaged that there will continue to be close co-operation and co-ordination between the various Secretariat Divisions in responding to any possible requests that will emerge either at the Meeting or in the normal course of the work of the Legal and Constitutional Affairs Division.

The principal objective is to draw Ministers' attention to the various legal issues emanating from the multilateral trade agreements, some of which are complex and, in particular, the volume of national legislative work to be undertaken in order to take advantage of membership of the World Trade Organisation. Ministers may also wish to consider whether there is any specific role the Legal and Constitutional Affairs Division, in conjunction with Senior Officials, can be mandated to play by facilitating the provision of advice to access the advantages of these treaties.

Papers before the Meeting include:-
LMM(96)19 Legal issues arising from the Uruguay Round Agreements - Paper prepared by the Commonwealth Secretariat
LMM(96)35 Canada's implementation of the TRIPS Agreement - Paper by the Department of Justice, Canada

AGENDA ITEM 8
A REVIEW OF THE ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD

A paper will be before the Meeting describing the legal activities of the Commonwealth Secretariat since Ministers last met in Mauritius in November 1993. The review of the Secretariat's activities in the legal field is a comprehensive overview of existing and potential Secretariat facilitative and supportive services on behalf of member states - their Law Ministers and other Law Officers, the judiciaries and professional law associations which are the main clients and interlocutors of the Legal and Constitutional Affairs Division.

The Meetings' Communiqués have in the past contained considerable material by way of comments on these services and activities. Under this item, Ministers will be informed of relevant activities of the major Commonwealth and other international legal NGOs such as the Commonwealth Lawyers Association, the Commonwealth Magistrates and Judges Association, Interights and others with whom the Legal and Constitutional Affairs Division has good and mutually beneficial working relations.

Specifically, the paper will seek to provide an update on any developments regarding those matters remitted to Ministers by Commonwealth Heads of Government. This will include developments in the work being undertaken by the United Nations on the possibility of establishing an international criminal court. Much more substantially, the paper will focus on activities relating to the recommendation by Heads of Governments urging the ratification by member governments of human rights instruments and including the Convention on the Elimination of All Forms of Discrimination Against Women and, in particular, on the subject of violence against women.

Papers before the Meeting include:-
LMM(96)4 Review of the Activities of the Commonwealth Secretariat in the legal field - Memorandum by the Commonwealth
LMM(96)21 The proposed International Criminal Court - Paper by Professor elect Dr William Gilmore, University of Edinburgh
LMM(96)30 Review of Activities of the Commonwealth Secretariat in the Legal Field: Future of the Commonwealth Legal Advisory Service - Memorandum by the Government of Britain
LMM(96)36 Presentation of practical measures,

strategies and activities in the field of crime prevention and criminal justice for the elimination of violence against women - Paper by the Department of Justice, Canada
LMM(96)37 Computerisation activities - Paper by the Department of Justice, Canada

AGENDA ITEM 9
ANY OTHER BUSINESS

Ministers may have before them for consideration matters and papers relating thereto which do not fall under any of the heads of the draft agenda listed above for the present Meeting. These matters will, if possible, be highlighted in the Secretariat's review of activities in the legal field, and Ministers will have the opportunity to take whatever action they may deem appropriate in the circumstances.

Consideration of the Communiqué
Venue of next Meeting.

CLOSE

Advancing Commonwealth Fundamental Values

INDEPENDENCE, QUALITY AND STATUS OF THE JUDICIARY IN COMMONWEALTH COUNTRIES

A Paper prepared for the Commonwealth Secretariat by Mr Stephen Skehill, Secretary, Attorney General's Department, Australia

BACKGROUND:

1. The 1991 Harare Commonwealth Declaration noted that: "The special strength of the Commonwealth lies in the combination of the diversity of its members with their shared inheritance in language, culture and **the rule of law**" and pledged the Commonwealth and its member countries to work with renewed vigour, concentrating especially on a number of areas including: "the protection and promotion of the fundamental political values of the Commonwealth:

- democracy, democratic processes and institutions which reflect national circumstances, **the rule of law and the independence of the judiciary**, just and honest government;

- fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief; ..."

2. The Declaration also noted that: "To give weight and effectiveness to our commitments we intend to focus and improve Commonwealth co-operation in these areas. This would include strengthening the capacity of the Commonwealth to respond to requests from members for assistance in **entrenching** the practices of democracy, accountable administration and **the rule of law.**"

3. The 1995 Millbrook Commonwealth Action Programme on the Harare Commonwealth Declaration noted the pledge to work for the protection and promotion of, *inter alia*, **the rule of law and the independence of the judiciary** and adopted an action programme to fulfil more effectively the commitments contained in the Harare Commonwealth Declaration.

4. Part (i) of the Action Programme related to "Advancing Commonwealth Fundamental Political Values" and provided that, as "Measures in Support of Processes and Institutions for the Practice of Harare Principles": "The Secretariat should enhance its capacity to provide advice, training and other forms of technical assistance to governments in promoting the Commonwealth's fundamental political values, including:

- assistance in creating and building the capacity of requisite institutions; ...

- strengthening **the rule of law and promoting the independence of the judiciary through the promotion of exchanges among, and training of, the judiciary; ...**"

5. These issues have been reflected in a number of other statements from Commonwealth meetings. For example, the 1992 Lusaka Statement on Government Under The Law noted that: "We express our joint belief in **the central place enjoyed by an independent, impartial and informed judiciary** in the realisation of just, honest, open and accountable government" and went on to state that: "In a democracy, the people can exercise their franchise only periodically and are empowered to remove from office those who fail to honour the trust and responsibility reposed in them. On a daily basis, it falls to the judiciary no less than to members of the legislature to hold the executive accountable under the Rule of Law, and to ensure (on the people's behalf) that government takes place on a constitutional basis and under the law. This included ensuring that minorities and minority interests are protected under the law, for although the government is chosen by the majority, it must, in a democracy, rule for all."

6. At the Meeting of Commonwealth Law Ministers at Grand Baie, Mauritius, in 1993, Ministers considered a number of papers of relevance to these general themes, including:

- "The Lusaka Statement on Government Under the Law" - Memorandum by the Commonwealth Secretariat and a paper prepared by the Hon. Rodger Chongwe, SC, MP, Minister of Local Government and Housing, Zambia;

- "The Harare Declaration: The Role of the Judiciary and the Protection of the Rule of Law" - Paper prepared by the Hon. Justice P. Nnaemeka-Agu;

- "The Commonwealth and the Promotion of Human Rights" - Memorandum by the Commonwealth Secretariat; and

- "Independence of the Judiciary in Canada" - Paper submitted by Canada.

PROPOSAL

7. It is a principle commonly accepted by all members of the Commonwealth, and consistently reflected in the declarations and utterances of the Commonwealth, that national interests and aspirations will be enhanced by the reality and perception that the judiciary in each country is able to exercise its judicial functions in a way that is independent of any undue influence of the executive, and that the members of the judiciary are and are perceived to be of a status commensurate with the fundamental role of the judiciary in supporting and entrenching the rule of law, to which all member countries are fully committed.

8. These desirable characteristics of independence and status are not capable of quantitative measurement and many subjective judgements are required on a range of difficult issues before any sustainable opinion can be confidently reached.

9. The developmental stage attained in the establishment, maintenance, preservation and safeguarding of the independence and status of the judiciary varies from one Commonwealth country to another. Additionally, a number of varying methodologies have been tested in a variety of Commonwealth countries with a view to achieving these important aims.

10. It is a matter of fundamental importance that each sovereign country is free to so structure its judiciary as it sees fit within national constitutions and laws, and it is accepted that there does not need to necessarily be uniformity between countries on matters affecting the status and independence of the judiciary.

11. At the same time, a comparative study of such matters amongst Commonwealth countries may well be of assistance to those member countries who seek to advance and accelerate the development of their own judiciaries beyond their present state of development.

12. It may also point to various best or preferable practices on certain matters which some countries may choose to adopt, and may assist others contemplating change or experimentation to asses how various methodologies have operated in other member countries.

13. Finally, that comparative study and a review of relevant action taken to date may also point to those areas in which concerted future action by the Secretariat and individual member countries may give more concrete form to the Millbrook Commonwealth Action Plan and the various other commitments noted above.

14. Accordingly, **it is proposed that Ministers agree:** that the Commonwealth Secretariat should convene a Working Party, comprised of member countries to be agreed by Ministers, which should provide an interim report to the next meeting of Senior Officials and a final report to the next meeting of Ministers in accordance with the following terms of reference:

1. to identify those matters which fundamentally affect the reality or actuality of **independence** of the judiciary, including but not limited to the following:

   - constitutional or statutory entrenchment of courts;

   - constitutional or statutory entrenchment of persons appointed to the judiciary;

   - the terms and conditions upon which members of the judiciary are engaged or appointed;

   - the processes by which members of the judiciary are selected;

   - the circumstances in which a member of the judiciary may be removed from office;

   - the nature and extent of accountability of the judiciary to the Parliament and Government; and

   - the nature of other offices which might be contemporaneously held by members of the judiciary;

2. to identify those matters which impact upon the actual and perceived **status and quality** of the judiciary and the rule of law, including but not limited to the following:

   - the criteria by reference to which potential members of the judiciary are identified;

   - the comparative level of remuneration received by members of the judiciary vis a vis other national holders of public office, the method of determination of that remuneration, and the process for adjustment of the level so determined over time;

   - ongoing educational and professional development opportunities for members of the judiciary;

   - the extent of development and acceptance of standards for ethical behaviour amongst members of the judiciary; and

   - the level of public education about, and knowledge of, the role and function of the judiciary;

3. to compare the **present state of the law and administration** amongst Commonwealth countries on such matters as fall within 1 and 2 above;

4. to suggest those criteria by which **best or preferable practices** in relation to such matters might be identified by the governments of member countries;

5. to propose, as considered appropriate, any **programme of further work** considered desirable beyond the undertaking of the comparative study commissioned in accordance with 1-4 above; and

6. to review practical steps that have been taken to date to promote the independence of the judiciary generally (and in particular by **exchanges** amongst, **and** by providing **training opportunities** for, the judiciaries of member countries) and if considered appropriate, to propose new or increased initiatives in these fields.

PRESENTATION OF PRACTICAL MEASURES, STRATEGIES AND ACTIVITIES IN THE FIELD OF CRIME PREVENTION AND CRIMINAL JUSTICE FOR THE ELIMINATION OF VIOLENCE AGAINST WOMEN

A Paper by the Department of Justice, Canada

BACKGROUND

1. The pervasiveness of violence against women in all countries has become an issue of global concern. Violence against women cuts across all economic, age, ability, religious, racial, cultural, political and sexual orientation spectrums of society. Violence against women is at once a reflection of structural and systemic inequality in society and a contributing factor to that inequality - be it social, political or economic.

2. Violence violates women's fundamental human rights and freedoms. The harm caused by violence undermines their ability to lead autonomous lives, free of fear and coercion, and imposes great costs on society. It has significant repercussions not only on the health and well-being of women, but also impacts on their community as a whole since it leaves them unable to achieve their full human and economic potential. In many parts of the world violence both within and outside the home, has been identified as a barrier to the full participation of women in society.

3. In Canada, the results of a national survey on violence against women, conducted by the Canadian Centre for Justice Statistics, were released in November 1993. The results clearly showed that violence and fear of violence is an everyday reality for many women. Fifty per cent of women reported being the victim of at least one violent incident in their adult life (over the age of 16). The Canadian study also revealed that in addition to physical injury, nine-in-ten incidents had an emotional effect on the woman, with the most commonly reported consequences being anger, fear, increased caution and less trust. We also know that women having experienced sexual abuse in childhood, for example, are more likely to experience depression, to attempt suicide and to succeed.

4. The impact of violence against women extends to their children. There is solid evidence that violent behaviour is passed from generation to generation. Child witnesses of violence in the home are likely to repeat the violence either as victims or as perpetrators. The 1993 survey found that witnessing violence in the home can establish a pattern of aggressive behaviour; sons with violent fathers were three times more likely to assault their partners than sons with non-violent fathers. In the same survey, 39 per cent of women in violent marriages reported that their children had witnessed violence against them.

DEALING WITH VIOLENCE AGAINST WOMEN AT THE INTERNATIONAL LEVEL

5. At the international level, the problem of violence against women has already been addressed by a number of bodies. Several components of the problem have been studied by the Commonwealth, the United Nations Commission on the Status of Women, the United Nations Commission on Human Rights, the Council of Europe and the Organization of American States.

(a) Commonwealth

6. Violence against women has been a major concern for Commonwealth Ministers Responsible for Women's Affairs since their First Meeting in Nairobi in 1985. More recently when they met in Cyprus in 1993, Ministers requested the Commonwealth Secretariat to continue its work as a clearing house on violence against women and girls and to disseminate materials and manuals on women's rights as human rights to Commonwealth governments and non-governmental organizations (NGOs).

7. The new Commonwealth Plan of Action on Gender and Development which was fully endorsed by Heads of Government in Auckland in November 1995, has as one of its key strategic objectives for governments, "to promote and defend women's rights as human rights and outlaw all violence against women and girls". Specific measures for governments under the new Plan of Action relate to "women's rights as human rights, the elimination of violence against women, the protection of the girl child and the outlawing of all forms of trafficking in women and girls".

8. On the part of the Women's and Youth Affairs Division (WYAD) of the Secretariat, a number of training materials on violence against women have been developed, including three manuals which have been widely disseminated and used. There are "Confronting Violence: a Manual for Commonwealth Action", "Guidelines for Police Training on Violence against Women and Child Sex Abuse", and "Violence against women: curriculum materials for legal studies". A Commonwealth annotated bibliography on violence against women has just been published for use in training and public awareness programmes and information on measures being taken by governments, NGOs and other organizations to combat violence against women in the Commonwealth.

(b) United Nations crime prevention and criminal justice programme

9. This issue has never been substantially addressed in the criminal law context, until recently when the United Nations Commission on Crime Prevention and Criminal Justice included it as a priority item on its work agenda and invited the 9th United Nations Congress on the Prevention of Crime and the Treatment of Offenders to consider this matter. As one of the two principal sponsors that introduced the resolution concerning the elimination of violence against women at the 9th Congress, Canada wholeheartedly supports the need for more work to be undertaken at the international level to address the issue of violence against women. However, the multifaceted nature of violence against women suggests that different strategies are required to deal with different manifestations of violence and the various contexts in which it occurs.

10. The Fourth Conference on Women, held in Beijing in September 1995 adopted a Platform for Action to deal with several issues related to women, including violence against women. Canada believes that the section of the Platform for Action dealing with violence against women should be implemented in all disciplines (social services, health, education, etc.), particularly in the field of crime prevention and criminal justice. Crime prevention and the criminal justice system at both the national and international levels have a central role to play in the elimination of violence against women and the creation of just and equitable societies.

11. In all countries, the message must be clear: no matter what the context, violence against women is unacceptable, and such violent acts are reprehensible and must be dealt with accordingly. However, punishment is not enough. Preventing such acts and treating the victims are equally important. Furthermore, the alarming statistics in respect of the inter-generational transmittal of violent behaviour clearly indicate that the rehabilitation of perpetrators of violence against women and the education and sensitization of children, particularly boys, is an essential step on the road to eliminating violence against women.

12. Canada is submitting the attached document (Annex), concerning practical-oriented measures, strategies and activities that can be introduced in the field of crime prevention and criminal justice to address the problem of violence against women, in order to facilitate discussion on this issue at the Commonwealth Law Ministers Meeting. This document has also been submitted to the Secretary-General of the United Nations as a Canadian proposal to be discussed at the next session of the United Nations Commission on Crime Prevention and Criminal Justice, which will be held in May 1996.

13. More specifically, the Meeting might wish to urge governments to implement the Commonwealth Plan of Action on Gender and Development, especially the measures dealing with violence against women. It might also wish to ask the Commonwealth Secretariat to monitor the implementation of these measures.

14. Both at home and within the international community, we must continue working to ensure that women's rights are recognized as human rights and that in concept and practice, these rights acknowledge the realities of women's lives and women's continuing efforts to achieve equality. By working together to achieve this goal, we might be able to better confront violence against women and find solutions contributing to its elimination.

April 1996

PRACTICAL MEASURES, STRATEGIES AND ACTIVITIES IN THE FIELD OF CRIME PREVENTION AND CRIMINAL JUSTICE FOR THE ELIMINATION OF VIOLENCE AGAINST WOMEN

CANADIAN PROPOSAL

The multifaceted nature of violence against women suggests that different strategies are required for different manifestations of violence and the various settings in which it occurs. This document suggests various measures, strategies and activities that can be introduced in the field of crime prevention and criminal justice to address the problem of violence against women.

Recalling the definition of violence against women in the United Nations Declaration on the Elimination of Violence against Women and reiterated in the Beijing Platform for Action, this document builds on the measures adopted by governments in the Platform for Action to prevent and eliminate all forms of violence against women.

Acknowledging specifically the need for an active policy of mainstreaming a gender perspective in all policies and programmes related to violence against women, these measures, strategies and activities can be undertaken by member states and other entities, as appropriate, in order to assist governments in their efforts to address the various manifestations of violence against women.

CRIMINAL JUSTICE SYSTEM

Member states are urged to:

1. Review their criminal law to ensure that the following acts of violence against women are prohibited and, if not, to adopt measures to do so:

   (a) rape and other sexual assaults within or outside marriage;

   (b) harmful traditional practices perpetrated on women and girl children, including female genital mutilation;

   (c) sexual exploitation and abuse of girl children;

   (d) trafficking in women and girl children and forced prostitution.

2. Adopt legislation to:

   (a) regulate the acquisition, possession, ownership, storage in the home and use of firearms, including their surrender pending trial;

   (b) prohibit and restrain individuals from harassing, intimidating or threatening women;

   (c) deal with the problem of nationals travelling abroad in order to sexually exploit girl children.

3. Review their criminal procedure to ensure that:

   (a) the responsibility for initiating prosecutions does not rest with victims;

   (b) women are entitled to testify as witnesses in court proceedings;

   (c) measures to protect the identity of women and girl children complainants or witnesses, as well as measures to facilitate the testimony of women and girl children victims of violence, are available, at their request and as appropriate, in cases of violence against women;

   (d) police have adequate powers to enter premises and conduct arrests in cases of violence against women;

   (e) violence against women is taken into account in bail and conditional release applications;

   (f) the victim of violence against women has a right to seek restitution.

4. Ensure that specific rules of evidence and defences, for example that of honour or provocation, do not have a negative impact on women.

5. Consider the introduction of judicial mechanisms that are sensitive to the needs of

women victims of violence and which facilitate prompt processing of cases involving violence against women.

6. Ensure that if mediation is used in the context of an abusive relationship, it is premised upon the informed consent of the victim and an acknowledgement of the criminal nature of such violence.

7. Encourage, where appropriate, prosecution of cases of violence against women by specially designated and trained prosecutors.

8. Ensure that the perspective of the victim is represented in the court process by, for example, victim impact statements, victim advocates or other means.

9. Develop, through professional associations, enforceable standards of practice and behaviour, for judges, lawyers, advocates and paralegals, which promote justice and equality for women.

10. Strengthen the application of protection and restraining orders and, if not already in place, to establish a registration system for such orders so that police and other criminal justice workers can quickly determine whether such an order is in force.

POLICE

Member states, in collaboration with the police, are urged to:

11. Create and implement policies, programmes and procedures in relation to the police to:

    (a) ensure that police procedures, decisions on arrest, detention and terms of any release give priority to the safety of the victim and the prevention of revictimisation;

    (b) remove, wherever possible, the abuser from the home, rather than the woman and her children, in the context of domestic crime;

    (c) recruit more women, including women from minority and indigenous populations, to operational and management positions throughout police services;

    (d) ensure that police respond to cases of violence against women in a timely fashion;

    (e) establish a fair and accessible police complaints process to hold police publicly accountable for their actions;

    (f) establish, wherever possible, dedicated police units, composed of specially trained police officers and persons from other disciplines to deal with violence against women;

    (g) establish multidisciplinary police and community advisory groups;

    (h) develop investigative techniques which reduce intrusiveness to the victim while maintaining standards for the collection of the best evidence.

SENTENCING AND CORRECTIONS

Member states are urged to:

12. Examine sentencing practices and strategies to ensure that:

    (a) they have the goals of holding offenders accountable for their actions related to violence against women, of stopping violent behaviour, of reducing the impact of the sentence on victims and family members, and of promoting sanctions which are comparable to those for other violent crimes;

    (b) they take into account the severity of both physical and emotional harm associated with violence against women, particularly in cases of no obvious physical injury;

    (c) a full range of sentencing dispositions exist to ensure the protection of the victim and society and that the sentencing judge can impose a sentence that affords the possibility for treatment or rehabilitation of the offender during periods of incarceration, probation or parole;

    (d) firearms can be confiscated upon conviction of the perpetrator of a crime of violence against women;

(e) victims of violence against women can submit victim impact statements to courts in order that the impact of victimisation may be taken into account in setting appropriate penalties;

(f) the victim is notified of the release on parole of the offender or at the end of the offender's sentence where the interest of the victim in such disclosure outweighs any invasion of the offender's privacy.

13. Review correctional policies and practices to:

(a) examine whether there are appropriate measures in place to eliminate violence against women in detention;

(b) encourage the development and evaluation of treatment programmes for offenders who commit violence against women, aimed at reducing the likelihood of further violence.

HEALTH AND SOCIAL SERVICES

Member states and, as appropriate, the private sector, foundations, non-governmental and community organizations, women's equality seeking organizations and research institutes are urged to:

14. Introduce, through relevant professional associations and training facilities, mandatory professional training for doctors, nurses, ambulance attendants and other health sector personnel to promote an understanding of and an appropriate response to the issue of violence against women.

15. Integrate questions on gender-based violence into national health surveys and into ongoing research.

16. Establish, fund, co-ordinate, support and staff, where they are not already in place, services such as toll free information lines, counselling and crisis intervention services and support groups to benefit victims of violence against women and their children.

17. Sponsor programmes to discourage alcohol and substance abuse, given the frequent presence of alcohol and substance abuse at the time of incidents of violence against women.

18. Establish, where they are not already in place, facilities for temporary residential accommodation for women and their children who are at risk of violence.

TRAINING

Member states and, as appropriate, non-governmental organizations and women's equality seeking organizations, in collaboration with relevant professional associations, are urged to:

19. Improve existing and develop new standardized protocols and procedures (both interdisciplinary and intra-disciplinary) to assist professionals in all relevant disciplines to detect and respond to all forms of abuse, including physical, sexual, emotional and financial abuse.

20. Take steps at the national level, through multidisciplinary training, to:

(a) educate and sensitize law enforcement officers, law students, lawyers, paralegals, judges, prison guards and other public officials with regard to issues concerning violence against women, particularly in respect of specific problems women face when seeking help from the criminal justice system;

(b) introduce mandatory cross-cultural and gender sensitivity training modules for these officials that address the unacceptability of violence against women, the social context of violence against women and the impact of violence and the consequences for women subjected to it;

(c) develop rules of practice and conduct for these officials that promote justice and equality for women.

21. Provide, through relevant professional associations, special training for teachers, including training in conflict resolution, to promote an understanding of and an appropriate response to the issue of violence against women.

RESEARCH, EVALUATION AND STATISTICS

Member states and, as appropriate, United Nations institutes, research institutes, non-governmental organizations and women's equality seeking organizations, are urged to:

22. Gather from victims, hospitals, police community agencies, community groups and other sources, data and information on a gender-disaggregated basis for analysis and use, together with existing data, in needs identification and policy making in the field of crime prevention and criminal justice, in particular concerning:

    (a) the different forms of violence against women, its causes and consequences;

    (b) the extent to which economic deprivation and exploitation is linked to violence against women;

    (c) the effect of the criminal justice system on women;

    (d) the relationship between the victim and offender;

    (e) the extent of violence in the home;

    (f) the rehabilitative or anti-recidivism effect of the criminal justice system on the individual offender and on the reduction of violence against women.

23. Include detailed questions in national crime surveys to allow more analysis of the nature and extent of violence against women.

24. Evaluate the effectiveness and efficiency of the criminal justice system in addressing the needs of women who are subjected to violence.

25. Review and evaluate police services and investigations concerning crimes of violence against women, particularly taking into account the victim's perspective.

26. Monitor the rates of arrest, charging and prosecution, as well as the disposition of cases of physical and sexual violence against women, and issue annual reports on these rates.

27. Research the extent of the relation between victimization or exposure to violence and subsequent violent activity and take it into account in the development of legislation, procedures, programmes and policies.

EXCHANGE OF INFORMATION AND PUBLIC EDUCATION

Member states and, as appropriate, private institutions and foundations, professional associations, educational institutions, community organizations, non-governmental organizations and women's equality seeking organizations, are urged to:

28. Establish a system or means for the national distribution and dissemination of information on the prevention of violence against women, and to maintain and disseminate statistics on violence against women.

29. Develop relevant and effective public awareness and public education programmes which promote equality between women and men and address the prevention of violence against women.

30. Disseminate, to community service providers, information on the availability of programmes designed to eliminate violence against women, in a manner appropriate for a given audience.

31. Support initiatives of women's equality seeking organizations and non-governmental organizations to raise awareness of the issue of violence against women and to contribute to its elimination.

32. Encourage the media to examine the impact of gender role stereotypes, including those perpetuated by commercial advertisements which foster gender-based violence and inequalities, and how they are transmitted during the life cycle.

33. Invite the media, media associations, media self-regulatory bodies, schools and other relevant partners, while respecting the freedom of the media, to consider developing public awareness campaigns and appropriate measures and mechanisms, such as codes of ethics and self-regulatory measures on media violence, to contribute to the eradication of violence against women and to enhance respect for their dignity

by promoting a violence free society and discouraging the stereotyping of women.

34. Develop, disseminate and implement manuals on different forms of violence against women directed at all sectors, including the indigenous community, in all languages, which, like the manual "Strategies for Confronting Domestic Violence: A Resource Manual", draw together best practices and strategies.

35. Develop public education programmes that raise awareness about the status, role and contribution of women and men in the family and in society in order to promote equality, co-operation, mutual respect and shared responsibilities between girls and boys and between women and men.

1 March, 1996

THE ROLE OF THE JUDICIARY IN THE PROMOTION AND PROTECTION OF THE HUMAN RIGHTS OF WOMEN

A Paper prepared for the Commonwealth Secretariat by Dr Jane Connors, Senior Lecturer, School of Oriental and African Studies

BACKGROUND

1. Respect for human rights is one of the fundamental values of the Commonwealth. As early as 1971, when Heads of Government issued the Singapore Declaration, laying down the principles on which the Commonwealth was to operate, they expressed their unequivocal support for equal rights for all citizens. Twenty years later their commitment was reaffirmed in the 1991 Harare Declaration which has as one of its priority areas the protection and promotion of:

* Fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;

* Equality for women, so that they may exercise their full and equal rights.

2. In Cyprus in 1993, Heads of Government again renewed their commitment to the Harare priorities. They stressed their dedication to building a world in which women enjoyed their full rights and were equal partners in shaping the economic, political, social and cultural development of their countries. They also recognised that women's rights are an "integral and indivisible part of human rights" and that men's violence against women is a contravention of basic human rights. They urged the ratification by 1995 of the Convention on the Elimination of All Forms of Discrimination against Women by all Commonwealth governments and the endorsement of the United Nations Declaration on Violence Against Women. The affirmation of women's rights as human rights by Heads of Government was reflected and built on by the 1995 Beijing Declaration and Platform for Action, which establish a set of actions that should lead to fundamental change. The Declaration confirms women's rights as human rights, while the Platform for Action identifies human rights as one of the critical areas of concern which must be addressed so as to ensure women's advancement and elaborates concrete measures required nationally and internationally, by governments and international governmental organisations, to promote and protect the human rights of women.

3. The advancement of women through the framework of human rights constitutes a commitment of Commonwealth governments, both by virtue of agreements made in Commonwealth fora and at United Nations level. While this commitment has been crucial, even more important is its translation to the national level. To a large extent this translation is achieved by way of ratification of or accession to international and regional human rights treaties and legislation of those treaties into domestic law.

4. A majority of members of the Commonwealth have become state party to international and regional human rights treaties, particularly the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, and some have gone forward to incorporate their treaty obligations into domestic legislation. Irrespective of whether treaty obligations have been incorporated into domestic legislation, judges have a crucial role in translating Commonwealth government commitments to the human rights of women from the level of rhetoric to reality.

THE ROLE OF THE JUDGE

5. Judges are provided with many opportunities to advance the interests of women through the framework of human rights. Human rights standards can be taken into account and inform decision making in litigation at all levels, even in those cases where such standards have not been enacted into domestic law. The Australian High Court, for example, has held that ratification of international treaties, while not entrenching rights into Australian law unless incorporated by statute and not operating as a direct source of individual rights and obligations, gives rise, absent statutory or executive indications to the contrary, to legitimate expectations that those treaty obligations will be taken into account by administrative decision-makers.[1]

6. The New Zealand Court of Appeal has also

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[1] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

suggested that a submission by a decision-maker that no regard at all need be paid to international obligations agreed by New Zealand by ratification was "an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing".[2]

7. In Commonwealth countries with constitutional bills of rights, there is greater potential for judges to advance the interests of women through human rights. Although some are more specific than others, most Commonwealth bills of rights contain norms of non-discrimination or non-distinction on the basis of sex and the norm of equality before the law.

8. In a number of these countries, judges had been prepared to interpret these norms in a broad and purposive manner, with some being prepared to interpret creatively their domestic bills of rights in line with international and regional human rights norms and standards. For example, the Court of Appeal of Botswana has interpreted the anti-discrimination clause in the Botswana Constitution's bill of rights, which does not include sex amongst the categories of prohibited distinctions, in light of the bill's preamble, and also Botswana's international and regional treaty obligations. The Court's broad and purposive interpretation allowed it to declare a legislative provision discriminating between women and men where devolution of citizenship to children was concerned as in contradistinction to the bill of rights.[3]

9. Broad and purposive interpretation of bills of rights, taking into account international and regional norms, as well as interpretation of those norms, has advanced the interests of women in countries as diverse as Namibia, Zimbabwe, Zambia, Tanzania, Canada and India. Litigation has been similarly diverse. Cases have raised questions of whether the requirement of corroboration in cases of sexual assault contravenes the equality before the law provision, in light of the fact that most victims of sexual assault are women and thus this requirement impacts disproportionately upon them; whether the right to freedom of movement includes the right of a woman to have her foreign husband live with her in her country of nationality; whether the right to freedom of discrimination includes a woman's right to enter hotel premises on a non-discriminatory basis; whether restrictions on the rights of women to alienate clan land constituted discrimination and the meaning of discrimination on the basis of sex where employment is concerned. In many of these cases international and regional human rights instruments were taken into account to aid the interpretation of the rights enshrined in national bills of rights. In many of these cases, also, the decisions of international and regional human rights bodies and courts were taken into account so as to enhance the liberal and purposive approach of individual judges.

10. While there is now a significant jurisprudence illustrating how the rights of women can be enhanced through reflection of international and regional human rights standards and their interpretation, there is scope for greater development in this area. In the first place, for international norms and jurisprudence to be useful for judges, it is essential that they be known by them. In many Commonwealth countries, the domestic legal system allows for reflection of international and regional standards, but sometimes these standards are not well known. There are many reasons for this. Until quite recently, the legal training of most lawyers has neglected specific instruction in international and regional human rights norms and even where such instruction was part of legal training, norms relating to the human rights of women and the interpretation of these norms, were rarely included in such instruction. Frequently materials concerning these norms are unavailable to lawyers and even judges and there are few resource institutions to advise lawyers and judges about international and regional human rights norms and jurisprudence. Even more frequently, those cases from other jurisdictions which have used international and regional human rights norms and interpretation to advance the interests of women are not well-known and frequently inaccessible in other jurisdictions.

11. In 1988, the Commonwealth Secretariat embarked on a series of judges' colloquia in order to stimulate and encourage judges to reflect on and incorporate concepts of international human rights and their interpretation in their decision making. The first such colloquium, convened by Justice P. N. Bhagwati in Bangalore, India, resulted in the elaboration of a set of Principles which confirm the relevance of international and regional human rights jurisprudence for domestic courts and encouraged resort to such jurisprudence where domestic law - whether constitutional, statute or common law - is

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2 [1994] 2 NZLR 696.

3 *Unity Dow v AG of Botswana* [1992] LRC (Const) 623.

uncertain or incomplete. The Bangalore Colloquium was followed by five other Colloquia and the Bangalore Principles were confirmed and reaffirmed.

12. Until 1994, however, no colloquium had explored the domestic application of international human rights norms from a gender perspective. In 1994, however, the first Judicial Colloquium for Senior Judges on the Domestic Application of International Laws on Gender Issues was held in Victoria Falls, Zimbabwe. Here senior judges from Commonwealth Africa, joined by two senior judges from Commonwealth jurisdictions outside that region, exchanged experiences and considered ways and means to promote the interests of women through the domestic application of international human rights norms. Building on the model of the Bangalore Principles, participants agreed the Victoria Falls Declaration.

THE VICTORIA FALLS DECLARATION

13. The Victoria Falls Declaration affirms the universality of human rights which are inherent in women and men and stresses the vital duty of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. The Declaration stresses the indivisibility of human rights, emphasising that although universal human rights are often perceived to be confined to civil and political rights or civil liberties, they also consist of economic and social rights which may perhaps be of great significance to women. The Declaration points out that universal human rights are usually interpreted as applying to regulate only the public sphere of life. Violations of human rights in the private sphere, including the family - where women experience a vast variety of suffering - are usually perceived to be outside the reach of human rights. While the state does not usually violate women's human rights in the private sphere in a direct fashion, it often supports or condones exploitative private structures through laws and rules of behaviour which legitimise the authority of men over women. In addition, states sometimes fail to act to protect women from private violations or tolerate or encourage structures wherein private violations against women occur on a regular basis. The Declaration recognises that many existing international, regional and national human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity. Accordingly, these standards sometimes fail to provide protection for the gender specific interests of women, particularly in the economic and social field. The Declaration also emphasises that discrimination against women can be direct and indirect, with indirect discrimination deserving of particular scrutiny of the judiciary. It goes on to stress the need to ensure not only formal, but substantive equality for women, suggesting that in certain contexts the adoption of affirmative action or positive discrimination measures might be appropriate.

14. As well as incorporating hortatory elements, the Victoria Falls Declaration includes very practical suggestions for judges. These suggestions, aimed at creating a culture of respect for internationally and regionally stated human rights norms, in particular those concerning women, were considered at a second colloquium which the Commonwealth Secretariat co-sponsored with the Commonwealth Magistrates' and Judges' Association during the Non-Governmental Organisation Forum held to coincide with the Fourth World Conference in Beijing, China. It is expected that the Declaration will be reaffirmed and strengthened at the third colloquium in this series which will be held during May 1996 in Hong Kong.

RECOMMENDATIONS

15. During the course of their consideration of this agenda item, Ministers may wish to consider the following recommendations:

* Regular exchange of information and views between members of the judiciary at all levels should be encouraged both regionally and Commonwealth-wide so that judicial techniques of advancing domestic decision-making by use of international and regional human rights norms can be further developed. In particular, the model of the judicial colloquium should be considered to achieve these ends.

* Means of disseminating international and regional human rights norms and their interpretation, particularly those related to women's human rights, should be explored. Information exchanged and disseminated should include litigation where international human rights norms and their interpretation have been used to expand the meaning of domestic statutes, including constitutional provisions.

* Closer links and co-operation across national frontiers by the judiciary on the application of human rights law should be encouraged.

* Means to encourage judges to consider that they have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women should be explored.

* Means to encourage judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination against Women when interpreting and applying the provisions of the national constitutions and laws, including the common and customary law, and when making decisions generally should be developed.

* Means to encourage judges to take particular note of the egregious nature of gender-based violence against women and to interpret forms of violence against women as constituting violations of human rights should be addressed. In particular, judges should be encouraged to consider the United Nations Declaration on the Elimination of Violence against Women and seek to interpret national law in the light of the norms and obligations established in that Declaration.

* Measures to encourage judges to be aware that all too frequently cultural and customary principles can be used to deny women their internationally agreed human rights should be developed. Judges should also be encouraged to be aware that frequently respect for women's human rights may appear to conflict with respect for other human rights values. Judges should be alert to the fact that frequently other human rights values have been given priority over women's human rights and should seek to give these rights the protection they deserve.

* Measures should be taken to encourage judges to consider that responsibility for violations of human rights, and particularly women's human rights, arises not only out of direct state violation, but also as a result of failure of the state to ensure that women have equal access to and enjoyment of internationally respected human rights.

* Means to encourage judges to aim for interpretations of domestic legislation, particularly constitutional bills of rights, that advance substantive equality rather than achieving mere de jure equality should be explored.

* Means to encourage judges to pay particular attention to indirect as well as direct discrimination should be considered, as indirect discrimination constitutes a significant obstacle to women's enjoyment of their enshrined rights.

* Measures to encourage judges to interpret human rights standards agreed at international, regional and national level widely so as to avoid androcentric interpretation of rights already defined by the male standards should be developed.

* Institutes devoted to the training of lawyers should be encouraged to develop courses in human rights, including modules related to the human rights of women. Gender sensitised new initiatives in legal education, provision of material for libraries, programmes of continuing judicial education and professional training for lawyers should be developed and encouraged.

* The Commonwealth Secretariat should be encouraged to develop a handbook for Commonwealth judges and lawyers which would be updated periodically and which would contain as core elements:

  (a) the basic texts of the most relevant international and regional human rights instruments;

  (b) a comparative table of provisions of international and regional human rights instruments;

  (c) a compilation of jurisprudence of international, regional and national decision-making bodies relevant to women's human rights.

* The Commonwealth Secretariat should be encouraged to ensure that a section in the Commonwealth Law Bulletin is devoted to developments, including decisions of international, regional and national tribunals, in the field of women's human rights.

* Commonwealth member states should be encouraged to notify the Commonwealth Secretariat of relevant decisions relating to the promotion of the interests of women. These decisions should be compiled by the Secretariat and disseminated to all Commonwealth members.

THE ROLE OF THE JUDICIARY

A Paper by the Department of Justice, Canada

1. Few institutions are more important to a healthy democracy than the courts. Their importance comes from the power they hold: the power to determine rights between individuals and between individuals and the government and the power to uphold the rule of law. They are entrusted to determine a multitude of issues and are responsible for making decisions over rights, obligations, freedoms and property of individuals. That is why it is so crucial to have an independent judiciary.

2. The objective of an independent judiciary is to ensure that everyone has access to an impartial judge, who is in control of the judicial proceedings, so that the rights of the person appearing before the bench will be determined solely on the basis of the facts and the law.

3. In Canada, the independence of the judiciary is a constitutional and legal principle of foremost importance. This principle has received recognition in Canada's Constitution and has continued to be developed and strengthened in Canada's statutes. The basic constitutional provisions with respect to the independence of the judiciary are those set out in sections 96 to 101 of the *Constitution Act, 1867*. They specifically acknowledge the concept of judicial independence through the judicature provisions respecting tenure and removal and the fixing and payment of salaries, annuities and allowances.

4. The relevant provisions read as follows:

> "**96.** The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.
>
> **97.** Until the laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts of those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.
>
> **98.** The Judges of the Courts of Quebec shall be selected from the Bar of that Province.
>
> **99.** (1) Subject to subsection two of this section, the Judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.
>
> (2) A Judge of a Superior Court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.
>
> **100.** The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.
>
> **101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the Better Administration of the Laws of Canada."

5. Section 96 has two important functions. By mandating that superior court judges must be appointed by the federal government, the effect of narrow, local concerns and pressures on the judiciary is reduced. Furthermore, section 96 has been interpreted and applied by the courts as guaranteeing that the essential jurisdiction of these courts cannot be eroded, on the argument that the power of appointment might thereby be rendered meaningless. Section 96 thus constitutes a guarantee that the superior courts' jurisdiction will not be eroded.

6. The effect of the other constitutional provisions is to give judges very substantial guarantees against arbitrary interference or removal by the executive level of government. The fundamental status of the judges, as well as the

provision of their salaries, allowances and pensions, is constitutionally guaranteed.

7. Certain of the rights established in the *Canadian Charter of Rights and Freedoms* by implication guarantee the independence of the judiciary by setting out minimum standards for the courts and tribunals which hear cases relating to criminal offenses and specific fundamental rights. Sections 7 and 11(d) of the *Charter* state the following:

> "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.
>
> 11. Any person charged with an offence has the right: (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

8. On the basis of these provisions, the constitutional independence of Canadian courts has been recognized and affirmed in the strongest terms by the Supreme Court of Canada in the cases of *Valente* v. *The Queen* (1985) 2 S.C.R. 673 and *The Queen* v. *Beauregard* (1986) 2 S.C.R. 56. In these cases, it was held that the principle of judicial independence is a fundamental precept of the Canadian Constitution and requires that Canadian judges be completely separate in authority and function from all other participants in the justice system, and not in any way dependent on the legislative, and particularly the executive, branches of the government.

9. Three essential elements of Canada's justice system were identified by the Supreme Court of Canada: the security of tenure of the judges, financial security and the constitutional independence of the tribunal with respect to issues of administration bearing directly on its judicial functions.

10. A great deal of care is taken to see to it that these conditions are complied with. Such structures as statutory provisions, administrative regimes and many of the practices and traditions of Canada's courts have been established to ensure that these constitutional guarantees are effective.

SECURITY OF TENURE

11. With respect to security of tenure, it is guaranteed by section 99 of the *Constitution Act, 1867* and by statutory provisions. Federally appointed judges stay on the bench until the age of 75 unless they voluntarily resign, are removed from office or die. They cannot be involuntarily removed from office except following an independent inquiry by the Canadian Judicial Council, a recommendation for removal made by the Council to the Governor General of Canada and a joint address of the two Houses of Parliament to effect removal. No Canadian Superior Court Judge has ever been removed from office pursuant to a joint address.

12. The Canadian Judicial Council, composed of the Chief Justices and Associate Chief Justices of the superior courts and the Tax Court, is the responsible body for federally appointed judges. It is tasked with the responsibility to inquire into and investigate situations where there are allegations that a member of the federal judiciary may have become incapacitated from the due performance of his/her duties through age or infirmity, misconduct, a failure to duly execute his/her office or otherwise having placed him/herself in a position incompatible with the execution of his/her office. Having given this important function of inquiring into judicial behaviour and conduct directly into the hands of the judiciary itself clearly indicates the importance that the Canadian system places on the maintenance of the essential security of tenure of the judges.

FINANCIAL SECURITY

13. A statutory and administrative regime is in place to ensure that the constitutional guarantee of independence of the judiciary with respect to their financial security is maintained. In Canada, the salaries of the judges are not determined by the executive. This function, as set out in the Constitution, must be performed by Parliament. The constitutional provision states that Parliament must fix and provide judicial salaries, allowances and pensions. There is as well legislative provision for the automatic indexation every year of judges' salaries, judges' pensions, and the pensions of surviving spouses and children.

14. Furthermore, the law requires that an independent commission be set up every three years to review the adequacy of judicial salaries and benefits. The federal Government takes this responsibility very seriously to ensure that judicial salaries are protected from arbitrary interference. Under section 26 of the *Judges Act* an independent commission, the Triennial Commission, of three to

five persons is appointed to hold hearings as necessary and to prepare an independent set of recommendations with respect to the level of judicial salaries and other related issues of judicial compensation, including pensions. Pursuant to this mandate, the Commission must submit , within six months after being appointed, a report to the Minister of Justice which is then tabled in the House of Commons. The Government then decides whether to introduce legislation implementing the recommendations of the Triennial Commission.

15. Notwithstanding that this process has a totally independent commission as its origin and basis, that it is statutorily mandated and that the ultimate level of judicial compensation is established by Parliament only after careful consideration and a full open and public debate, the current system has been seen by the judiciary as unsatisfactory. The fiscal realities have made it difficult in recent years for the Government to recommend to Parliament the increase in spending that is required to improve the judicial compensation scheme. At the moment, a legislative scheme has frozen judges' salaries at the level it was in 1992 until 1997, as part of an overall fiscal restraint initiative.

INDEPENDENCE WITH RESPECT TO MATTERS OF ADMINISTRATION

16. Recognizing the principle that the judiciary must be independent with regard to issues of administration bearing directly on its judicial functions, the system by which the courts and judicial affairs are administered in Canada has been set up with particular care. A prime concern has been to ensure that the assignment of members of the judiciary to specific cases, the establishment of judicial workload and similar issues are matters not subject to administrative or executive pressures. In practice, such decisions are taken by the judges themselves, usually in a collegial fashion under the authority of each court's chief justice.

17. In terms of the resources required to perform their judicial functions, the federally appointed judges receive generous salaries, pensions and allowances from the federal government but they must rely on provincial governments to supply their needs for things like courtrooms, secretarial assistance, computers and supplies since the provinces must supply the resources necessary for the administration of all the courts in Canada except the three federal courts. The adequacy of the financial and human resources given to the courts to carry out their judicial functions can be a source of tension between governments and the courts. Some judges are of the view that in order to make the judiciary effectively independent, it must not be dependent on the government for its material resources and budgets.

18. The Minister of Justice is responsible in Parliament for the spending estimates of the three federal courts (the Supreme Court, the Federal Court and the Tax Court). He is also responsible in a technical sense for the money voted by Parliament to pay the salaries, pensions and allowances of the 981 federally appointed judges. But in order to keep the Minister and the Department of Justice at arm's length from the administration of the courts and of judicial compensation, Parliament has created the office of Commissioner for Federal Judicial Affairs which reports directly to the Minister.

19. The Commissioner is responsible for all matters pertaining to the administration of judicial compensation and oversees the administration of the support services for the Federal Court, the Tax Court and the Canadian Judicial Council. The Registrar of the Supreme Court of Canada performs a comparable function for the judges of that court and she reports directly as well to the Minister. These measures separate the judiciary from the executive in a very real and practical way, enhancing the independence of the judges and their courts while, at the same time, preserving the principle of ministerial accountability to Parliament for the spending of public moneys.

20. It is clear that in Canada, strong constitutional and statutory guarantees ensure that the judiciary will be truly independent. As stated above, measures have been taken to reinforce and to enhance this principle in practice as well as in law which is to the benefit of everyone in Canada.

JUDICIAL TRAINING

21. Public interest demands a judiciary of the highest possible quality and this requires a high caliber of continuing judicial education. Innovative and effective judicial education is as well essential to preserve and enhance the independence of the judiciary. This has been taken very seriously by Canadian judges and several institutes have developed programs on legal issues, skills training and on gender, racial and other social awareness issues. The course content is determined by the institutions thereby reducing concerns over possible interference with judicial independence.

22. The National Judicial Institute (NJI) was established in 1988. It is a body funded by the federal, provincial and territorial governments, providing judicial education in both official languages to federally and provincially appointed judges throughout Canada. The mission of the NJI is to foster a high standard of judicial performance through programs that stimulate continuing professional and personal growth; to engender a high level of social, gender and multicultural awareness, ethical sensitivity and pride of excellence, within an independent judiciary, thereby improving the administration of justice.

23. The Institute organizes approximately 40 programs a year covering three main areas: substantive law, skills training and social context issues. In the category of sensitivity training, the Institute has received funding and overseen the production of training videos in the areas of race relations, family violence, child abuse and gender equality. The NJI as well developed a judicial education policy and is active in co-ordinating educational activities. The Institute undertook a project in 1992 which resulted in the development and publication of standards for judicial education. This was a first attempt to articulate precisely the educational needs of the Canadian judiciary. It recommended that every new judge should take approximately ten days of intensive judicial education as soon as possible after appointment and subsequently about ten days per calendar year attending judicial education programs relating to the judges' responsibilities or court assignment. Training materials for sensitization programs have been prepared and continue to be distributed. For example, a video and related materials on the issue of gender equality are being given to all newly appointed judges, federal and provincial. The judges' libraries are also provided with a copy and loans can be arranged to other interested parties. The NJI estimates that more than 60 per cent of all the judges in Canada have viewed this single program.

24. Other organizations are also involved in continuing education for judges, such as the Western Judicial Education Center(WJEC) and the Canadian Institute for the Administration of Justice (CIAJ). The WJEC was established in 1984 for the provincial court judges sitting in the western provinces. It provides training sessions for newly appointed provincial court judges. Their workshop series relating to social issues has been evaluated as extraordinarily successful and their gender equality program is considered to be a model program. The CIAJ has organized judicial education sessions for all judges. They have developed courses and training for new judges and presented seminars on the Charter, judgment writing, as well as several other topics.

25. In each province there exists a provincial judges association which represents the interests of its members in matters of local concern. The Canadian Association of Provincial Court Judges (CAPCJ), whose membership is composed of the majority of provincial court judges in Canada, acts to unify the efforts of these organizations. Judicial education is of highest priority for the CAPCJ. They offer a new judges' program yearly to newly-appointed provincial and territorial judges from across Canada. It is a seven day program which concentrates on topics of particular interest to new appointees. Instructional emphasis is placed on particular areas of the substantive law, such as a refresher on the rules of evidence, the impact of the Charter, the conduct of a preliminary inquiry and judicial interim release. In addition, precise topics of special interest are considered such as dealing with child witnesses and the law related to contempt of court. Skills training forms a part of the curriculum as well with instruction being offered on the delivery of reasons for judgement and the enhancement of memory skills.

26. Other provincial organizations are also involved in providing continuing judicial education to the judiciary. Such an organization is le Conseil de la magistrature du Québec which provides training for judges in the province of Québec. It organizes an annual meeting which is attended by all judges in Québec falling under the jurisdiction of the Conseil. In 1995, the annual meeting touched particularly on the topics of family violence and judicial independence. With the assistance of the Conférence des juges municipaux du Québec, the Conseil was involved in a conference given to municipal judges on subjects relating to their particular work. The Conseil as well ensures that the judges are able to participate in activities and can attend conferences given and organized by other organizations providing continuing education to the judiciary.

27. The programs prepared by and for the judiciary themselves have been well received by the judges. Continuing judicial education is very important to ensure that the judges keep up to date with the law, improve their judicial skills and are equipped to treat equally and with respect everyone who is affected by their work.

INTERNATIONAL ASSISTANCE

28. Canada has provided and continues to provide technical co-operation and assistance to a number of countries with respect to issues pertaining to the independence of the judiciary and judicial education and training. This co-operation has taken the form of presentations and documentation provided to visiting judges and officials directly by the NJI, Department of Justice and court officials, and through the direct participation of the NJI and other organizations in designing and presenting intensive study programs for international delegations both in Canada and abroad. This technical co-operation and assistance is as well available in the areas of promulgation of national legislation, exchange of experience, mentoring, research, policy and planning and direct training.

29. One example of such an intensive study program involved a co-operative effort in the fall of 1992 on the part of the NJI, the Canadian Bar Association, the Supreme Court of Canada and the Department of Justice, in which ten judges from the Czech and Slovak Federal Republics were given the opportunity to experience first hand the Canadian court system directly by being teamed up with a Canadian judge in a mentorship relationship over a period of one month.

30. Another example of Canadian co-operation and assistance in the field of judicial education and training occurred in August 1992 when a NJI lawyer, a law professor from the University of Ottawa and a judge traveled to Uganda in a project funded by the International Centre for Human Rights and Democratic Development. In Uganda, that Canadian delegation met with judges, justice officials, human rights organizations, and members of the Bar for the purposes of assessing the need for judicial education in Uganda. The Canadian delegation gave a full-day session on judicial independence and related subjects to Ugandan judges and masters.

31. In November of 1992, a seven-person delegation from the Francophonie countries of Ivory Coast, Senegal and Cameroon visited the NJI to learn about the Canadian model for judicial education. This visit was part of a longer program organized by the Centre International de la common-law en français at the University of Moncton.

32. In June of 1993, the NJI assisted the South African Education Trust Fund in putting together a three week program in Canada for a delegation of lawyers representing the South Africa National Association of Democratic Lawyers.

33. The International Appellate Judges' Conference was organized and hosted in September 1995 by the Supreme Court of Canada. Appellate judges from around the world gathered and discussed issues of common concern including law and cultural diversity, aboriginal cultures and the law, and the administration of justice. The Supreme Court as well organizes visits from judges of different countries such as the visit by members of the Supreme Court of Hungary in June of 1994 and the visit of judges of the Russian Federation in August of 1994.

34. Canada is actively addressing issues of judicial education and judicial independence through the Commonwealth Judicial Education Institute. Some of the initiatives undertaken include the following programs, which were for the most part funded by the Canadian International Development Agency (CIDA) and partly by the Commonwealth Secretariat. In October of 1995, the Institute conducted a two week study education program for judicial educators from Kenya, Uganda, Ethiopia, Tanzania, Mauritius, Malawi, South Africa, Swaziland, Zimbabwe, Zambia and Papua New Guinea. A program for Caribbean jurists was held recently in the Cayman Islands on the topic of judicial accountability. A first Round Table Discussion of Commonwealth Chief Justices on the topic of "The media and the image of justice" was held at the Institute in September of 1995 which has led to the planning of five future regional programs in Britain, the Caribbean, Asia, Australia and Africa. The next one will be in April of this year in Britain.

35. Canada has been asked to provide assistance to the South African Government in the reform of its system of justice. The Canadian contribution is likely to include some element of judicial training.

36. The Office of the Commissioner for Federal Judicial Affairs is currently working with CIDA to develop a three-year program of assistance to the reform of the judicial system of Ukraine.

37. Programmes of this nature are ongoing. In the past, the federal Department of Justice has on a number of occasions helped organise study tours on matters pertaining to the independence of the judiciary or the management of courts. The Canadian judiciary has been extremely supportive of the endeavours in international judicial education,

and have freely given their time to participants as planners, instructors and mentors thereby contributing to the success of these initiatives.

38. Direct financial aid in these areas is, however, severely limited or generally unavailable. The dramatic increase in the number of requests for this type of assistance in the past few years strains Canada's capacity to continue dealing with these demands on an ad hoc basis. The Department of Justice is now inclined to believe that there should be fewer interventions in this field, but that interventions should be more systematic. The Department of Justice has no funds in its own budget for international assistance programs, and must work with development agencies such as CIDA. As a result, all significant co-operation initiatives require the granting of financial support by CIDA. CIDA establishes the Government of Canada's priorities for technical assistance and the training for judges falls into this category.

CONCLUSION

39. The foregoing has been an attempt to set out the concrete measures taken by the Parliament of Canada to ensure that the concept of an independent judiciary is truly recognized and that the separation between the judiciary and the executive at the federal level clearly exists. In Canada, the independence and impartiality of the judiciary is a constitutional and legal principle of paramount importance. It is hoped that this principle will continue to be developed and strengthened in Canada's statutes as both Parliament and the courts strive to ensure that the independence of the judiciary is reinforced and enhanced to the benefit of all persons in this country.

The Role of Administrative Law in the Promotion of Good Governance

COMMONWEALTH FUNDAMENTAL VALUES - ADMINISTRATIVE LAW, HUMAN RIGHTS AND THE JUDICIARY

A Discussion Paper by Anthony W. Bradley, Barrister; Emeritus Professor of Constitutional Law, University of Edinburgh

A. INTRODUCTION

1. At their Meeting in Harare in 1991, Commonwealth Heads of Government undertook to promote:

"the protection and promotion of the fundamental political values of the Commonwealth:

- democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;

- fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief".

In very many countries in the Commonwealth today, there is growing awareness of the important role of law and legal institutions in the promotion and maintenance of good government. Often statistical evidence of the work-load on the courts demonstrates this, but even where this is not the case, the executive's legal responsibility for its decisions is seen as a dimension of the demand for democratic accountability. Certainly, the necessity for protecting the constitutional rights of the people, of minority groups and of individuals will not diminish in the coming years.

2. What is sometimes forgotten is the close link that exists between the protection of the constitutional rights of the governed, and the interest of governments in upholding the principles of sound administrative decision-making. The two matters are to be seen as two sides of the same coin, not as being mutually inconsistent.

3. It is not possible in a short discussion paper to review the complex trends in the recent development of public law in diverse Commonwealth jurisdictions. This paper seeks rather to focus attention on some broad issues that relate to recent developments and should be considered against the background of the different jurisdictions involved.

B. ADMINISTRATIVE LAW IN THE SETTING OF NATIONAL LAW

4. Hitherto, and on the evidence of legal textbooks, administrative law in general, and judicial review of administrative action in particular, have been seen as a phenomenon of national law - much influenced by the constitutional provision that exists within each country. In the United Kingdom, for example, emphasis is laid on the sovereignty of Parliament and on the responsibility of the Government to Parliament; courts formerly tended to treat judicial review of administrative action as essentially a matter of statutory interpretation, emphasising that the central issue was one of *vires* (did a public authority have statutory power to act as it did?).[1] The corollary of this approach is that, if only the draftsman of legislation uses clear enough words, there are no limits to the powers that Parliament may confer; and thus Parliament may cut down or exclude judicial review of executive decisions. On this view, although total exclusion of judicial review may not be intended, legislation at Westminster may render toothless the judicial lions that sit under the throne.[2]

5. Despite the fact that the United Kingdom has no written constitution to buttress the inherent

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1 In the decision by the English High Court holding unlawful the British Government's decision to fund the Pergau dam in Malaysia, *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611), one key issue involved interpretation of the Overseas Development and Co-operation Act 1980, but the significance of the decision goes far beyond this.

2 An attempt to do this came before the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147: there, by adopting a broad view of the concept of jurisdiction, the House of Lords deprived a legislative exclusion clause of much if not all of its effect. But it was European Community law alone, and not English law, which preserved the possibility of judicial review in *Johnston v Chief Constable, RUC* [1987] QB 129, [1986] ECR 1651.

jurisdiction of the courts, the judges in Britain are today more likely than in the past to emphasise that one fundamental of the legal system is a 'separation of powers' between legislature, executive and judiciary.[3] There have been developments in the law which make it difficult to explain judicial review as merely a refined form of statutory interpretation.[4]

6. In most Commonwealth countries, by contrast, the written constitution provides the foundation for the duty of the judiciary to resolve cases and controversies resulting from governmental action. Typically, the constitution sets up a formal framework based on the separation of powers, and imposes certain obligations on those entrusted with public administration, including the duty to protect the human rights that are guaranteed by the constitution. The constitution also provides safeguards (such as government accountability to the legislature, and judicial independence), which promote the integrity of the key institutions.

7. Although many constitutions contain common features, there is no uniformity in what they provide. Comparison of one constitution with another may show that a procedure to control the acts of government (for example, the office of ombudsman) is effectively provided for in state A, exists in a watered-down form in state B, and is absent in state C. Thus the mere existence of a written constitution does not necessarily promote a common level of standards. Even where the texts of two constitutions make the same provision for an ombudsman or a human rights commission, the ombudsman or commission may be much more successful in one country than in the other.

8. Potentially, at least, the effectiveness of administrative law is liable to be much influenced by constitutional provision for the protection of fundamental rights. In general, all public authorities must respect the guaranteed rights of citizens in the decisions which they take in the exercise of their functions. Moreover, many Commonwealth constitutions include in their Bill of Rights a provision which vests in the High Court original jurisdiction for giving effect to the guaranteed rights, including the power of giving such relief as it may consider necessary for enforcing those rights.[5] This jurisdiction would appear to be intended to prevail over contrary provision made in ordinary legislation. If so, it would follow that, for instance, even though a State Proceedings Act excludes the court from giving injunctive relief against a state official or government department, the High Court has jurisdiction, and possibly a duty, to issue such relief if it is necessary to protect an individual's constitutional rights. The same would apply to legislation which sought to exclude judicial review of decisions taken that affect the guaranteed rights.

C. THE LINK BETWEEN ADMINISTRATIVE LAW AND THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

9. By contrast with an approach to the legal control of government which is confined to national parameters, the international system for the protection of human rights provides an important source of principles for the exercise of state power. Multilateral treaties, such as the International Covenant for the Protection of Civil and Political Rights and regional Conventions for the protection of human rights, express values associated with the rule of law and depend for their effective fulfilment both on the conduct of governments and on the functioning of independent courts of law in the countries which adhere to the treaties. Where human rights are infringed, international remedies are of course important, but they are essentially a residual form of redress, and can scarcely provide accessible, day-to-day recourse against the infringement of rights.

10. To make the point in more specific terms, it is impossible to imagine how the protection for the fundamental rights declared by such treaties can be

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[3] See e.g. *R v Home Secretary, ex parte Fire Brigades Union* [1995] 2 All ER 244. The separation of powers has been considered in recent articles by two British judges, namely by Sedley J in "The Sound of Silence: Constitutional Law without a Constitution" (1994) 110 LQR 270 and by Laws J in "Law and Democracy" [1995] PL 72.

[4] For the judicial review of non-statutory powers, see *CCSU v Minister for the Civil Service* [1985] AC 374 and *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815. The judicial review of prerogative powers was examined by Professor J Ll J Edwards for the Mauritius Meeting of Commonwealth Law Ministers in 1993 in his paper, "The Office of the Attorney-General - New Levels of Public Expectations and Accountability" LMM (93)24. On whether the ultra vires rule is the true basis of judicial review, see D Oliver [1987] PL 543.

[5] See e.g. Constitution of Botswana, s 18 (Enforcement of protective provisions).

achieved within a member state unless the executive's acts are subject to an effective system of review in national courts. Why is this?

11. These treaties declare the existence of certain civil and political rights, such as freedom of the person, freedom of expression, freedom of religion, freedom of association, the right to respect for an individual's private and family life, freedom from discrimination on racial or ethnic grounds, and so on. If such primary human rights are to be respected in a country's legal system, these rights imply the existence of a further right, the right of the individual to have a court adjudicate on the legality of government conduct which affects him or her, or, put more shortly, the right of the individual to administrative justice.[6]

12. The right to administrative justice is, for instance, declared in section 24 of the provisional Constitution of South Africa in these words:

"Every person shall have the right to:

(a) lawful administrative action where any of his or her rights or interests are affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations are affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights are affected or threatened."

13. The existence of these rights necessarily imposes a duty on the state to ensure that there is effective machinery for the judicial review of administrative action, that principles of fairness and legality are observed by those who exercise power, and that reasons for executive action are provided.

14. These themes have been examined in depth in the influential series of judicial colloquia organised by the Commonwealth Secretariat (in conjunction with Interights) on the domestic application of international human rights norms (Bangalore, 1988; Harare, 1989; Banjul, 1990; Abuja, 1991; Oxford, 1992; Bloemfontein, 1993). Similar issues have also been explored in the series of Workshops on Administrative Law organised by the Commonwealth Secretariat between 1992 and 1995, and in the Lusaka Declaration which emerged from the first Workshop. These workshops have led to the recent publication by the Commonwealth Secretariat of a booklet primarily intended for administrator, *Good Government and Administrative Law - An Introductory Guide.*

15. If international norms apply to national systems of administrative law in this way, the implications for Commonwealth governments include the following propositions:

(1) that administrative justice is not an optional extra to be provided as and when other governmental priorities permit;

(2) that fair administrative procedures are a fundamental of the civil society;

(3) that judicial review does not exist by grace and favour of the executive or legislature;

(4) that governments should not seek statutory power to make decisions affecting individuals and minorities which are 'final and conclusive' for all legal purposes.

16. One conclusion that may be drawn, and which is not always recognised, is that judicial review of official action (regarded as a matter of administrative law) and constitutional remedies for the protection of guaranteed rights serve common purposes.

D. THE CONSTITUTIONAL AUTHORITY OF THE JUDICIARY

17. The purposes which have been described will not be achieved unless the national judicial system is capable of undertaking an onerous task of adjudication in administrative matters which in some respects goes well beyond the ordinary duties of trying and sentencing criminals, enforcing commercial contracts, determining property disputes and so on. Many constitutions guarantee the independence and impartiality of the judiciary, but in practice a legal system may not be accustomed to enabling questions involving a potential conflict

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[6] The question is discussed in the European context by A W Bradley, "Administrative Justice: a Developing Human Right?" (1995) 1 European Public Law 347.

between governmental authority and individual rights to be resolved in the courts. In common law jurisdictions, such questions are generally decided by the ordinary civil courts and not (as in France and some other European countries) by separate administrative courts with jurisdiction limited to questions of public law.

18. It is no part of the courts' duty in any system of judicial review to substitute themselves for the government. But it is fundamental to a system of judicial review that scrutiny of public administration by the courts is not limited to local councils and other subordinate bodies, but extends to the acts and decisions of central government. Government agencies, for their part, must be willing to contemplate that their decisions may be challenged in the courts on grounds of legality.[7]

19. As well as the need to establish the authority of the courts to resolve such questions, the question of access is important. How much is achieved if access to the courts is open only to wealthy corporations and multinational companies, and recourse to a judicial remedy is beyond the reach of ordinary citizens? Even in countries which make some provision for legal aid, governments may be reluctant to fund legal aid if this will encourage litigation against public authorities and government departments. Again, in some but not all jurisdictions, recourse to the courts in matters involving the government may involve the use of legal procedure which is outside the ordinary experience of most legal practitioners.

E. PROCEDURES OF THE COURTS

20. Where access to the courts exist, what kind of justice will be available to an individual litigant once he or she gets to court? In some systems, judicial review of administrative action depends too much on the minutiae of out-dated court procedures.[8] In contrast to this, wherever the process of judicial review is in a healthy state today, the emphasis is on principles rather than technicalities. In the opening paragraph of the recent new edition of an authoritative work,[9] the editors state: "In all developed legal systems there has been recognition of a fundamental requirement for principles to govern the exercise by public authorities of their powers. These principles provide a basic protection for individuals and prevent those exercising public functions from abusing their powers to the disadvantage of the public. ... [In recent years] Coherent principles have steadily evolved in a number of areas of administrative law and disfiguring archaisms have been removed".

Judicial review ought to be less concerned with procedural technicalities than with securing "the articulation of acceptable principles governing the exercise of public functions and the vindication of the rights of the individual against the state".[10]

21. The mere retention of ancient and venerable remedies (for example, the old prerogative writs of certiorari, prohibition and mandamus) without reform is likely to hamper the development of clear principles of public law.[11] Where the old procedures survive, a litigant's initial choice of remedy may have a crucial (and arbitrary) effect on both the grounds and procedure of judicial review, with the result that a litigant may fail on grounds other than the substantive merits of the case. A

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[7] In *M v Home Office* [1992] QB 270, the relationship was neatly encapsulated when Nolan LJ, adopting a submission made to him by Stephen Sedley QC, referred to the need for mutual respect between the judges and the executive and accepted that "the proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is".

[8] Some Commonwealth jurisdictions have not even experienced the reform of writ procedure (whereby the prerogative writs became prerogative orders) which in the United Kingdom occurred in the Administration of Justice (Miscellaneous Provisions) Act 1933.

[9] See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th edition 1995.

[10] *Ibid.*, p. 13.

[11] Nomenclature may not be of the first importance, but in 1994 the English Law Commission recommended that the Latin titles of the prerogative orders be dropped and that the court should be empowered to make mandatory, prohibiting and quashing orders: *Administrative Law: Judicial Review and Statutory Appeals*, Law Com No 226, 1994, p 72.

specific instance of this danger is that in an unreformed system of remedies, the rules of standing to sue (*locus standi*), or the rules as to evidence, may differ according to the remedy that an individual seeks. For there to be an effective administrative law jurisdiction, the rules of court must provide a generalised and flexible procedure, to enable an application to be determined in accordance with the relevant principles of review, at the behest of any individual or group having a serious (or sufficient) interest in the matter.

22. One scheme for procedural reform is contained in Part II of the booklet, *Good Government and Administrative Law - An Introductory Guide*, already mentioned. That scheme reflects the recent practice of some Commonwealth countries in opting for a generalised, public law procedure of 'application for judicial review'. However, other ways of meeting the need for reform have been developed in some Commonwealth jurisdictions; in Australia, for example, law reformers in 1995 considered whether the way forward was to develop procedure enabling the reviewing court to exercise its jurisdiction through the remedy of a 'public law declaration'.[12] While numerous forms of procedural reform are possible, there can be no doubt that the existence of ancient and poorly understood 'forms of action' is likely to inhibit the development of effective means of review.

23. One matter for discussion in the context of reform is whether the substantive grounds for judicial review should be included in the reform or whether changes should be confined to procedural matters. There is a strong case to be made for accompanying procedural reform with a restatement of the substantive grounds,[13] but any restatement must be phrased in an open-ended manner and not in a way which might obstruct future development of the law - affecting matters such as the duty to give reasons, proportionality and legitimate expectations.

[12] See P Bayne, "The Reform of Judicial Review - a New Model?", paper presented to the 1995 Administrative Law Forum, held in Canberra on 27-28 April 1995. I am grateful to Mr Charles Beltz of the Administrative Review Council, Canberra, for supplying me with a copy of this paper.

[13] As is stated in Part II of the booklet, *Good Government and Administrative Law - an Introductory Guide*.

F. COMPLEMENTARY ROLE OF THE OMBUDSMAN

24. When the substantive grounds of judicial review are summarised, it will be seen that they all relate to the duty of public authorities to exercise their functions lawfully, reasonably and by proper procedure. As Sir Robin Cooke, President of the New Zealand Court of Appeal, said in 1992 at the Oxford Colloquium,

"It would be something of an over-simplification to say that all the principles of administrative law can be stated in ten words. But 45 years of learning, researching, teaching, practising and adjudicating the subject have left the impression that this is not very far from the truth. The administrator must act fairly, reasonably and according to law. That is the essence and the rest is mainly machinery".[14]

25. In the case of particular powers of government which are suitable for judicial decision, it may be possible to provide a right of appeal on the merits to a court or to a specially constituted tribunal. But, except where an appeal on the merits is justified, any formulation of the grounds of judicial review must maintain the distinction between (a) the process of judicial review and (b) procedures for appealing on the merits against executive decisions. Further, the process of judicial review cannot sensibly be extended to include every situation in which an individual has cause to complain at the way in which he/she has been treated by officials. Even where an effective system of judicial review exists, there may also be a need for the creation of an ombudsman to deal with a wide variety of individual complaints about poor performance of administration.

26. Judicial review is as much concerned with the duties of public authorities as it is with the rights and interests of private persons. The grounds of judicial review may indeed be rephrased as norms of decision-making, as suggested by Sir Robin Cooke above. Thus a public official must exercise the powers vested in him or her, and not the powers vested in another official; they must understand the limits on their powers and must not act outside those powers, nor seek to exercise them for extraneous, irrelevant or improper purposes; they must act by

[14] Sir Robin Cooke, "Empowerment and Accountability: the Quest for Administrative Justice" (paper for the Judicial Colloquium at Oxford in September 1992), Developing Human Rights Jurisprudence, Vol. 5, Commonwealth Secretariat 1993, pp. 81-88.

a fair and proper procedure, and this may necessitate giving a hearing to those affected by a decision before it is made.

27. In a similar way, the lessons to be learned from the investigations and reports of an ombudsman can be stated in the form of principles of good administration.

28. What is essential is that the norms which emerge from judicial review of administration should be fully consistent with norms that emerge from review and scrutiny by an ombudsman.[15] Both the courts and the ombudsman require administrators to base their decisions upon a proper understanding of their legal powers, and to act in good faith, without malice, for reasons of public and not private interest, and without improper discrimination. By looking both at decisions of courts and at reports of ombudsmen, we can find out what the duties of administrators are. On the basis of judicial decisions, it is possible to state **principles of lawful administration**; on the basis of ombudsmen's reports, it is possible to state the **principles of good administration**. The two sets of principles are not identical, but they have much in common, and they should not be giving conflicting signals to officials.

G. TRAINING OF CIVIL SERVICE IN LEGAL AWARENESS

29. One fundamental conclusion is that there cannot be good government which is not lawful government. Ministers and civil servants need to be aware of this requirement, just as they need to be conversant with the rules of accountability for public expenditure. This theme has been emphasised at the Commonwealth Secretariat's Workshops on Administrative Law already mentioned, and the booklet, *Good Government and Administrative Law - an Introductory Guide*, has been prepared with this need in mind.

30. There are indeed many ways in which the training and education of those holding public office or employed in the public service can be organised. However, if the general argument developed in this paper is accepted, then in every country the Law Officers and lawyers in the public service have a role to play in contributing to the education and training programme - and it would be a false economy not to recognise the need for this.

H. CONCLUSION

31. I do not summarise the main issues touched on in this paper: they are apparent from the sub-headings which I have used. But it might be appropriate to quote a passage from the late Mr H. M. Seervai, an outstanding constitutional scholar, who died in Bombay on 26 January 1996 at the age of 89, 46 years to the day after the Indian Constitution came into effect. For 17 years (1957-74), he had been Advocate General of Maharashtra, he frequently appeared in leading constitutional cases, and his Critical Commentary on the Indian Constitution has passed through four editions. During an impressive speech to the Fifth Commonwealth Law Conference in Edinburgh on 26 July 1977, on the subject "The legal profession and the state: the place of law officers and ministers of justice", Mr Seervai had this to say: "Respect for the law is essential to a free society; and that respect is secured not only by the free and fearless administration of justice by an independent judiciary but also by a fair and even-handed executive enforcement of the law. Administration of justice by independent judges is taken for granted in upholding and enforcing the law in a free society. The part played by the executive government in the administration of justice and in enforcing law appears less obvious, however, because administration of justice is only a part of the manifold functions of the executive government - but it is not a less important part for that. Courts cannot do justice if the executive fails to discharge its duty of enforcing the law."[16]

This was said in the particular context of criminal justice. But I have no doubt that these words deserve to be applied to the subject-matter of this discussion paper.

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[15] See A W Bradley "The Role of the Ombudsman in relation to the Protection of Citizens' Rights" [1980] CLJ 304, 324-332.

[16] Journal of the Law Society of Scotland, 1977, pp. 265-268.

GOOD GOVERNMENT AND ADMINISTRATIVE LAW - AN INTRODUCTORY GUIDE

A MEMORANDUM BY THE COMMONWEALTH SECRETARIAT AND A PAPER PREPARED BY PROFESSOR A W BRADLEY AND DR C HIMSWORTH

In 1992 in Lusaka, Zambia, the Commonwealth Secretariat held the first in a series of administrative law workshops the object of which is to bring together senior pubic officials with a view to exposing them to an appreciation of the relationship between administrative law and good governance. The Lusaka Workshop gave birth to *The Lusaka Statement on Government under the Law* which Law Ministers endorsed at their 1993 Meeting in Mauritius as a notable contribution to administrative law and commended the principles it contained as valuable examples of good practice.

Subsequent workshops held in pursuance of the objectives of the series have not only affirmed the Lusaka Principles but they also have sought to develop these principles in ways that lend them to a more practical everyday application.

Arising from a perceived need of public officials, whose decisions and actions in the exercise of their public duties necessarily affect the general public in their everyday lives, and in response to a demand expressed in the course of the workshops, the Secretariat commissioned the preparation of a guidebook on administrative law and good government which could serve as a manual for all public officials to assist them, when carrying out their public duties, to act in accordance with the law.

The guidebook which has been prepared to assist ongoing work in furtherance of the promotion of the fundamental values of the Commonwealth accompanies this Memorandum in the form of a paper and is placed before Ministers for their information. The guidebook is being circulated separately to all the workshop participants and to governments in the form of a publication.

GOOD GOVERNMENT AND ADMINISTRATIVE LAW - AN INTRODUCTORY GUIDE

A Paper prepared for the Commonwealth Secretariat by Professor A W Bradley, Emeritus Professor of Constitutional Law, University of Edinburgh and Dr C Himsworth, University of Edinburgh

A. THE ROLE OF LAW IN GOVERNMENT

1.1 Within the Commonwealth today, two aspects of the role of law in government stand out. The first is the extraordinary diversity of constitutional systems of government within the many member states. Because of differences in their history and in current circumstances, states have very different structures for such matters as:

- the appointment or election of the head of state and/or the head of government;
- whether the country is a republic or a monarchy;
- the composition of parliament (whether in two chambers or one) and the form of elections;
- the relationship between government and Parliament;
- decentralising government to separate states (in a federal system) or to local government.

1.2 Secondly, despite this diversity, the legal systems of the member states share one common feature, namely the fundamental principle that, in a democracy, all powers of government and administration must be conducted in accordance with the law - and that every holder of public office is subject to the law.

1.3 The principle of 'government according to law' operates at two levels. First, at the level of constitutional law. In very many states, the constitution is placed in a position of supremacy over all other forms of law, including the laws made by Parliament itself. If there is any conflict between the terms of the constitution and the contents of an Act or ordinance, the courts must give priority to the constitution.

1.4 This important rule guarantees to citizens fulfilment of the 'promises' made in the constitution itself. It ensures that the legislators respect the human rights provisions in the constitution - and, in a federal system, that the devolution of power to states or provinces is upheld. Since the constitution is paramount, the 'fundamental law' which it contains binds those who exercise executive and legislative powers. Even the elected parliament must ensure that the laws it enacts comply with the constitution. If such laws do not so comply, they may be held by the courts to be 'unconstitutional'.

1.5 The second level at which the principle of 'government according to law' operates is that of administrative law. This branch of law applies where powers have been granted by legislation to central or local government, or to other public bodies - whether to provide services needed for the benefit of the whole community or to place under public control (by means of regulation) the economic activities of private persons or companies.

1.6 Just as legislation by Parliament must itself conform with the constitution, so too what Parliament has laid down must be observed by public authorities. In respect of public administration, it is the task of the courts to ensure that the terms of legislation are carried out and enforced by public bodies. How this can be done is examined later in this booklet. But the essential principle is that laws that have been made with constitutional authority, must not be ignored or subverted by private or public bodies.

1.7 An unfortunate but currently passing development has been the emergence in recent years of one-party or military regimes, during which undue pressures have been placed on the working of the normal principles of legality. In such situations, the role of the courts has been critical and the need for judicial review of administrative action is even more compelling.

1.8 It is worth recalling the words of Commonwealth Heads of Government meeting at Harare in October 1991. Having first re-affirmed their commitment to their belief in the liberty of the individual under the law, in equal rights for all citizens, and in the right of all individuals to take part in free and democratic political processes, the

Heads of Government undertook to promote "the protection and promotion of the fundamental political values of the Commonwealth:-

- democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;

- fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour creed or political belief".

It is the purpose of this booklet to work out the implications of these values for all those who are concerned in Commonwealth countries with government and public administration.

B. ACCOUNTABLE GOVERNMENT

2.1 The principle that public affairs must be dealt with on the basis of legality applies in an important way to the day-to-day conduct of government and administration. At the heart of the 'rule of law' doctrine, the principle of legality is one of several principles which promote accountable government. For accountability to be achieved, a public agency must be accountable to other public bodies which are able to scrutinise that agency's work from an independent position.

2.2 There can be no doubt that the central function of government - whether at the level of ministers, civil servants, public corporations or local authorities - is to govern. Those in office are given power and authority by the constitution and by Parliament to carry out their tasks on behalf of the people. They have statutory powers and duties, many of which are cast in broad terms to give both politicians and officials flexibility to discharge their responsibilities in the public interest.

2.3 What accountability requires, however, is that the powers given to government are neither absolute nor without limits. One of these limits on government is that these powers are exercised in accordance with principles of good administration.

2.4 These principles require that public administration:

- must be honest and not corrupt;

- must be conducted to serve the public at large, not the private interests of those in the public service;

- must observe the rules of good financial practice;

- must be efficient, responsive to the needs of the public, and conducted without undue delay or inconvenience to citizens.

2.5 Many more qualities could be added to this list. These indicators of good administration are endorsed in the education of all administrators. Indeed, systems of training, supervision and discipline within the public service are probably the most effective means of ensuring high standards.

2.6 But external systems of supervision and control are also essential. These include:

- financial audit (for example, by the Auditor-General);

- an ombudsman, or a citizens' protector, or a presidential commission of inquiry, to investigate injustice and maladministration and propose a remedy for the citizen whose complaint is justified;

- parliamentary supervision and control, for example in relation to delegated legislation, or by the use of committees of MPs;

- courts and specialised tribunals;

- human rights commissions, which may (depending on their mandate) investigate alleged violations of human rights and recommend appropriate remedies;

- integrity commissions, whose mandate may be to maintain proper standards of public life and to enforce codes of conduct for politicians and administrators.

2.7 These forms of scrutiny serve two broad purposes. First, they help to redress grievances of the public, by giving individual citizens a remedy for an injury done to them or by assisting them to obtain a remedy. Second, they provide a means of ensuring improvements in administration for the future.

2.8 Often, the redress of grievances can be combined with improving the quality of administration. Justice and fair play for the

individual complainant may lead to changes providing a better standard of service across the board. For this reason, although scrutinising bodies must be independent from government itself and may need to criticise executive action, they share with those in government the same goal, namely a higher quality of service for the public.

2.9 In the constitutions of many Commonwealth countries, the rights of the people to lawful and just administration are taken for granted rather than being spelled out. However, section 24 of the provisional Constitution of the Republic of South Africa provides as follows:

"Every person shall have the right to:-

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

C. CONTROL BY THE COURTS

3.1 In the process of protecting the rights of the people to lawful and just administration, the courts, exercising their powers in administrative law, play a crucially important role. Their duty is to ensure adequate legal standards in the conduct of government. They operate by granting remedies to individuals and their power to do this can lead to lessons being drawn which assist in improving public administration.

3.2 The means by which the courts perform this function range widely. The criminal law (including anti-corruption laws) enforces minimum standards of honesty in public administration. In the civil courts, actions can be brought to enforce contracts entered into by governmental bodies, or to claim damages for injuries caused by the unlawful acts of public servants.

3.3 In many countries, individuals may exercise statutory rights of appeal against certain categories of administrative decision. Such appeals may go direct to the ordinary courts or they may go instead to tribunals, boards or committees established to hear particular types of appeal.

3.4 The main focus of this booklet is on the broad jurisdiction of the superior civil courts (which for convenience we will refer to as the High Court) to require public authorities to observe the law, in particular by granting judicial review of their decisions.

3.5 Access to the High Court for this purpose is often by a procedure known as an "application for judicial review". Although the court has a very broad power to decide on the legality of official decisions, the manner in which that power is used largely depends upon the court's own procedure and case-law. The law of judicial review is not confined to one specific area of government, such as the granting of permission to develop land or the licensing of traders. On the contrary, judicial review applies to virtually the whole range of governmental functions.

3.6 Judicial review often requires the High Court to apply broad principles of public law to the specific facts in the case before it. In doing so, the court must take account of relevant legislation, in particular the statute conferring the administrative powers in question. The court must decide what the text of that legislation means, a process which is carried out by the judges against a background of established principles of interpretation. These principles assist the court in deciding what the legislature intended to achieve in granting the powers under consideration.

D. JUDICIAL REVIEW OF PUBLIC ACTION - THE COURTS AT WORK

4.1 We have seen that judicial review of administrative decisions taken by public authorities - 'judicial review' for short - is based on the principle that government should be conducted according to law. This duty includes the duty to observe any requirements in the constitution that may relate to public administration.

4.2 If we take the example of a licence that an individual or a company needs to be able to open a new business, say an import and export trading business, a vehicle repair works, a mineral-working plant or a market stall. The need for a licence will

be found in an enacted law.[1] Without such an Act, a licence will not be required, since in general anyone is free to carry on activities that are not restricted by legislation. And in the absence of such an Act, no public authority is able to point to any power as the basis for requiring a licence.

4.3 Assuming that such an Act is in force, it will probably also cover such matters as the following:

- the identity of the licensing authority; that is, the public body or official with power to grant or refuse the licence;
- the procedure which an applicant must follow in applying for the licence;
- the procedure which the licensing authority must follow in making a decision;
- the fee, if any, that can be charged for dealing with an application and for issuing a licence;
- the matters which may affect whether or not a licence should be granted;
- whether members of the public or other traders have a right to object to the grant of a licence;
- whether any conditions may be imposed on the grant of a licence;
- whether an applicant can appeal against a refusal of a licence or the imposition of conditions and, if so, which body or official must decide the appeal.

4.4 Let us assume further that the individual applies for a licence and this is refused; he/she appeals to an appeals board, and the appeal fails. Assume too that the individual insists that the licence ought to be granted and asserts that the procedure was flawed and/or that the decision was wrong.

4.5 In such a case, because of the effect of the refusal of the licence on the applicant, he/she may come to the High Court and ask for judicial review of the decision. To succeed on judicial review, he/she must show that something has gone wrong in law that makes the refusal defective or invalid.

4.6 What kind of complaints might enable the applicant to seek judicial review? The following are examples of complaints which an applicant might have:

1. the licensing board refused the licence because the applicant was a member of a small church that was known to be critical of the government or because the applicant's brother was an opposition politician;
2. the application failed after someone in authority (an official, or a Minister) had told the applicant even before the application was made that the licence would never be granted;
3. the application failed because (in the case of a proposed cinema) the hall had no air-conditioning and no emergency exits;
4. the licensing board said that the licence would be granted only if the applicant would make an annual payment to the licensing authority;
5. the board refused a licence (for a vehicle repair works on land owned by the applicant), saying that the works would be unsuitable in that part of the town, even though the applicant had obtained a development permit from the land use planning authority;
6. a similar application was refused because there were already two vehicle repair works in the town and the board was told by their owners that they were running at a loss.

4.7 In all these cases, the applicant's primary grievance is that the licence was refused. But to succeed in an application for judicial review, the applicant needs to be able to show that the refusal occurred for a reason or by a procedure that was unlawful. Thus he/she must be able:

- by producing evidence, to show what went wrong; and
- to satisfy the court that the errors made were sufficient to invalidate the refusal.

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[1] The term used for primary legislation is not uniform and may include Act of Parliament, ordinance, measure etc. Here the term 'Act' will be used to refer to primary legislation. Secondary, or delegated, legislation may also be described by many terms (such as regulations, rules, schemes, orders, byelaws and so on).

4.8 Of course, the licensing board may not agree that anything went wrong, nor (if mistakes were made) that they were serious enough to make the refusal unlawful. In example 3, for instance, it would be surprising if a cinema licence could not be refused if a cinema had no emergency exits! But example 6 raises what may be a difficult point of law, since many Licensing Acts do not state whether a licence is a way of restricting the amount of competition in a particular trade or industry. Some licences are imposed as a means of raising revenue. Other licences are required in order to maintain minimum standards of public health, public safety and so on.

4.9 When such a dispute comes to court, the judge must decide whether the applicant has a good case in law, or whether the licensing board acted in a lawful manner. In this situation, much will depend on what the Licensing Act says. Sometimes, but not always, the Act may indicate clearly what the relevant indicators are for granting or refusing a licence. If this is not the case, the court will have to interpret the Act to decide the proper scope of the board's powers and duties.

4.10 If the applicant succeeds, the court will quash (set aside) the refusal; this means that the original application for a licence still stands and must be considered afresh and the court may order that this should occur. However, if the court is not persuaded by the applicant's case, the application for judicial review fails.

4.11 Another illustration of the crucial role of the judges in interpreting legislation is to be found in the situation where a licence has been held for some time but is then cancelled by the licensing board.

Example: suppose that A has had a licence for a cinema and has run it well for five years; recently, some complaints are made about him (for example, that he is often drunk or abusive to customers, that he shows unlicensed films, or that the equipment in the cinema keeps breaking down); because of these complaints, the licensing board decide to cancel the licence. This means that the cinema must close down.

4.12 Before taking this decision, the licensing board must be certain: -

(1) that it has power to revoke the licence;

(2) that it may use this power for reasons such as those stated above;

(3) that the complaints are in fact well-founded (and not the result of malice or gossip); and

(4) that the licence-holder is told of the complaints and is given a full opportunity to respond to them before the board decides to cancel the licence.

4.13 Point (4) illustrates the importance of judicial interpretation of the law. Even though there are no words in the Licensing Act requiring the licensee to be given notice of the complaints, the court will apply the rules of natural justice. This means that the licensing board must give the licensee notice of the complaints and the opportunity of a hearing before a decision to revoke the licence is taken. If the board does not do this, the court will hold:

(1) that the board took the decision without properly informing itself as to the facts; and

(2) that the board did not act fairly in revoking the licence.

Subject to what the Act itself states, the court will probably rule that the Licensing Act did not authorise the board to take away the licence without the licensee having had a hearing on the allegations against him.

4.14 After considering these illustrations of judicial review in action, we now look in more depth at the law that applies in this area. We look first at the grounds of judicial review, before considering in section F. the remedies which the High Court may give, the rules about who may seek judicial review, and some questions about procedure.

E. THE GROUNDS OF JUDICIAL REVIEW

5.1 In many countries whose legal system has evolved from the English common law, the grounds upon which the courts may review official decisions have been developed by the courts over many years. The law is not identical in every legal system, and in any given country the national High Court must take account of relevant provisions of the Constitution and of relevant legislation. What follows in this section is a summary of the general grounds for seeking judicial review.

(I) **Acting without powers (or acting in excess of powers)**[2]

Examples:

(1) Byelaws were made by a Minister which treated apparatus used solely for receiving satellite TV as a 'radio station' and imposed a heavy licence fee ($1500) for installing the apparatus and an annual renewal fee ($500). The court held that the byelaws were 'ultra vires', since the TV receiver was not capable of being treated as a radio station (the court also considered the fees imposed to be grossly unreasonable).

(2) A Local Government Commission with power to make regulations about the conduct of local elections made a regulation that every candidate must have a minimum education of standard 7: this was held by the High Court to be beyond the Commission's powers, since the power to regulate the conduct of elections does not include power to regulate the educational qualifications of candidates. The right to be a candidate for election was quite separate from the conduct of the elections, and was dealt with in the Local Government Act. (The Commission would probably also be exceeding its power to regulate the conduct of elections if, for instance, it stipulated that the business of local councils must be conducted in the English language - but not if it made rules about the opening of polling stations.)

(3) A regional government decided that land which under a statutory improvement scheme was reserved as an open space should be allotted to a medical trust for the purpose of building a private nursing home on the land. The court held that the decision was contrary to the improvement scheme and that the building of a private nursing home was not an 'improvement' of open space.[3]

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[2] The Latin phrases 'ultra vires'(beyond powers) and 'intra vires' (within powers) are often used in relation to this ground of review.

[3] The court also held that residents in the vicinity of the land had sufficient interest in the future of the open space to seek judicial review (on standing to sue, see para. 6.9 below).

Just as it is unlawful for a public authority to act without powers, or to exceed such powers as it has, so too breach of duty by an authority is unlawful. Thus, where an electoral registration officer has a duty to maintain a public register of persons entitled to vote, it is a breach of duty to fail to keep a register at all, to keep the register secret, or to omit from the register the names of persons who are entitled to vote.

(II) **Act of the wrong person (improper delegation or assumption of power)**

Example: While the Registrar of Companies is abroad, an assistant registrar makes a decision removing company X from the register. Under the Companies Act, the Registrar had delegated to the assistant power to register new companies, but not power to remove a company from the register. The court would be likely to hold the decision by the assistant registrar unlawful in the absence of proper delegated authority (but not if, for the period of the Registrar's absence abroad, the assistant registrar had been formally appointed as Acting Registrar.)

(III) **Acting by the wrong procedure**

Example: where an Act requires four weeks public notice to be given before a licensing board's meeting, the board meets privately without giving any notice of its meeting, and during that meeting decides to refuse an application from Y for a licence. The board has the power to refuse a licence, but in doing so must observe the procedural rules laid down in the Licensing Act. Failure to observe an important procedural rule may cause the decision to be held unlawful. (But not every minor technical irregularity or defect of procedure will invalidate the decision, particularly if the board can show 'substantial compliance' with the set procedures.)

(IV) **Acting in breach of natural justice (or unfairly)**

(a) denial of the right to a fair hearing

Examples:

(1) where a police officer is alleged to have abused his powers by assaulting a young woman and

is dismissed from the police without being told of the allegation and with no opportunity to defend himself against it.

(2) where a diplomat accused of misappropriating public funds in an embassy abroad is retired compulsorily without a hearing since (according to the Foreign Ministry) it would take too long for the true facts to be discovered.

(b) decision affected by bias

Examples:

(1) where a licensing board always favours one group of applicants or is always prejudiced against another group (for example, on religious, political or ethnic grounds)[4]

(2) where an official or a Minister (or a close relative) has a personal financial interest in a decision that he/she must make (for instance, where a Minister's wife owns the only mill in a small town and permission to open a second mill is sought by another person).

(3) where a Minister has said in a public speech that he/she is never going to grant a permit or licence to a particular individual or group.

(V) Exercising discretion perversely or unreasonably

In administrative law, a discretionary decision is made whenever a public body or official has a choice to make between two or more possible courses of action (for example, where the available funds for a certain purpose (say, awards for higher education) are limited and a choice must be made as to who is to receive them. Provided the discretion has been exercised lawfully, there will be no basis for judicial review of the merits of the decision. However, discretionary powers must be exercised 'reasonably' and this requires (amongst other things) that the administrator:

- has properly understood the extent of the powers;
- has taken all relevant considerations into account;
- has not been influenced by irrelevant considerations;
- has made the decision after giving consideration to the full circumstances and has not 'fettered' the discretion by applying a rigid rule or policy that had been adopted in advance.

Even when no obvious defect of this kind exists, an administrator may be held to have acted 'unreasonably' or 'perversely' when he/she makes a decision which is so unreasonable in all the circumstances that no reasonable official in that position could properly have made such a decision.

Examples:

(1) where L has by hard work built up a trading business over many years, and one day one of her employees gets into dispute with an awkward customer and uses bad language: if this is an isolated incident, and L disciplines her employee, it could not be reasonable to bring the business to an end by revoking her licence, for example, on the order of a high official or Minister who knows the customer and decides to throw his weight around to show L who is in charge;

(2) where the Licensing Act permits a licence to be refused on one of five stated grounds and M's application is refused without the licensing board considering which, if any, of the five grounds applies to the application[5].

In some jurisdictions, particularly when executive action has affected fundamental rights protected by the constitution, it is possible to claim that the action taken is 'disproportionate' when the public interest in and reasons for the action are compared with the effect on the individuals' rights.

(VI) Abuse of power, or exercising a discretion for improper purposes

Example: where a local council has power to

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[4] This decision would also appear to be discriminatory and thus in breach of the constitution.

[5] Such a decision may also be in breach of natural justice, since it is quite possible that the authority has taken into account something alleged against the applicant without identifying what this is. This example also illustrates the importance of the duty to give reasons.

acquire land that is needed for road-widening and uses this power to acquire N's land, the true reason being that N has antagonised many councillors by publicly criticising the council's policies. A statutory power granted for one purpose may not be used for a quite different reason.

(VII) **Acting contrary to the constitution (for example, by infringing fundamental rights of an individual or a group)**

Examples:

(1) a town clerk refuses permission to a religious or political group to hold a meeting in a public hall, because he disapproves of the religious or political views of the group;

(2) a decision terminating a contract with a bookshop to supply books to the Ministry of Education because the bookshop's owner is a woman;

(3) a decision refusing to enter certain families on the election register because they support an opposition party.

(VIII) **Acting in breach of a person's legitimate expectations**

An individual may have a 'legitimate expectation' that a public authority will follow a certain procedure in his or her case either (A) because he/she has been assured by an official that the procedure will be followed or (B) because it has been the constant practice of the authority to follow that procedure, and (C) the individual has relied on either the assurance or the constant practice, only to find that it has not been followed.

Examples:

(A) a nurse from overseas, who has a limited permission to remain in the country, wants to return to her home for compassionate reasons; she writes to the immigration department and receives a reply assuring her that if she returns within two months, she will be permitted to re-enter the country. After only one month, when she tries to enter the country, the immigration officer refuses her permission to do so, even when she has shown him the department's letter.

(B) a trader has been in business for many years and his trading licence has always been renewed annually by sending in a renewal application by post and enclosing a cheque for the licence fee. This year, when he does the same as in all previous years, he learns that his licence has not been renewed because he should have attended the licensing authority in person and paid the fee in cash. He is told that all he can do is to apply for a new licence next year.

In some Commonwealth jurisdictions, the concept of legitimate expectation has been used in developing the practice of consultation before certain kinds of decision are made. Where, for example, a Minister has power to make rules about the qualifications applying to professional or economic groups (doctors, accountants, surveyors etc.), they may well have developed an unbroken practice of consultation, even if there is no statutory requirement to consult. If the Minister departs from this practice, or does not allow sufficient time for those consulted to reply, a court may hold that the legitimate expectations of the group in question have been breached.

(IX) **Failure to give reasons where there is a duty to do so**

Sometimes an Act expressly requires reasons to be given for a particular decision, for example where permission for the development of land is refused or a licence is refused, or where an appeal against a Minister's decision has been decided by a tribunal. There may also be particular circumstances in which a certain decision will be held unfair or arbitrary if reasons are not given for it, or where the High Court in judicial review proceedings may require reasons to be given. However, there is no general rule in administrative law that reasons must be given for all decisions.

As we shall see below, this is one matter on which the requirements of good administration may make up for any weaknesses in the law.

5.2 In this section we have tried to identify the principal grounds on which administrative decisions are vulnerable to judicial review. Frequently a single decision may be challenged on more than one of these grounds, and often there is no hard and fast demarcation between them. In some but not all Commonwealth jurisdictions, the judges are prepared to take a 'broad brush' approach to judicial review. As was said by one leading judge (Sir Robin Cooke, President of the Court of Appeal in New Zealand):

"The administrator must act fairly, reasonably and according to law. That is the essence and the rest is mainly machinery."

F. JUDICIAL REVIEW: REMEDIES, PARTIES AND PROCEDURE

(I) Remedies

6.1 In section E, we summarised the main grounds on which the High Court may hold that an official decision was unlawful or was taken improperly. Where such grounds exist, the court may issue an order quashing the defective decision and, if required, it may order the official or board concerned to consider the matter again and decide it in accordance with the law.

6.2 Sometimes, when the decision of a board or tribunal is under review, it may be clear that a different decision would have been made but for an error which the board or tribunal made as to the law; here, the court may substitute for the defective decision the correct decision that should have been made. Usually, however, it is not for the court to be concerned with the merits of a particular decision - the court's role is confined to issues of legality.

6.3 Where a public authority has a duty to act in certain circumstances (for example, if a licensing board must produce its register of decisions upon request of any licensee) and the authority refuses to carry out this duty, someone entitled to have the duty performed may ask the court to order the authority to perform its duty.

6.4 The court may also have power to grant an injunction or an interdict restraining the public authority from acting unlawfully in the future.[6] Such an order must be obeyed, since anyone (including a public officer) who disobeys such an order will commit 'contempt of court' and will be at risk of being sent to prison.

6.5 In some cases, it is enough for the court to make a declaration of the rights of the parties, since this should ensure that in future the same mistakes as to the law are not repeated. Failure to observe such a declaration is not contempt of court, but any failure to do so might be likely to lead to further applications for judicial review.

6.6 The fact that an application for judicial review succeeds does not usually entitle the applicant to compensation or to damages from the public official or authority whose decision was quashed. But if, say, the unlawful action interfered directly with the individual's property or liberty, he/she may be entitled to damages for any civil wrong (tort or delict) committed at civil law. There may also be a right to claim compensation or damages for interference with an individual's fundamental rights under the constitution.

(II) Who are the parties to judicial review proceedings?

6.7 In judicial review proceedings, the applicant for judicial review of a decision must usually be the person who is directly affected by the decision in question: for example, the trader who is refused a licence, the owner of land who is refused development permission, the police officer who is dismissed without a hearing, the foreigner who is refused permission to stay in the country. Sometimes the decision will directly affect the applicant's liberty, rights of property or freedom to contract; sometimes it will only deprive him/her of an interest in securing a certain benefit to which he/she is not entitled as of right.

6.8 Where an administrative decision adversely affects a collective person (such as a company, a parastatal undertaking, a trade union, a co-operative or a religious group), that person may seek judicial review in its own name. If such a body does not in law have corporate personality, officers or leading members of the group may apply for judicial review in their own name. A public body with corporate status, such as a town council, is generally able to apply for judicial review of an administrative decision which adversely affects it, but in some Commonwealth jurisdictions the system of local government may not permit this.

6.9 If an applicant has no direct interest in the decision which he/she seeks to review, this might

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[6] In some but not all states, the constitution or an Act of the legislature may make it impossible for such an injunction or interdict to be obtained against a government department or a Minister. The case-law on this question includes M v Home Office [1994] 1 AC 377 (UK) (injunction properly awarded against Secretary of State in judicial review proceedings) and Zambia National Holdings Ltd v Attorney General of Zambia [1994] 1 CLR 98 (Zambia) (no injunction may be awarded against the state).

justify the High Court in rejecting the application on the ground that the applicant has no 'standing to sue' (in Latin, no 'locus standi') or no 'sufficient interest'. Some Commonwealth jurisdictions are stricter than others in the rules of 'standing to sue' which they apply. One frequent problem is where the decision subject to review is a decision taken in the public interest and it affects the public at large (for example, a decision to build on an open space in an urban area, or to permit exploitation of a natural resource in a way which will harm the environment and the local community). In such cases, will any individual with resources to bring legal proceedings be able to show that he/she has standing to sue? One solution is to permit 'public interest' litigation - for example, where a voluntary organisation formed to defend the interests of a particular group or locality applies for judicial review on behalf of all those affected. A broad approach to the question of standing to sue may be required by the constitution, especially when an individual is seeking to enforce fundamental rights under the constitution.

6.10 When an application for judicial review is made, the applicant must usually identify the public body, board, tribunal or official who made the decision or on whose behalf the decision was made, and such a body or official will be able to defend the decision against judicial review. If no public body can be identified as having made the decision, and if it was taken by a private employer or a company, this may indicate that the decision is outside the area of administrative law, and is a matter purely of private law. The demarcation-line between a public and a private body for this purpose is often not clear, and much may depend on the general structure of public authorities within a country, and the approach taken to the mode in which economic and social needs are met (whether by public action, private action or a combination of both modes). For example, a hospital or a school may be privately owned but may be publicly funded and may perform public functions; so too, many parastatals are likely to have both private and public functions.

(III) **Procedure of judicial review**

6.11 The procedure for seeking judicial review differs from country to country, but in some it is simply called 'application for judicial review'. In states which apply procedures derived from the English common law, the various remedies have names such as certiorari (an order quashing a decision), prohibition (an order prohibiting an unlawful decision from being made) and mandamus (an order requiring a legal duty to be performed).

6.12 If an individual (or a relative or friend of a detainee acting on his behalf) claims to be unlawfully detained, he/she will in many countries be able to invoke the procedure of 'habeas corpus'. If an application for habeas corpus succeeds, the court will order the detained person to be set free.

6.13 Sometimes an Act of Parliament which empowers a public authority to take certain action also specifies the procedure by which individuals may apply to the courts for a decision as to the legality of the action. Such an Act may also lay down the procedure to be used, the time limit which applies, who may apply to the court and so on.

6.14 Other Acts may seek to protect particular decisions from being challenged by judicial review by using phrases like "The decision shall not be questioned in any court" or "Publication of this order shall be conclusive evidence that the order is properly made and conforms with the powers conferred by this Act". Such phrases may have the effect of cutting down the scope for judicial review, and may sometimes exclude any effective opportunity for doing so. However, in many countries the courts are not sympathetic to judicial review being excluded in this way and refuse to give such 'exclusion clauses' their full effect. Where a constitution authorises the High Court to protect the individual's fundamental rights, exclusion clauses of this kind contained in an Act of Parliament will not achieve the desired effect if they are considered by the court to be contrary to the constitution.

6.15 The High Court will require there to be reliable evidence to be given by or on behalf of the applicant before it will grant an application for judicial review. The official or public authority whose decision is sought to be reviewed will have an opportunity to put in their own evidence against the application. However, in an emergency when a public authority is about to take action (like pulling down someone's building) which adversely affects that person, he/she may come to the court for a temporary injunction (or interdict) to prevent the building from being demolished until there has been time for relevant evidence to be submitted to the court. In such an emergency, the public authority may not have a chance to present its side of the case until after the temporary injunction has come into effect.

6.16 The rules which govern the giving of evidence to the court in judicial review cases differ from country to country, according to the established procedures of its High Court. In many judicial review cases, whether the court is able to make a fully informed decision will depend upon the relevant official documents being made available in evidence; usually the court needs to be able to read the text of the decision challenged, the reasons for it, correspondence relating to it (including any explanations given) and so on. Because the outcome of judicial review cases is nearly always significant for the public interest, as well as for the private interests affected, the High Court may adopt an approach that requires disclosure by both sides of all relevant documents. Since judicial review is often concerned with the nature of the decision-making process, usually more documents are held by the public authority than by the applicant for review.

6.17 In exceptional circumstances, where there are vital public interests which may be threatened if certain matters are produced in evidence (for example, national security, defence and international relations), a public authority may seek to protect particular documents from disclosure. Public interest immunity, as this is sometimes known, may be claimed by a Minister responsible for the area of government in question, but a claim of public interest immunity ought to take effect only when the court has been satisfied that it is being made for good reason and that the claim should outweigh the public interest in the administration of justice.

6.18 In many countries, much ignorance and uncertainty exist, even amongst the legal profession and public servants, about the powers and procedures of judicial review. This is partly because many of the rules have grown up over the years and are based on previous decisions of the courts, rather than being located in Acts of Parliament.

6.19 There is however no good reason that prevents the main rules of judicial review being contained in a short Act of Parliament, which can if necessary be supplemented by procedural rules made by the High Court. The text of such a model Act is contained later in this booklet. It must be read with care, since it does not directly state the law in any one jurisdiction, but it may serve as a guide to important features of this branch of the law.

G. Conclusions

7.1 It was said above (in para. 2.2) that the one certain function of the government is to govern. In other words, the existence of the state as the organising framework for life in human communities today calls for both the structure of government and the performance of tasks on which the public's lives, security and well-being depend.

7.2 The development of judicial review as a means of controlling government varies much from country to country, according to the state of economic and industrial development, social awareness, and the accessibility of legal services.

7.3 In particular cases, judicial review may seem hostile to a particular decision or policy of government. Sometimes opponents of the government may institute judicial review proceedings as an additional way of expressing their opposition. However, political opposition and political motives are never grounds for a successful application for judicial review.

7.4 The concern of the courts must always be with upholding principles of law and legality. The courts are not to be identified with the policies or preferences of sectional groups or parties.

7.5 When judicial review is working well, the lessons to be learned from the decisions of the courts deserve to be understood by all in the public service. (Sometimes a court's decision may make it necessary for an amending Act to be passed or fresh regulations made.) Where a country has an ombudsman, able to investigate areas of administration and to report publicly on his/her findings, valuable lessons may be learned when the ombudsman makes a finding of maladministration or reports on poor standards of public service. The questions to be asked include: what went wrong? what were the reasons for those mistakes? are there means of ensuring that the same mistakes are not repeated?

7.6 While the courts and the ombudsman observe different procedures, they are both concerned with scrutinising the process of administration. The lessons to be learned from the results they achieve often share much in common. Indeed, the grounds on which public decisions may be reviewed in the courts often overlap with the indicators of poor administration which an ombudsman will detect. Thus senior officials need to understand the powers that are in law available to them in a given situation; if they do not understand the powers that they are supposed to be exercising, this is likely to lead to decisions which in law are defective, and also to maladministration.

7.7 To obtain the full advantages both of judicial review and of the ombudsman's power of investigating complaints by citizens, officials need to learn from both systems of control. Some unacceptable forms of administration would be criticised both by a judge and by the ombudsman. Two examples may be given.

7.8 The first is that of legitimate expectations (see ground VIII in section E above). An ombudsman would surely criticise conduct by a public authority which at one moment gives an assurance to an individual as to what is to happen to her and later on goes back on that assurance.

7.9 The second example is the giving of reasons for decisions (see ground IX in section E above). Even though the law does not require reasons to be given for every administrative decision, where a public official must act in the public interest in reaching a decision, he/she must have some reasons for that decision, and must be able to say what they are. (If there are no such reasons that can be given for a discretionary decision, the decision would appear to be an arbitrary one.) Those reasons should be recorded in writing and kept on file. If necessary, such reasons may be notified to those affected by the decision. The experience of the public service in very many countries is that better decisions are made if the decision-maker thinks out what should be done in an orderly and systematic way, and records the reasons for the decision at the time. Failure to record reasons for a key decision would be criticised by an ombudsman, or (as the case may be) by the court. As we have already seen, in certain situations the courts may hold that fairness requires the giving of reasons. Moreover, the giving of reasons may enable someone who has a right of appeal against the decision to decide whether it is worthwhile to appeal.

7.10 These examples illustrate ways in which administration can be improved if public servants take account of both the findings of the ombudsman, where the office exists, and of the decisions of the courts.

7.11 In 1992, at the conclusion of the first Commonwealth Workshop on Administrative Law, held in Zambia, the assembled ministers, judges, civil servants, lawyers and law teachers adopted what has come to be known as the Lusaka Statement. This Statement has been endorsed at other such Workshops and it was also approved by Commonwealth Law Ministers in 1993 at their meeting in Mauritius as a useful guide to the subject of government under the law. The Statement emphasises both the importance of government being conducted in accordance with law, and also the main practical conclusions which flow from a commitment to government according to law. A copy of the Lusaka Statement is annexed to this booklet.

THE JUDICIAL REVIEW OF ADMINISTRATIVE ACTION - A MODEL LAW FOR COMMONWEALTH JURISDICTIONS

General Comment

This model law has been prepared for two main purposes: (1) to provide a basis for legislation in those Commonwealth jurisdictions that have not in recent years reformed their own procedures for judicial review; (2) to re-state the main essentials of the law of judicial review, including the grounds of review, since a short and accessible re-statement of the law should dispel much uncertainty and ignorance that exists about this important area of the law.

The procedure outlined in this model law is primarily intended to apply to the judicial review of administrative action. However, in many Commonwealth jurisdictions, such review on administrative law grounds may well also involve questions relating to the enforcement of fundamental rights guaranteed by the constitution and the proposed procedure is intended to enable this to be done in the same proceedings. Since the constitution in these countries usually vests jurisdiction in the High Court to enforce the guaranteed rights, the proposed model law would be inconsistent with the constitution if it sought to limit the width of that jurisdiction.

Although the model takes the form of an Act of Parliament, many of its provisions are limited to procedural matters, and in some jurisdictions it would be straightforward to deal with these matters by the making of new Rules of Court. However, not all provisions in the model can be dealt with in this way, since (for example) section 9 deals with matters of substantive law, namely the grounds on which judicial review may be based.

In preparing this model, reference has been made (inter alia) to the following sources:
Administrative Justice Act 1983 (Cap. 109B, Barbados)
Judicial Review Procedure Act (Revised Statutes of Ontario 1990, c.J.1)
Alberta Rules of Court, Parts 56 and 56.1
Federal Court Act (Revised Statutes of Canada 1985, c. F-7)
Judicature Amendment Act 1972 (No. 130) (New Zealand)
Supreme Court Act 1981, s. 31 (U.K.) and Rules of the Supreme Court, Order 53 (England and Wales)
"Administrative Law: Judicial Review and Statutory Appeals", Report No 226 by the English Law Commission, 26 October 1994
Rules of Court (Scotland), Chapter 58
Administrative Decisions (Judicial Review) Act 1977 (Australia)
Fundamental Rights (Enforcement Procedure) Rules 1979 (Federal Republic of Nigeria).

An explanatory comment is appended at the end of each section of the model Bill.

A Bill for an Act to regulate the procedure for the judicial review of administrative action, to re-state the grounds for the exercise of judicial review and for related matters.

Jurisdiction of the High Court

1. (1) This Act applies to the jurisdiction referred to in subsection (2) and, subject to the Constitution, to such other jurisdiction by way of supervision or review as may be conferred on the Court by the Constitution or by or under any law.

(2) It is hereby declared that the Court has jurisdiction to review the decision or act of any subordinate court, tribunal, board, department, council, Minister, civil servant or other body or officer exercising public functions under any law.

(3) In this Act:

(a) the expression "the Court" shall mean the [High Court] exercising the jurisdiction referred to in sub-section (1);
(b) the expression "decision or act" shall include any failure or omission to take a decision or to act where there is a duty to do so;
(c) the expression "decision-maker" shall mean the court, tribunal, board, department, council, Minister, civil servant or other body or officer whose decision or act is subject to an application for judicial review made under this Act;
(d) the expression "public functions" shall include the judicial, quasi-judicial, legislative and administrative functions of any public authority or officer;
(e) the expression "supervisory jurisdiction" shall mean the jurisdiction which is referred to in sub-section (2).

(4) The decisions or acts subject to the supervisory jurisdiction shall include decisions or acts taken or made by or in the name of the President or Vice-President, [the monarch], the Cabinet and the Prime Minister, except for decisions or acts which are subject to contrary provision contained in the Constitution or any Act.

[Comment. The aim of subsections (1) and (2) is not to confer a wholly new jurisdiction on the High Court but to declare that the present supervisory jurisdiction exists and to ensure that it is exercised in future in accordance with the Act, along with comparable jurisdiction conferred by the Constitution or any other law. The purpose of subsection (4) is to make clear that all decisions taken within the executive branch of the state are subject to judicial review, except where the Constitution or an Act provides to the contrary.]

Procedure of application for judicial review

2. An application to the Court for the exercise of the supervisory jurisdiction in respect of any decision or act shall be made by means of an application for judicial review in accordance with this Act.

[Comment. The Act is intended to be capable of operating without the making of any Rules of Court, but it is likely that some Rules of Court would be desirable for the purpose of regulating matters of procedure, and these are authorised under section 3.]

Rules of Court

3. (1) Rules of the Court may provide for the procedure to be followed in respect of applications for judicial review, and for the manner in which evidence may be given to the Court in such proceedings.

(2) Such Rules may in particular provide that: -

(a) no application for judicial review shall be made unless on a preliminary application [petition/ summons/ motion] the leave of the Court has been obtained for the making of such an application; and
(b) such leave shall not be granted unless the Court considers that the preliminary application [petition/

summons/motion] discloses an arguable case.

[Comment. Subsection (2) requires an appropriate Rule of Court to be made if it is desired to make the procedure of application for judicial review subject to a preliminary leave stage. If a preliminary leave stage is not required, no Rule of Court need be made. By subsection (1), Rules of Court may provide for other matters, such as the form of application, service of notice on interested parties etc.]

Standing to apply for judicial review

4. The Court shall not entertain an application for judicial review unless either: -

   (a) the applicant has a sufficient interest in the matter to which the application relates; or
   (b) the Court is satisfied in the circumstances of the case that it is in the public interest for the application to be decided by the Court.

[Comment. This clause draws on both the Administrative Justice Act (Barbados), section 6 and on the recommendations made by the English Law Commission in its Report in 1994.]

Time limits

5. (1) Subject to subsections (2)-(6), an application for judicial review shall be made within the period of three months beginning with the date when grounds for the application first arose.

   (2) The Court may refuse an application made within the period of three months if it is satisfied: -

      (a) that in the circumstances of the case there has been undue delay in making the application; and
      (b) that to grant the relief sought would, because of such delay, cause substantial hardship to, or would substantially prejudice the rights of, any person, or would be seriously detrimental to good administration.

   (3) Where an application for judicial review is made after the period of three months, the Court may allow the application to proceed if it is satisfied -

      (a) that there is good reason for the application not having been made at an earlier date; and
      (b) that if the relief sought were granted, it would neither (i) cause substantial hardship to, or substantially prejudice the rights of, any person, nor (ii) be seriously detrimental to good administration.

   (4) Where the application concerns any judgment, order, conviction or other decision, the date when grounds for the application first arose shall be taken to be the date of the judgment, order, conviction or other decision, unless there is good reason why a later date should be adopted for this purpose.

   (5) In considering whether the applicant has acted without undue delay or has shown good reason for delay for the purposes of this section, the Court shall take into account any steps taken by the applicant to pursue any other remedies that were open to him.

   (6) Subsections (1) to (5) are without prejudice to any Act which for any specific class of decision or act limits the time within which an application for judicial review may be made to a period being not less than four weeks.

[Comment. This section draws upon the present position relating to time-limits in the English High Court, although some of the drafting is original. The three-month limit was supported by the English Law Commission in 1994, but in many Commonwealth jurisdictions the difficulties of securing access to legal resources could justify the time-limit being longer than three months. In several Commonwealth jurisdictions, such as Scotland and Barbados, no specific time limit exists; the law of Barbados treats undue delay (not defined) as a reason why the Court may refuse relief:

"The Court may, if it thinks fit, refuse to grant any relief under this Act if it considers that there has been undue delay in making the application for judicial review, and that the grant of the relief sought would cause substantial hardship to, or would substantially prejudice the rights of any person, or would be detrimental to good administration." (Administrative Justice Act, s. 8)]

Alternative remedies

6. The Court may in its discretion refuse an application for judicial review if it is satisfied that there was available to the applicant another remedy, whether by way of appeal, review or recourse to a court, tribunal, public official or other authority, which would have enabled - (a) the substance of the application to be considered in an effective manner; and (b) appropriate relief to be awarded to the applicant.

[Comment. The aim of this clause is to give guidance to the Court as to the manner in which it should exercise its discretion in respect of alternative remedies. In several jurisdictions, for example New Zealand, the Court may grant an application for judicial review "notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application" (Judicature Amendment Act, s. 4(1)).]

Remedies

7. (1) Without prejudice to section 8, on an application for judicial review the Court may grant by way of relief the following remedies:

   (a) an order quashing the decision or act under review;
   (b) an order [injunction/interdict] prohibiting the decision-maker or any other person from taking further action in a specified matter;
   (c) an order requiring the performance of a public duty, including a duty to make a decision or to hear and determine any case;
   (d) a declaration of the legal rights, duties and interests of the parties, where it is just and convenient for the Court to make such a declaration;
   (e) an award of damages, restitution or the recovery of a sum due in law, where grounds for such an award exist in law; and
   [(f) such other relief as may be necessary to give effect to the fundamental rights enumerated in Part ... of the Constitution].

   (2) Where the Court quashes an decision or act to which the application relates, it may in addition remit the matter to the court, tribunal or other authority concerned with a direction to reconsider the matter and to determine it in accordance with the Court's order.

   (3) Any of the remedies mentioned in subsection (1) may be applied for together or separately in an application for judicial review; and the Court may grant one or more of them as law and justice may require, and whether applied for in the original application or not.

[Comment. The drafting of subsection (1)(a)-(c) intentionally avoids use of the common law terms of certiorari, prohibition and mandamus. Subsection (1)(e) enables damages or restitution to be awarded in the same proceedings, but only where legal grounds for the award of such compensation exist (for example, in the civil law of tort or as a constitutional remedy for the enforcement of fundamental rights). The remedies available to the Court are broad enough to include the power to order that someone who is unlawfully detained should regain their liberty, but the law of habeas corpus is not affected: see section 12 below. Subsection (2) is derived from section 9 of the Administrative Justice Act (Barbados), and subsection (3) is from section 5(3) of the same Act.]

Interim relief

8. (1) On an application for judicial review, the applicant may seek such form of interim relief as may be necessary in the interests of justice pending the disposal of the application by the Court.

(2) Where the interests of justice so require, the Court may make an order granting interim relief notwithstanding that the Court has not at that stage granted leave for the making of an application for judicial review for the purposes of section 3(2).

[Comment. Subsection (2) is needed only if Rules of Court have been made under section 3(2) providing for a preliminary leave stage. If so, subsection (2) would allow the Court to grant interim relief as a matter of urgency, while adjourning for further consideration the question whether leave for the application for judicial review should be granted.]

Grounds of review

9 (1) The grounds on which the Court may grant relief by way of the remedies mentioned in section 7 are:

(a) that the decision or act under review was contrary to law, was based on an error of law, or involved a breach of the applicant's constitutional rights;
(b) that the decision or act was outside the powers of the decision-maker, was made in excess of jurisdiction, or involved a breach of or failure to perform a duty;
(c) that in the procedure leading to the decision or act under review, the decision-maker:

(i) failed to observe conditions or requirements prescribed by legislation;
(ii) was in breach of the principles of natural justice or fairness; or
(iii) failed to comply with a person's legitimate expectations;

(d) that the decision or act involved an abuse of power, an improper purpose or the perverse exercise of discretion;
(e) that the decision-maker did not take into account considerations which ought to have been taken into account, or took into account irrelevant considerations;
(f) that the decision or act was affected by fraud, bad faith or malice;
(g) that the decision-maker acted on instructions from an unauthorised person; and
(h) that there was no evidence upon which the decision-maker could have made a conclusion of fact that was material to the decision or act.

(2) Where the sole ground of relief established is a defect within subsection (1)(c)(i), which the Court finds has given rise to no substantial wrong or miscarriage of justice, the Court may refuse relief.

[Comment. Subsection (1) draws upon earlier statements of the grounds of judicial review enacted in Barbados and Australia but the drafting is original. Subsection (2) is based broadly on the Judicature Amendment Act (New Zealand), s. 5. and the Ontario Judicial Review Procedure Act, s. 3.]

Power of the Court to require reasons

10. (1) Except where the Constitution or an Act of Parliament provides to the contrary, where a person makes an application for judicial review under section 2, he may request the Court to order the decision-maker to provide a statement of the reasons for the decision or act within a period specified by the Court.

(2) Where a request for an order under subsection (1) is made, the Court shall, if satisfied that the interests of justice and fairness so require, order the decision-maker to provide a statement of reasons within a period specified by the Court.

(3) Where an order under subsection (2) has been made, the Court shall in exercising its supervisory jurisdiction take into account the statement of reasons provided by the decision-maker in response to the order or (as the case may be) the failure to provide such a statement.

[Comment. Although there is no general duty at common law to provide reasons for an administrative decision at the request of an individual who is adversely affected by it, it is increasingly recognised in the case-law of many states that administrative justice often requires the giving of reasons, particularly when judicial review has been sought. A duty to provide reasons for certain classes of official decisions was included in the Administrative Justice Act of Barbados, Part II. Section 10 is restricted in its effect to situations in which an application for judicial review has been made. However, the fact that the Court has the power to order the giving of reasons is likely in practice to encourage public authorities to give reasons.]

Transfer of proceedings

11. (1) Where either -

(a) an application is made for judicial review and the Court considers that the subject of the application should properly have been made the subject of a [writ or other procedure] for enforcing a private right; or

(b) an action has been started by way of a [writ or other procedure] which the Court considers should properly have been made the subject of an application for judicial review, the Court may, if the interests of justice so require, order that the application or the action by writ (as the case may be) shall be treated as having been instituted by the proper procedure.

(2) When the Court exercises its power under sub-section (1)

(a) it may impose such conditions as it thinks fit (including in its discretion the payment of costs) upon the parties; and

(b) it shall specify, in respect of the action or application as the case may be, the procedural steps which are deemed to have been completed and those which remain to be performed.

[Comment. Since this Act makes provision for a distinct form of procedure to be known as an application for judicial review, to be available in respect of the acts and decisions of public officials and authorities, there will inevitably be some instances in which an applicant may have difficulty in knowing whether he/she should apply for judicial review or should go by ordinary procedure. This clause enables an inappropriate choice of procedure to be corrected by the Court without requiring the applicant/plaintiff to start proceedings all over again.]

Habeas corpus

12. Nothing in this Act affects the law of habeas corpus, but

(a) where an application for judicial review is made when an individual is detained as a result of a decision or act which is subject to the supervisory jurisdiction of the Court, the Court may in the exercise of its powers under sections 7 or 8 order the release of an individual who is unlawfully detained;

(b) an application for judicial review may be brought concurrently with an application for a writ of habeas corpus.

[Comment. This section is (except for paragraph (a)) derived with amendment from the Administrative Justice Act of Barbados, section 11(a) and the Ontario Judicial Review Procedure Act, s. 11(2).]

The State [the Crown]

13. This Act binds the State [the Crown].

[Comment. This section may well be strictly unnecessary in view of the earlier provisions of the Bill. But it would be unfortunate if, without it, it could be argued that a State entity (or the Crown, where a monarchy exists) fell outside the scope of this legislation.]

Short title and commencement

14. (1) This Act may be cited as the Administrative Justice (Judicial Review) Act.

(2) This Act shall come into force on such day as the [President/ Minister of Justice] may by order appoint.

Concluding statement of the Workshop on Administrative Law held in Lusaka, Zambia, from 12-15 October 1992

THE LUSAKA STATEMENT ON GOVERNMENT UNDER THE LAW

MEMBERS of the Government of the Republic of Zambia, the judiciary and the civil service, meeting in Lusaka on 15 October 1992 together with members of the legal profession, the media and the wider public [see pages 34-39 for details] at the conclusion of a three-day seminar organised by the Commonwealth Secretariat, adopted the following statement:

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

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

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

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

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

GUIDING PRINCIPLES

An administrative authority, when exercising a discretionary power should:

1 pursue only the purposes for which the power has been conferred;

2 be without bias and observe objectivity and impartiality, taking into account only factors relevant to the particular case;

3 observe the principle of equality before the law by avoiding unfair discrimination;

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

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

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

Procedure

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

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

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

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

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

Review

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

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

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

Implementation

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

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

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

FOR such procedures to function properly it is essential that:

* the executive ensures that senior civil servants enjoy appropriate security of tenure and have a full appreciation of, and are encouraged to discharge, their own responsibilities for good administrative practice, and of the proper role of the judiciary;

* senior civil servants ensure that their own staff receive appropriate training and guidance in good administrative practice and the basic requirements of administrative law, so as to ensure that best administrative practice is followed and that the room for individual citizens to feel aggrieved is minimised;

* the judiciary be well-versed in the judicial review of administrative action (including, if need be, the establishment of a Division within the High Court comprising specialist judges) and be adequately resourced with up-to-date legal materials, including promptly produced Zambian law reports;

* the legal profession be equipped both through proper training in law faculties and through continuing legal education programmes to discharge their own vital function in preparing cases that should be brought before the courts for consideration;

* the general public be informed - and be kept informed - of their rights and of fact that the law can provide redress in cases of arbitrary, discriminatory and unfair administrative action by government, and be assured of appropriate access to legal aid; and

* the legal procedures for judicial review of administrative action be reviewed, and kept under regular review, to ensure that it meets the expectations of Zambian society and reflects best prevailing Commonwealth practices.

IT IS OUR belief that if the above programme of action can be implemented effectively, the quality of administration will be consistently improved and sustained, to the ultimate betterment of the lives of all our citizens. We therefore solemnly pledge ourselves to its fulfilment and urge others who may have a part to play to join us. Our people are entitled to no less.

Lusaka
Zambia
15 October 1992

THE ROLE OF ADMINISTRATIVE LAW IN THE PROMOTION OF GOOD GOVERNANCE IN CANADA

A Paper by the Department of Justice, Canada

INTRODUCTION

1. The question that we would like to address in this paper is: how does the law, in particular administrative law, contribute to an improved method of governing?

2. Before we can identify what role administrative law has to play in the promotion of good governance, it is important to define exactly what we mean by administrative law and to situate this branch of the law within the Canadian legal system. Once we have done this we will examine the basic administrative law principles that relate to the manner in which public authorities exercise their functions and the remedies available to citizens if these functions are not exercised according to the law.

ADMINISTRATIVE LAW: DEFINITION AND SCOPE

3. For the purposes of this paper we are defining administrative law in its broad sense, as the law that applies to the control of government power. It is the "body of general principles that govern the exercise of powers and duties by public authorities."[1] This includes the entire spectrum of public law outside of the formal constitutional sphere (common law, statutes, prerogatives, conventions and administrative policies) that governs the institutional structures, acts and operations of the public administration. In this context the concept of "public administration" encompasses the executive (Cabinet and Ministers), departments, and various decentralized agencies, commissions, tribunals, Crown corporations and other representatives of government.

4. When we speak of "government", or "public administration" in this paper however, we do not include Parliament. Constitutional law is the principal law governing the primary organs of Canadian government which are the Parliament of Canada and the provincial legislatures, the Crown and the Courts. For the purposes of this discussion we are defining constitutional law narrowly, as the *Constitution Acts 1867-1982*. On the other hand, the main subject of administrative law is the exercise of powers delegated by a legislature to a subordinate body. This body may be politically accountable (such as the Cabinet or a Minister of the Crown) or independent to a lesser or greater degree of the central government.

5. Both administrative law and constitutional law relate to the legal framework in which our government operates. But while constitutional law sets out the broad legal structure of the government, administrative law provides details of how the administration operates on a day-to-day basis. Administrative law is also informed by private law notions. As Dussault and Borgeat note: "administrative law abuts on the traditional boundaries of constitutional law and private law; in effect it occupies a halfway house between the two and draws upon each in turn."[2] Towards the constitutional end of the continuum lie questions of Crown prerogative and the rules of natural justice. Towards the private law end lie the principles governing the power of government to contract and to hold and control property. In between the two lies the complex legal issues that we will address in this paper, namely the question of legal and judicial controls on the exercise of discretionary power by public authorities.

6. Defined broadly administrative law fulfils two major functions: it provides the rules for the organization and internal operations of the administration and it establishes relationships between administration and citizens (by providing remedies against the administration). At the foundation of administrative law is the law governing the organization and operation of the administration, as well as the law establishing its powers and duties. While this is clearly the framework of administrative law, for the purposes

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1 H.W.R. Wade and C.F. Forsyth., *Administrative Law* 7th ed. (Oxford: Clarendon Press, 1994) at 5 [hereinafter Wade].

2 R. Dussault and L. Borgeat, *Administrative Law: A Treatise* 2d ed. vol 1 (Toronto: Carswell, 1990) at 12 [hereinafter Dussault].

of this paper we will concentrate on the rules governing the **manner** in which public authorities must exercise their functions and on the remedies available to citizens if these functions are not exercised according to law. This is the law of public power as it relates to ordinary citizens.

THE EXERCISE OF POWERS AND DUTIES BY PUBLIC AUTHORITIES

7. The public administration plays a central role in the lives of Canadians. In the same way that Parliament creates duties and prohibitions by means of statutes, the administration also restricts the rights and liberties of citizens in a number of ways. The administration enacts regulations which have the same force and effect as statutes. It may also bind citizens by means of contract. The administration exercises judicial or quasi-judicial powers when it grants or refuses to grant licences, permits or other benefits. Also, Parliament has conferred upon the administration certain discretionary powers which it exercises in the performance of a multitude of acts of a purely administrative nature. Given the impact of the actions of the administration on the lives of Canadians, the public must be able to rely on the law to ensure that the power of the administration is used in a way which conforms to the ideas of fair dealing and good administration. The role of administrative law is, therefore, to keep the powers of government within their legal bounds.[3]

8. The first and most important point to be made is that the powers of the public administration are subordinate to the law. Public authorities only possess the power which has been given to them by statutes and regulations and have no authority to exceed this power. This means that legal norms are both the source and the measure of acts taken by the administration.[4] For the public administration respect of the law includes:

(a) **Respect for the Constitution**
(b) **Respect for the Limits of their Powers**
(c) **Respect for the Principles of Natural Justice**

9. If a public authority fails to respect the law, one speaks of an excess of jurisdiction or of an *ultra vires* act. In such a case, administrative law provides the citizen or group of citizens affected by the *ultra vires* act with various remedies against the administration and the right to have the exercise of the power reviewed. These remedies will be discussed in the next section of this paper. We will now examine each of the above categories.

(a) Respect for the Constitution

10. The Constitution represents the supreme law of Canada which Parliament and the provincial legislatures must obey when they enact laws.[5] The most important Canadian Constitutional Laws are the *Constitution Act 1867*[6] and the *Constitution Act 1982*[7] (which includes the *Canadian Charter of Rights and Freedoms*[8]) and the "quasi-constitutional" statutes such as the *Canadian Bill of Rights*[9] and the *Canadian Human Rights Act,*[10] as well as various provincial human rights statutes.

11. An Act of Parliament or of a provincial legislature can only be reviewed by a court and declared *ultra vires* if it offends the Constitution by failing to respect the division of powers between federal Parliament and the provincial legislatures or if the rights and freedoms guaranteed in the *Charter*, or in a quasi-constitutional statute have been affected.

12. Likewise, when the public administration exercises its regulatory, administrative, judicial or quasi-judicial powers it is also subject to the review

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3 Wade, *supra* note 1 at 5.

4 Dussault, *supra* note 2 at 12.

5 As Dussault and Borgeat explain, this fundamental law has three major objectives: to indicate who exercises the legislative, executive and judicial powers of the state, to determine the division of legislative jurisdiction between the two levels of government, and lastly to guarantee citizens certain civil liberties, *supra* note 2 at 14.

6 (30 & 31 Vict.), c.3.

7 being schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

8 Part I of the *Constitution Act, 1982,* being schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

9 R.S.C. 1985 Appendix III.

10 R.S.C. 1985, c. H-6.

by the courts for compliance with constitutional and quasi-constitutional requirements.

(b) Respect for the Limits of their Powers

13. As we noted above, regulations, acts and decisions of the public administration affect the rights of citizens and can impose duties and obligations upon them. It is for this reason that the functions of the administration can only be performed within a specific legal framework. Thus in addition to its duty to respect the Canadian Constitution, the public administration is always subject to legal limitations which have been established by statutes, regulations and the common law.

14. If, in performing its functions, an administrative body fails to respect the limits of its statutory or regulatory powers, it may be acting *ultra vires* its jurisdiction. Often therefore, determining whether the public authority has the power to act becomes a question of statutory interpretation. As Wade and Forsyth point out: "When the question arises whether a public authority is acting lawfully or unlawfully, the nature and extent of its power or duty has to be found in most cases by seeking the intention of Parliament as expressed or implied in the relevant Act."[11]

15. While questions of statutory interpretation may be at the heart of the doctrine of *ultra vires,* the ways in which the doctrine can be invoked are virtually unlimited. For example, if a public authority exercises more power than it has been granted, or if it exercises its power with respect to the wrong person, it may be acting *ultra vires* its jurisdiction. Or if a validly created power is exercised by someone other than the person upon whom it was conferred, the courts may find the act to be illegal. Even if the power is exercised by the correct public authority, that authority must be properly constituted or appointed. All facts which are conditions precedent to the exercise of that action must be fulfilled.

16. Also, most of the legal powers possessed by the administration involve an element of discretion. A good example of this is the decision to grant or not to grant a licence. In making this decision the public authority will likely consider government policy and public interest. However, there is no such thing as unfettered administrative discretion. The exercise of discretion by the administration must be exercised in conformity with the presumed intention of the legislature that conferred it, and it must not be abused. The discretion granted by the legislature must be exercised by the person to whom it was granted, and not by an agent or a delegate. Also, where discretion has been granted it must be fully exercised. It cannot be limited by contract, agreement or self-imposed rules. Finally, the cardinal rule of administrative discretion is that it cannot be abused. It must be exercised reasonably, in good faith and on proper grounds. Jones and deVillars identify five generic types of abuses of discretion that can lead a court to find that jurisdiction has been exceeded:

"The first category occurs when a delegate exercises a discretion with an improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations. The second type of abuse arises when the delegate acts on inadequate material, including where there is no evidence or without considering relevant matters. Thirdly, the courts sometimes hold that an abuse of discretion has been committed where there is an improper result, including unreasonable, discriminatory or retroactive administrative actions. A fourth type of abuse arises when the delegate exercises his or her discretion on an erroneous view of the law. Finally, it is an abuse for a delegate to refuse to exercise discretion by adopting a policy which fetters his or her ability to consider individual cases with an open mind."[12]

(c) Respect for the Principles of Natural Justice

17. Whereas the law relating to the exercise of discretion aims to control the substance of discretionary decisions, the principles of natural justice control the procedure under which these discretionary decisions are made. Wade and Forsyth note that "by developing the principles of natural justice the courts have devised a kind of code of fair administrative procedure".[13]

18. Procedure is a matter of primary importance. This is because, citizens are likely to accept laws that are applied according to a fair

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[11] Wade, *supra* note 1 at 245.

[12] *Principles of Administrative Law* 2nd ed. (Toronto: Carswell, 1994) at 146.

[13] Wade, *supra* note 1 at 464.

procedure. Ultimately the effective exercise of government authority relies on the consent, or at least the acquiescence of the governed. The consent required for the exercise of governmental authority must be achieved in spite of the fact that many governmental actions, while for the general good, are likely to have a negative effect on some people. Natural justice nourishes the consent required for the effective exercise of governmental authority. As long as the exercise of government authority is seen as having been fair, the vast majority of people will acquiesce in what is required of them.

19. In administrative law natural justice is often equated with fairness. The Supreme Court of Canada has affirmed that there is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual".[14] There are two fundamental rules of fair procedure.

20. First, it is essential to fair procedure that both sides be heard. Thus the the right to be heard, often referred to by the Latin maxim *audi alteram partem,* ("hear the other side") is the first principle of natural justice. In practice this means that people who will be affected by a decision must be given an opportunity to have input into the decision. They must be provided information concerning the decision to be made and they must be given a chance to express their views, before a decision maker who will genuinely take those views into account. These basic requirements of fairness lead to a variety of particular requirements in particular circumstances. The level of participation of the individual can range from simply the opportunity to respond to the case in writing, to an informal interview to a full and formal hearing. The greater the adverse affects on the rights of the individual, the higher the degree of procedural fairness required.

21. The second basic rule of fair procedure is that the decision maker must be unbiased. This notion is referred to by the Latin Maxim: *nemo judex in causa sua* (no man may be a judge in his own cause). Therefore a decision maker will be disqualified from deciding a case where he or she is biased or where there is a reasonable apprehension of bias. Problems of bias arise if the decision maker has an interest in the outcome of the proceedings. This interest can be of a pecuniary nature, such that the outcome of the decision may have an impact on the financial interests of the decision maker. Also, if the decision maker has a personal interest in the outcome of the proceedings, because of personal relationships or connections, or personal attitudes, an argument of bias can be made. Problems of bias also arise if the decision maker may be seen to have an interest in the outcome of the proceedings because of the agenda, opinion or policy of the institution that he or she represents. This is known as institutional bias and it arises when a decision maker may be subject to being influenced by professional relationships.

REMEDIES

22. The exercise of the extensive regulatory, administrative, judicial and quasi-judicial powers delegated to various emanations of the public administration may give rise to abuse. It is important to underline that when we talk about "abuse" we are not necessarily implying malice or bad faith. Indeed government authorities "may misunderstand their legal position as easily as may other people, and the law which they have to administer is frequently complex and uncertain."[15] Abuse, in the sense of exceeding jurisdiction, is therefore inevitable. In order to protect citizens from possible administrative abuse, the law provides a number of ways in which the legality of the acts of the administration may be questioned. The rules that have been developed to govern the various remedies available in administrative law have come to be known as the law of judicial review.

23. It is important to distinguish between the judicial review of a decision and its appeal. Generally speaking the appeal of a decision permits the reconsideration of the decision on its merits while review only examines the lawfulness of the decision. On appeal a judge may substitute his or her own opinion for that of the lower level judge, or may add reasons to the existing judgement. The judge who is reviewing an administrative decision, on the other hand, may only quash the decision or let it stand. Judicial appeals from federal agencies are generally made to the Federal Court of Appeal and are only possible under certain very specific conditions prescribed by legislation. We will concentrate on judicial review of administrative

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[14] Le Dain J. speaking for the Court in *Cardinal* v. *Kent* Institution [1985] 2 S.C.R. 643 at 655.

[15] Wade, *supra* note 1 at 5.

action, which is by far the most common means of reviewing the actions of the administration.

24. The types of remedies available at the federal level can be divided into two categories. First there are the extraordinary remedies, which are the traditional common law remedies that are specifically designed to review the activities of administrative authorities. These remedies are exercised by means of an application demanding the issuance of a prerogative writ. The second group of remedies are the ordinary remedies. These are remedies that are not only designed for the purposes of judicial review and are provided for by statute. We will examine each category.

EXTRAORDINARY REMEDIES: PREROGATIVE WRITS

25. The traditional common law means for the review of decisions made by the administration are *certiorari, mandamus,* prohibition *quo warranto* and *habeas corpus*. These remedies involve the review by a Superior Court of the legality of decisions by the administration.

26. Both *certiorari* and prohibition are used as a general means of supervision and control over any public body whose decision may affect the rights of an individual. They are available in cases where the body exceeds its jurisdiction, fails to act in accordance with natural justice, or in the case of a procedural defect. The difference between these two remedies is that while *certiorari* is used to quash decisions of inferior bodies, the writ of prohibition is used to prevent inferior tribunals from exceeding their jurisdiction before a decision is made.

27. *Mandamus* is a means of compelling a public body to perform its statutory duty. It is important to note, however, that where the duty involves an exercise of discretion, *mandamus* cannot compel a particular result.

28. Two other prerogative writs are *quo warranto* and *habeas corpus*. *Quo warranto* is a remedy that is used to question the legality of an appointment. A writ of *quo warranto* "asks by what warrant or authority a person holds a public office and ascertains whether he [or she] is rightfully entitled to exercise the functions claimed."[16] A writ of *habeas corpus* is most often used in criminal law, but it has application in administrative law in matters of immigration and extradition. This remedy allows a person who is detained illegally to apply to a judge of the Superior Court to obtain a writ of *habeas corpus* ordering the person under whose custody he or she is detained to bring him or her forthwith before a judge of the Court and to show the cause of the detention, so that it may be decided if such a detention is justified.

ORDINARY REMEDIES

29. Ordinary remedies include declaratory judgments and injunctive relief.

30. A motion or an action for a declaratory judgment allows a court to determine the rights and obligations of the parties in a dispute. The court declares the rights and obligations of the parties but does not make any coercive order. In other words, the court pronounces on the law without ordering any sanctions or ordering either party to do anything.

31. A party may also seek an order of injunctive relief which enjoins the government, or its agents, officers or employees not to do something or to cease doing something or to perform a particular act. Injunctive relief may be **prohibitive**, in that it orders that a certain act not be performed or **mandatory** if it requires a person to perform a certain act contrary to their will or desire (failing which the person is penalized).

32. As we can see from the above discussion the Court is vested with a number of mechanisms of supervision and control over a public authority whose decisions may affect the rights of an individual. In addition to the above remedies, an individual can, in some circumstances, make a claim for damages if he or she suffers financial loss because of the action or inaction of a public authority who subsequently turns out to be acting *ultra vires* his or her jurisdiction.

CONCLUSION

33. The question that we asked at the outset of this paper was: "How does administrative law contribute to an improved method of governing?" We have seen that in Canada the public

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[16] R. F. Reid and H. David, *Administrative Law and Practice*, 2nd ed. 1978 at 419

administration has the power to affect the rights and liberties of citizens in a number of ways. However, the powers of public authorities are subordinate to the law. This means that in exercising its functions the public administration must respect the Constitution. It must also respect the limits of its powers by not exercising its functions in a manner that was not intended by Parliament and it must not abuse its discretion. Finally, respect for the law requires that public authorities conform to the principles of natural justice which control the procedures under which discretionary decisions are made. Natural justice requires that people who will be affected by a decision be given an opportunity to have input into the decision and it also requires that the decision maker be unbiased. If a public authority fails to respect the law, administrative law provides citizens affected by the *ultra vires* act with the right to have the exercise of the power reviewed by the courts and to seek various remedies against the administration. Therefore, administrative law helps improve our method of governing by keeping the powers of public authorities within their legal bounds and by ensuring that the exercise of these powers conforms with the principles of good administration and fair dealing.

April 1996

The Offices of the Ombudsman, Human Rights and Equal Opportunities Commissioners

THE COURTS, THE OMBUDSMAN AND THE PUBLIC

Paper prepared for the Commonwealth Secretariat by Mr William Reid, Parliamentary Commissioner for Administration and Health Service Commissioner for England, Scotland and Wales

1 The functions of the courts and the Ombudsman are, in their different ways, to administer justice, to right wrongs, to uphold human rights, to mediate or arbitrate and to try to achieve for the citizen the standards of service promised by Governments. They should be seen as complementing each other, not as rivals. They operate in different ways. The legal process is adversarial. That of the Ombudsman is inquisitorial - and inquisitorial without sitting in public under the glare of the press. That confers on Ombudsmen different strengths, as senior legal figures have recognised. Lord Mackay of Clashfern, the Lord Chancellor, referred in his Hamlyn Lectures to Ombudsmen schemes as having gained the confidence and imagination of the public. He said "a characteristic all the Ombudsmen schemes have in common is their potential to adjudicate between disputing parties without the trappings or expense of going to the court".

THE OMBUDSMAN'S ROLE

2 More recently in his interim report on the civil justice system in England and Wales "Access to Justice" of June 1995 Lord Woolf wrote: "Ombudsmen schemes provide many advantages to the complainant. They are free and complainants do not need the assistance of lawyers. The Ombudsman may achieve what is needed by referring the complainant in the first instance to an internal complaints mechanism, or he may achieve a settlement without the formality of a full investigation by referring to an individual at the right level. I would recommend the relevant Government Departments to investigate whether there are areas where, with their encouragement, additional Ombudsmen schemes could be established with advantage.

In addition to their obvious function of handling individual grievances, the Ombudsmen, chiefly through the publication of annual reports, also have an important role in setting and maintaining standards of good practice within their specialist sectors. The courts, which have a broad general jurisdiction and do not share the Ombudsmen's investigative powers, are less well equipped to take on functions of this kind..... The public Ombudsmen are concerned with issues of maladministration which do not manifestly fall within the province of court proceedings and judicial review. While the courts' jurisdiction should not be curtailed in any way, there would be advantages if the public Ombudsmen had wider scope to take on issues which could be resolved by the courts. An Ombudsman's decision would not prevent a subsequent application to the courts."

3 If he is to fulfil his important role effectively and with the confidence of the public, like the Judge, the Ombudsman must have the expectation of remaining in office for an undisturbed tenure. It would be inappropriate for the Government to be able to remove the Ombudsman at whim without substantial constitutional guarantees of his independence in investigating complaints. His reports must carry absolute privilege and freedom from prosecution for defamation. He should have the authority to report periodically on investigations to the legislature or to the head of state or to the Government. He must have adequate financial resources and effective investigatory powers. Although his findings, unlike those of the Courts, are not enforceable in law, he must have at least the same powers as the Courts to require evidence and to obtain documents and papers. He needs to be able to see matters in their full context. As the President of the International Ombudsman Institute, Mr Marten Oosting of the Netherlands, has said "It may not suffice for the Ombudsman to regard the cases with which he deals as isolated incidents. Because he is confronted with many different cases, he can gain a more general understanding of problems and shortcomings in the way in which a given Government Agency operates. Prevention forms an essential element of his work and one that may be reflected in recommendations relating to specific cases being placed in a broader perspective." That is akin to the description of the work of an Ombudsman given by a former Australian National Ombudsman, Professor Dennis Pearce, who said it was a combination of fly swatting and lion hunting. The flies are the small cases which may be small in the eyes of the legislature or the Government but are of extreme importance to the individual citizen. As Dr Samuel Johnson observed to Lord Bute in 1762 "To interrupt your Lordship with such petty difficulties is improper and unseasonable; but your knowledge of the world has long taught you that every man's affairs, however little, are important to

himself". The lion hunting is exemplified by my predecessor's, Sir Anthony Barrowclough's, inquiry into the Barlow Clowes scandal and by the thematic studies of maladministration which during my time as Parliamentary Commissioner and Health Service Commissioner I have used in respect of areas of administration which have caused widespread distress to numbers of individual citizens and where redress is needed.

WHAT IS MALADMINISTRATION?

4 Where maladministration is not defined in statute law, it is a function of the Ombudsman to exemplify or illustrate from time to time what he considers is represented by that term. Among the examples I gave in my Annual Report for 1993 were unwillingness to treat the complainant as a person with rights; neglecting to inform a complainant on request of his or her rights or entitlement; knowingly giving advice which is misleading or inadequate; ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler; offering no redress or manifestly disproportionate redress; refusal to inform adequately of the right of appeal; cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use the service; and failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment.

5 The difference between what the courts do on judicial review and what the Ombudsman can achieve is this. The courts can quash a decision and require a fresh decision to be taken. The Ombudsman can invite the Government Department concerned to look again at its decision, to offer redress whether monetary or not; and to change its procedures so that the same situation is unlikely to recur. Here observe that Mr Justice Carnwath, in a case brought by trustees of a pension fund against the Pensions Ombudsman, ruled that, since courts do not have the power to set financial penalties on trustees for maladministration, there is no reason why the Pensions Ombudsman should instead. "There is no reason why a complainant should be in a better position because the dispute happens to be litigated before the Ombudsman than before a court", he wrote. Perhaps fortunately the Parliament of the United Kingdom in defining the jurisdiction of the Parliamentary, Health Service and Local Government Ombudsmen did not empower the holders of those offices to provide redress in that way. That is why I regard it as preferable to invite Ministers and other bodies within jurisdiction to make payments by way of redress for maladministration. For such payments their Accounting Officers answer to Parliament; and the relevant Ombudsmen are immune from Carnwath J's strictures.

STANDARDS OF SERVICE TO THE PUBLIC

6 Governments are increasingly setting out, sometimes in competition with the Opposition parties, their stalls by way of charter targets and standards of service to the public. The line I have taken is that, if targets are expressed as mandatory, or a promise has been given that the citizen has an expectation to compensation should they not be met or should they be missed by a specified period, the case for compensatory redress is strong. Otherwise targets are to be taken as indicators of a satisfactory or unsatisfactory performance rather than as a firm commitment that a specific performance will be achieved in every individual case.

7 Because of the marked increase in the number of applications to the courts for judicial review of Ministerial decisions, the British Government issued to its civil servants (and Ministers) a leaflet "The Judge over Your Shoulder". Its purpose is to encourage them so to act as to minimise the chance that their decisions will be quashed by the courts after a judicial review. In December 1995 the British Government issued to its servants a leaflet "The Ombudsman in Your Files" with the same purpose but with the Ombudsman rather than the courts in mind.

RELEASE OF INFORMATION

8 Both the courts and the Ombudsman have a function in discovery of the truth or of information. There is continuing debate about whether openness needs to be guaranteed by a Freedom of Information Act or by some other means. The United Kingdom Government chose a non-statutory code of practice on Access to Government Information and announced in July 1993 that they considered that the Ombudsman, rather than the courts, was more likely to influence the habits of public servants with a long tradition of secretiveness in persuading them to change their stance. There has been some degree of success in changing attitudes through Ombudsman investigations of complaints of refusal of information under the Code. To give one example from the United Kingdom, Her Majesty's Treasury refused to release a report on frauds in Government Departments and agencies on the ground that its circulation was limited to prevent details falling into the hands of fraudsters. When the Ombudsman investigated, the Treasury reviewed their refusal,

agreed to release the report subject to very minor deletions and promised to publish future reports. Less than a year later they have convened a conference on the subject. Whether that will meet public expectations - and the public generally has been very apathetic about using the new but not well advertised facilities - remains to be seen. Even with a Freedom of Information Act there should remain a significant role for the Ombudsman to perform.

INTERNATIONAL COMPARISONS

9 Over the last 10 years there has been a substantial increase in the number of countries establishing National Ombudsmen or Commissions on Human Rights. In some countries there has been a corresponding growth, in the context of giving more power to the individual citizen, of Complaints Adjudicators, accompanied by the publication of Charter statements in which the Government, both broadly and in relation to particular services have committed themselves to statements of the standards of service which citizens can expect from Government Departments and Agencies funded largely from public funds. The International Ombudsman Institute (which has had rapid growth as the numbers of states in varying regions of the world which have appointed Ombudsmen have increased) recognises that the classic Scandinavian model is not necessarily applicable to varied political structures. The Institute has therefore been prepared to accept as performing the functions of an Ombudsman bodies such as Human Rights Commissions, Control Yuans, and the Management and Co-ordination Agency in the Prime Minister's Office in Japan.

SCOPE OF OMBUDSMAN JURISDICTION

10 In May 1992 within the framework of the Conference on Security and Co-operation in Europe a meeting of Ombudsmen and Human Rights organisations considered the non-judicial protection of the fundamental rights of persons. After observing that the institution of Ombudsman had developed at different speeds in the countries of Europe and that it was a significant guarantee both in countries with a long Parliamentary tradition of democracy and in those countries emerging from a history of recent absence of democracy, the Conference concluded that ideally no area of public administration should be immune from the jurisdiction of the Ombudsman. Growing concern has been expressed in New Zealand Australia and in the United Kingdom that certain changes in the pattern of Government may have the effect of taking public utilities and other significant public services outside the purview of an independent and dispassionate investigator of complaints. In New Zealand the State-Owned Enterprises Act 1986 imposed on state enterprises certain obligations. Submissions were made supporting the removal of those enterprises from the ambit of the Official Information Act and the Ombudsmen Act. Those submissions emphasised the requirement to be as profitable and efficient as comparable private sector businesses, and maintained that the commercial nature of their operations was paramount and in some cases appeared to be to the exclusion of any other requirement. However Section 4 of the 1986 Act stated that every state enterprise should be a good employer and exhibit a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these interests when able to do so.

11 In his Annual Report for 1992-93 the Queensland Ombudsman made known to his Government his dissatisfaction that the Government Owned Corporations Bill proposed to remove totally from his jurisdiction certain agencies, electricity boards, harbours corporations, and so on amounting to possibly 20% of his current jurisdiction. The Ombudsman brought to the Government's attention the considerable research and debate going on as to whether corporatised bodies should be removed from an Ombudsman's jurisdiction. He made the point that many such bodies would be in monopoly or near monopoly situations and therefore would not be held accountable through whatever commercial constraints may exist in a competitive marketplace to protect the consumer and the public. He took the stance that, even if corporatised bodies were in a competitive situation, they were still publicly owned, handling public monies, performing public functions and representing the public interest. He did not regard it as appropriate that they be removed totally from his jurisdiction which was designed to ensure that public sector standards of accountability were observed.

12 In the United Kingdom the statutes which set down the jurisdiction of the Parliamentary Ombudsman and the Local Government Ombudsman make it clear that the Ombudsman may investigate a complaint about an action taken "by or on behalf of" an authority within jurisdiction. The Local Government Ombudsmen have taken the line that that includes the actions of firms or individuals undertaking work on behalf of a local authority. That applies whether the external contractor is engaged as a result of a compulsory tendering arrangement required by legislation or through

voluntary action by the authority. In one instance the Local Government Ombudsman investigated the actions of a QC engaged by a council to undertake an independent inquiry to examine allegations of corruption in the operation of street markets in its area. When there was a growth in the number of Agencies as distinct from Departments in 1992 the Government confirmed in response to a Parliamentary Question that the Parliamentary Ombudsman's jurisdiction would not be affected by those changes and members of the public would still have recourse to the Ombudsman in cases of maladministration by private sector contractors carrying out work done previously by Government Departments. A concern to members of the Select Committee on the Parliamentary Commissioner for Administration has been the changes which take functions previously undertaken by Government outside the area of Government altogether. One such example was transferring television licences to the British Broadcasting Corporation. What had previously been within the jurisdiction of the Home Office was therefore taken outside the Ombudsman's jurisdiction. Whether services are provided in-house or by contractors I see as vital the need for the providers to deal fairly with all, to keep adequate records and appropriate audit trails and to show willingness in justified cases to offer redress when matters go wrong - even if at a financial penalty to those providing the service.

REGULATORS AND COMPLAINTS ADJUDICATORS

13 In the United Kingdom the existence of regulators as watchdogs of public utilities has been the pattern for some years. All those regulators are in the purview of the Comptroller and Auditor General and within the jurisdiction of the Parliamentary Ombudsman. The complaints which reach him about their actions relate chiefly to the perception of members of the public of the way in which they have inadequately handled complaints about the industries within their terms of reference. Obviously the pattern of regulation and complaint handling in relation to public utilities varies from one country to the other. What is encouraging is the growth of voluntary Ombudsmen schemes where different companies in a particular sector of the economy will unite and appoint an Ombudsman with powers to investigate complaints and in some instances to award compensation for injustice. While that is encouraging, it is not comprehensive since not all companies in a particular sector agree voluntarily to belong to an Ombudsman scheme. It is perhaps significant that statutory Ombudsmen had to be established in England and Wales and in Scotland to take complaints about those who deliver legal services.

INNOVATION IN THE FIELD OF HEALTH

14 New ground is to be broken in the United Kingdom in 1996 by conferring on the Health Service Ombudsman the power, hitherto withheld specifically, to investigate complaints about action taken in consequence of the exercise of clinical judgment. The proposal was made in the light of recommendations by the Select Committee on the Parliamentary Commissioner for Administration and of the Wilson inquiry into Health Service complaints procedures. If as a result the Ombudsman is able to help patients and their families to have an explanation and an apology for an operation or an episode of care which has gone wrong without having to take the matter to court, that may make it possible to avert some long and costly legal proceedings, traumatic both for the complainant and for the doctor or other professional involved. Consequently the Ombudsman may also be a means of generally improving service standards and practices. In that way the interests of justice and of the citizen may be served in a new form. This is one example of the flexibility and adaptability of non-legal process provided by Ombudsmen. The use of Ombudsmen and adjudicators which has grown rapidly in many countries and in the private as well as the public sectors is likely to increase in the next few decades - not in competition with the courts but as an inexpensive alternative.

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THE OMBUDSMAN INSTITUTION

A MEMORANDUM BY THE COMMONWEALTH SECRETARIAT AND A PAPER PREPARED BY SIR JOHN ROBERTSON, FORMER CHIEF OMBUDSMAN, NEW ZEALAND

The Commonwealth Secretariat accords a high priority in all its activities to fair and just government. The Ombudsman is seen as an institution which will make a worthwhile contribution to this objective through directly contributing to enhancing the quality of government, including greater accountability to the people, improving relations between government and the governed, restoring faith in democracy, the elimination of maladministration and corruption in the delivery of government services, and the protection of basic human rights. These are matters covered by the Harare Commonwealth Declaration and which the Millbrook Commonwealth Action Programme is intended to address.

Consequently the Commonwealth Secretariat is prepared to consider appropriate proposals for assistance in the setting up of an Ombudsman institution, or in improving existing institutions. So far as existing institutions are concerned, appropriate assistance could cover reviews of legislation, reviews of operating procedure and administrative practices, and training workshops for investigators.

Commonwealth Secretariat
Marlborough House
London SW1Y 5HX

February 1996

THE OMBUDSMAN INSTITUTION

A Paper by Sir John Robertson, former Chief Ombudsman, New Zealand

THE PROBLEM OF DEFINITION

1. Establishing a definition of an Ombudsman is difficult, owing to the fact that in creating an Ombudsman the classical parliamentary model has been varied to suit different political philosophies and different cultural and socio-economic systems.

2. The classical model was once defined by the International Bar Association (IBA) as: "An office provided for by the constitution or by action of the legislature and headed by an independent, high level, public official, who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his own motion and has the power to investigate, recommend corrective action and issue reports."

3. In discussing the Ombudsman in the Commonwealth, it has to be recognised that while the bulk of those created are classical institutions in terms of the IBA definition there are also many Ombudsman institutions which do not fit this definition. The most important of these are known as executive (as distinct from parliamentary) Ombudsman. The main, and quite often only distinguishing feature is that they are appointed by, and answerable to the executive rather than Parliament. Examples of this are the Permanent Commission of Enquiry in Tanzania, and the Investigator-General in Zambia.

4. An executive Ombudsman may be supported by legislation or constitutional provisions. This paper does not set out to argue that every executive Ombudsman is disadvantaged by being accountable to the executive rather that the legislature, because clearly some may be doing the same things just as effectively as a parliamentary Ombudsman. However, even if that is so, the original concept of an Ombudsman inherited from its Scandinavian environment, is for an institution related to, or as an extension of, the role of the elected representatives of the people sitting in Parliament, and having the duty to hold the executive accountable to the people for it's actions. That is why so many existing Ombudsmen in the Commonwealth have been specifically appointed as officers of Parliament to emphasise that they are not just officials but an extra dimension of Parliament to improve the accountability process.

5. In conceptual terms therefore an executive Ombudsman cannot be part of the parliamentary machinery of accountability, and its independence to hold the executive accountable when it depends for its existence on the will of the executive may circumscribe its ability to perform and operate with the same freedom as the parliamentary Ombudsman. There is also the point that for credibility with the people who use the institution, it must be seen to be independent before its decisions will be accepted with confidence.

6. However as in so many cases the gap between concept and operation may be more apparent than real, but there are many critics of the executive Ombudsman who, in recognising the needs of developing countries to hone institutions to suit their political and social circumstances, still see allegiance to the executive as its greatest credibility risk, and its only weakness. Nevertheless many developing countries do not see this as a weakness. Mr A. Kiapi, writing in the Ombudsman Journal 90/91 about the Inspector-General in Uganda said: "The view of developing countries is that an Ombudsman must be an instrument of the President to be used in his capacity as guardian of administrative legality against excesses committed by officials subordinate to him."

7. For the purpose of this discussion paper the focus will be on the parliamentary or legislative Ombudsman, (with the possible exception only of the appointment process). There are many other complaint mechanisms where the officials are called "Ombudsman" but do not meet the criteria of the IBA for a legislative Ombudsman. For example there are single purpose parliamentary Ombudsmen (e.g. Ethnic, Health, Immigration etc.) officers handling complaints within an organisation, and a consumer type Ombudsman such as those set up in the private sector for insurance, banking etc. None of these are covered by this discussion paper.

WORLD COVERAGE

8. The Ombudsman is an institution which has already won acclaim and proved its worth all around the world. Apart from its Swedish precedent which has existed from about 1809, this acclaim has been earned mostly over the last 40 years when the great

majority of institutions were set up. In the last decade and a half the institution has had spectacular growth in Latin America, Africa, Asia, and Eastern Europe.

9. According to the latest issue of the International Ombudsman Institute Directory, the institution as defined by the IBA and including executive Ombudsmen with the same role, has been set up in 79 countries with an Ombudsman in 207 posts. There are hundreds more officials titled "Ombudsman" who do not fit the institution model used in this discussion paper.

10. Included in the 79 countries are 31 Commonwealth countries with a total of 69 Ombudsman posts which fall within the definition set for this discussion paper. The Ombudsman positions are at either national, federal, state, provincial, or local government level.

WHY AN OMBUDSMAN?

11. An Ombudsman cannot function effectively in a dictatorship or other form of totalitarian government. In such cases, if an Ombudsman is present it is usually because those who control the count want this institution to influence people to believe that the regime is sensitive to criticism of government activities. In fact any Ombudsman in these circumstances will have severe limitations on his/her ability to make any inroads into correcting proven maladministration. Consider for one moment how free the Public Complaints Commissioner in Nigeria has been to publicly criticise the human rights conduct of it's military dictatorship.

12. Modern democracy, whether it has evolved from old established democratic countries or developing nations, or totalitarian regimes, depends for its health and quality on an open and trusting relationship between the governed and the government. More and more people are demanding explanations for what their government's are doing and thinking, and more and more they expect to be treated by their government in a considerate and sensitive manner with full recognition of the rights of individual citizens to a life of quality within a democracy. The public will look for better fulfilment of this expectation as they advance into the next century.

13. The presence of an Ombudsman, or movement towards setting one up, is a natural step to assist the consolidation of a democracy and reduce the distance between officials and the people, and help them to understand each other. Always governments must strive to produce the means to soften relations between the government and the people. An Ombudsman institution with it's independence and moral persuasion has proven itself to be a major contributor to that objective. Any one or more of three important factors may be present to justify the role of an Ombudsman.

14. First, it may be a reflection of political maturity that a government will recognise that notwithstanding pride in the policies and practices of public administration implemented for the people, some maladministration in relationships between the governed and government will occur, and that it needs to be dealt with effectively and expeditiously.

15. Second, that such maladministration should occur is inevitable, given that governments have to work through hierarchies and bureaucracies. Vaclav Kraus the Czech Prime Minister said in 1995. "The battles with communism are yesterdays battles. Today's enemy is bureaucracy, and the people are losing the struggle." Not all countries will have bureaucracies of the type and culture of newly emerging Eastern European democracies but the Czech Prime Minister is correct to warn of the danger to people's rights of excessive, unrelenting, and insensitive public administration.

16. A democracy may not endanger fundamental rights to life and liberty, but within government bureaucracies burdened with the complexities of modern day policies and public administration there can be found in some a sense of self importance, of indifference, of obsession with precedents rules and processes and a lack of sensitivity to the problems that face ordinary people when confronted by the authority of the state.

17. The display of these characteristics may be entirely unintentional, but understandable in terms of the structure within which officials work. Some of the characteristics occur with more emphasis at the periphery where administration meets the people and where officials concentrating on detailed servicing find it harder to see clearly the objectives of public policy.

18. Third, the last few decades have been characterised by a series of trends and movements toward the definition, assertion and protection of human rights. While some countries have different views on what are acceptable standards of human rights, other countries subscribe to international protocols recognising those trends and movements which clearly enshrine enlightened values. The net effect of these, and the education process which has accompanied them encourages people to be more

questioning of government actions and to demand reasons for decisions. The growth of the Ombudsman institution around the world reflects the public demand for, and response to, these movements and trends. Such demands cannot reasonably be declined in this enlightened age.

19. A government may feel that these three factors do not justify an Ombudsman, when the government itself can set up internal systems, institutions, and checks and balances, which meet the problems outlined. Be that as it may, it has been shown all round the world that the public does not have confidence that the government's bureaucracy will itself be independent enough to resolve the disputes which will inevitably arise between the people and officials. They do not see that it is fair and just for government to be judge in its own cause. If any system which is set up to resolve conflicts between the state and its citizens is to have the confidence of the people, it has to be seen to be independent. This simple requirement has most often driven the growth of the Ombudsman institution around the world.

20. Being a public office directly accessible to the people, with independence and wide powers of investigation, it safeguards an individual's rights to good governance. An Ombudsman's conclusions are not legally binding but are seldom refused, and the institution stands alongside Parliament and the Courts in monitoring the actions of public agencies. While the institution's role is that of a public "watchdog" it does however have a marked impact, through it's activities, on the improvement of public administration in all its areas of jurisdiction.

21. The Ombudsman should not be seen as a threat to anyone or any institution. It has to be assumed that all democratic governments wish to accord justice and fairness to it's citizens, and that all public officials wish to improve their standard of administration. Frequently the Ombudsman's investigation supports the official action complained about. Recommendations are supported by the intellectual integrity of reasons, which are not only persuasive in the way they are expressed, but also for their moral force.

22. Nor should an Ombudsman be seen as a threat to the Courts or Parliament. The Courts determine matters of law, using appeal or review processes to avoid an unfettered power, and to apply or determine the law. Law making is Parliament's role, but decisions of the Courts and recommendations of the Ombudsman will be seen by Parliament as strong reasons for creating new law or amending old law. The Ombudsman is concerned with the process of administration, whether laws and policies are administered fairly, reasonably and in a non-discriminatory way. Where maladministration is found the moral force of the Ombudsman is used to correct the injustice, and improve the administration which caused the problem. There is a complementarity between the Courts, the Parliament, and the Ombudsman, which is not a creation of opposites, but a contrast between different methods of oversight of the executive.

ESSENTIAL CHARACTERISTICS OF AN OMBUDSMAN INSTITUTION

23. Basically there are three separate characteristics to a successful Ombudsman institution- its independence, its flexibility and its credibility - and these are now closely examined. (For this section the author draws heavily on his concluding summary to an international conference the papers of which were published by the international Ombudsman Institute in 1995 in a book entitled *The Ombudsman Concept*.)

(a) Independence

Looking first at independence, there are few who will disagree that an Ombudsman needs to be able to work from a position of independence. Because an Ombudsman comes in both parliamentary and legislature models and in different organisational forms a general presumption of independence is inadequate without further explanation. That explanation may best be set out in answer to three question: independence from whom or what?, independence for what?, and is it total independence?

So far as the first question is concerned there is an obvious need for an Ombudsman to be independent from any organisation over which jurisdiction is held. As jurisdiction encompasses the actions of executive government, s/he must be able to operate without being influenced by any concurrent or subsequent action which a government might take to circumscribe freedom of operation. As the people's "watchdog" it is not enough to be independent in fact, but the Ombudsman in working clothes has also to be seen to be independent by those who use its services. For instance, it is desirable that the Ombudsman not be a serving career civil servant who would normally look to the civil service for a future career. This applies also to investigators who are best seen as employees of the Ombudsman and not civil servants.

Organisations subject to jurisdiction also need to see and perceive the Ombudsman as

impartial and independent. S/he must not be seen as an advocate or counsel for the complainant. The independence necessary to ascertain all the facts, assess them impartially and draw conclusions from the facts will be eroded if an Ombudsman is inclined to advocacy on behalf of the complainant. Such advocacy would cause loss of confidence and credibility with organisations subject to jurisdiction.

Independence is also necessary from special interest groups in society who may wish to influence issues through having an Ombudsman conditioned to draw conclusions in line with their interests. "Capture" by such interests must always be guarded against, and this is why an Ombudsman should give up on appointment all other activities, special interests and offices of profit. Any conflict of interest will affect independence.

The second question, "independence for what?" raises very pointedly the reasons for independence, and the personal integrity of the office holder. Independence is necessary so that the accumulated wisdom of an Ombudsman, by virtue of the office held, and the experience s/he brought to it, may be contributed freely and impartially to the conclusions of the office without being committed to extraneous or outside influences.

The third question, "is it total independence?" is a little more difficult to answer. It is generally agreed that an Ombudsman's independence is compromised by some form of accountability. However there are several aspects of accountability.

An Ombudsman must be accountable to the governing law, or constitutional provision which sets up the office. Many precedents of judicial review exist where the Ombudsman's level of accountability is not enough. An Ombudsman should not be able to escape accountability to the people for what is done under a cloak of independence. There is a necessity to publish reports, behave impeccably, give reasons for decisions, and promote in public the role of the Ombudsman. Reaching the people is an important aspect of accountability because a right to complain enshrined in a constitution, or in stature, is not a right at all if certain sections of the population are denied access to it through ignorance of its existence.

There is also need for accountability for the resources used to discharge the role. Independence necessitates that resources are made available by Parliament and not the executive but it is not an excuse for demanding unlimited budgets and presenting inadequate records of utilisation of those resources. There must be sufficient resources for the role, but guaranteed independence in operation does not obviate the need to be transparent and accountable in the use of those resources. Performance measures need to be formulated and published, all resources used need to be subject to outside audit, and an Ombudsman should be prepared to defend effectiveness in the use of resources before the elected representatives of the people. Performance measurements however should not be extended to the conclusions of an Ombudsman on case work. That is a judgemental role relying on the experience of the office holder.

There is no unanimity on the organisational model for an Ombudsman which best protects independence. So many different cloths have been cut for an Ombudsman, the variety being by the requirements of the host country in relation to its political and social traditions. The ideal concept for an Ombudsman does not depend on its organisational form, for its effectiveness. Whatever organisational model is decided, independence can be accommodated in greater or lesser form. In the end the way it works, or is permitted to work, by the political regime of the country will determine its level of independence in operation.

(b) Flexibility

There is no doubt the Ombudsman concept has shown great flexibility in operation, and in meeting the roles it has been called upon to perform. Basic grievance resolution through a complaint-driven process will always remain the main thrust of the Ombudsman concept and indeed is usually the main driving force for the setting up of an Ombudsman.

Within that basic role most Ombudsmen in the Commonwealth have shown considerable flexibility:

- to design unique methods of taking and investigating complaints, and of drawing conclusions according to the needs of indigenous people, ethnic minorities, refugees and unusual leadership norms in society, e.g. communes

- to encompass basic human rights issues as part of the grievance resolution process for maladministration

- to improve administrative processes which are prone to the creation of grievances through systemic investigations and recommendations to the Executive or Ministers

- to act as an honest broker to resolve major issues of dissent between the governed and the government

- in the conduct of investigations and in recommending remedies most calculated to achieve substantial justice as between the individual and the state.

The Ombudsman institution has also shown flexibility to undertake functions which could be said to be related to, but not part of the basic role. Examples of such cases are:

- undertaking alternative dispute resolution to settle by mediation or other means disputes between minorities or other groups and the state

- in making the machinery of government more transparent and more participative with the people of a nation. Many Ombudsmen are now involved in freedom of information programmes, for example in New Zealand, the United Kingdom and Australia

- being able to encompass a role of "watchdog" on the behaviour of a country's leadership. Such functions are, for example, part of the role of the Ombudsman Commission in Papua New Guinea

- the concentration on human rights issues as distinct from maladministration.

Clearly the Ombudsman as an institution is flexible enough to operate in a wide range of at risk social situations where improvement from the public's point of view merits the intervention of an independent and credible review mechanism.

(c) **Credibility**

To be effective the Ombudsman institution must have credibility with all with whom it operates. It is wrong to believe that credibility arises from the model itself - it has to be earned. And in the process of earning credibility, the personal characteristics of the holder of the office in matters such as personal integrity, courage and sensitivity to the people are in the forefront.

The personal factor aside, there are certain inherent characteristics which assist in the earning of credibility, both with complainants and organisations subject to jurisdiction. Some of these characteristics are:

- appointment of the Ombudsman with the support of not less than two thirds (but preferably unanimously) of the people's representatives sitting in Parliament

- the extent to which the institution meets the test of independence and flexibility covered in (a) and (b) above

- the extent to which it operates in an impartial and non-political way so that people can rely on it to decide issue without fear or favour and without cost. All the socio-economic levels in society may access it by direct contact

- that it relates directly to the people in that it is complaint driven and is open at all times to receive, in a sensitive and dignified manner, people who have been unable to resolve their differences with government agencies, and wish to have a just and fair resolution of their grievances

- that the Ombudsman is not an advocate for the complainant, but is one who investigates the facts of the grievance, reports on it, makes recommendations, and gives reasons for conclusions, whether or not the complaint is sustained

- where the Ombudsman, in appropriate cases, clears a jurisdictional organisation of allegations of maladministration or corruption with the same impartiality and intellectual reasoning as it will use to sustain a complaint. The Ombudsman has no favourites

- fair and just processes of investigation which reach conclusions in an acceptable time frame

- an ability to communicate to people through reporting and public education programmes, the result of the work of the Ombudsman in a manner calculated to discharge public accountability and ensure that every citizen knows when and how it is appropriate to appeal to an Ombudsman

- the manner in which an Ombudsman offers advice and guidance even when jurisdiction does not exist.

CONCLUSION

24. Any short description of the Ombudsman institution cannot incorporate all the nuances that exist where it operates in different parts of the world. All that a paper of this magnitude can do is

to describe its role and processes in the light of a wide spectrum of international experience.

25. The institution is not just a concept: it is an actuality, alive and well in all parts of the world. Its independence, flexibility, and credibility is being seen by governments and the governed as a vehicle to reinforce the people's rights to fair and just treatment, and an instrument which can tidy up the extremes of maladministration, and help to bring about good government.

26. The Ombudsman institution is not however a panacea for curing all problems between the government and its people. It takes its place with other legislative and constitutional agencies, retaining its essential characteristics which distinguish it from other social organisations. It has proved itself adaptable to change, and its visionary outlook should keep it relevant to the people on into the 21st Century.

THE COMMONWEALTH AND HUMAN RIGHTS EDUCATION

A Memorandum by the Commonwealth Secretariat

INTRODUCTION

1. The 1995 Commonwealth Oxford Conference on Human Rights Education made recommendations on matters of importance for Law Ministers.

2. The purpose of this Memorandum is to draw the attention of Ministers to the recommendations of the Oxford Conference, and to seek the guidance of Ministers on these recommendations.

3. Given the legal basis of many human rights, Law Ministers have a key role to play in developing and strengthening programmes of human rights education.

4. The **Oxford Declaration on Human Rights Education**, the **Framework Document** for developing a comprehensive programme for human rights education and training and the **Agenda** for the decade on human rights education and training appear at Annexes A, B and C respectively.

BACKGROUND

5. The Harare Commonwealth Declaration of 1991 articulated the fundamental political values of the Commonwealth and its integrated approach to democracy, human rights and development. The Heads of Government Meetings in Limassol in 1993 and in Auckland in 1995 reaffirmed the commitment to human rights as an essential ingredient of these fundamental political values. In the Auckland Communiqué, Heads of Government adopted the Millbrook Commonwealth Action Programme to fulfill more effectively the commitments to fundamental values contained in the Harare Declaration.

6. In the Auckland Communiqué, Heads of Government also confirmed the importance of human rights education by requesting the Secretariat to assist member governments to promote greater awareness, education and training in human rights.

7. The Human Rights Unit of the Commonwealth Secretariat is centrally involved in promoting these fundamental principles and the Unit's main means of doing so is through human rights education.

8. The importance of education in the human rights field has recently been emphasised by the United Nations Declaration of 1995-2005 as the Decade of Human Rights Education. As an early contribution to this Decade, the Human Rights Unit organised the Commonwealth Oxford Conference on Human Rights Education which was attended by representatives from government, educational institutions and non-governmental organisations (NGOs). This Conference developed the Oxford Declaration on Human Rights Education and established a Framework and Agenda for human rights education in the Commonwealth for the decade and beyond.

THE OXFORD CONFERENCE RECOMMENDATIONS ON HUMAN RIGHTS EDUCATION

9. The attention of Law Ministers is drawn to the recommendations of the Oxford Conference.

10. The Oxford Declaration on Human Rights Education (Annex A) recognised human rights education as "an essential requirement for the realisation of the goals of human rights and fundamental freedoms and democracy and development". The Declaration particularly recognises that "effective human rights education is essential to the development and implementation of national human rights laws in Commonwealth countries". In this context, the Declaration calls upon the Commonwealth and its member states to "encourage and assist member governments to take all necessary steps to develop strategies for comprehensive human rights education".

11. The Oxford Conference envisaged a framework within which such strategies for comprehensive human rights education could be developed. The Framework Document (Annex B) proposes three stages of assessment, planning and implementation for a comprehensive programme developed to suit the particular circumstances of each country and region.

12. The Oxford Conference outlined an Agenda for the Decade of Human Rights Education. The Agenda (Annex C) proposes regional and national targets for the Decade.

RECOMMENDATIONS OF IMPORTANCE TO LAW MINISTERS

13. The Oxford Conference recommended an agenda of national and regional action on human rights education with a pan-Commonwealth conference for the purpose of a mid-decade review targeted for the year 2000.

14. At the regional level, the Conference recommended the co-ordination of human rights education by holding regional conferences and developing regional action plans.

15. At the national level, the Conference recommended:

- that national conferences are held to review current human rights activities and to develop strategies for comprehensive human rights education;
- that existing human rights programmes within government and professional institutions are identified and examined;
- that the national conferences develop national action plans to implement human rights education programmes at all levels;
- that national human rights institutions are established and strengthened;
- that human rights resource, research and information centres are established.

CONCLUSION

16. The Ministerial forum has great potential for the Commonwealth in addressing the strategic legal aspects of the Commonwealth Programme for Human Rights Education. The Law Ministers Meeting also provides an opportunity for Ministers to carry forward the Commonwealth's fundamental principles through human rights education.

17. With their responsibilities for policy development and implementation, Law Ministers can play a key role in promoting human rights education at national, regional and pan-Commonwealth levels. They are uniquely placed to identify how human rights education might most usefully be developed in a legal framework and most effectively implemented at each of these levels.

18. The Secretariat looks to this Meeting for guidance as to the most effective way ahead.

POSSIBLE ACTION BY THE MEETING

19. The Meeting may wish to:

(a) endorse the Oxford Declaration;

(b) consider how Law Ministers may contribute to the Commonwealth Programme for Human Rights Education;

(c) request the Secretariat to provide any necessary assistance;

(d) remit the matter to the next meeting of Senior Officials of Commonwealth Law Ministries for a review of progress made in the Commonwealth Programme of Human Rights Education.

COMMONWEALTH CONFERENCE ON HUMAN RIGHTS EDUCATION AND TRAINING. CHRIST CHURCH, OXFORD, 11-14 SEPTEMBER 1995

OXFORD DECLARATION ON HUMAN RIGHTS EDUCATION

Noting the Commonwealth Declaration adopted by the Heads of Government in Harare in 1991 which pledges the Commonwealth and its member states to work with renewed vigour, concentrating especially on:

- the protection and promotion of the fundamental political values of the Commonwealth:
  - * democracy, democratic processes, and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;
  - * fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief.

Noting also the Communiqué by the Commonwealth Heads of Government in Cyprus in 1993 in which they:

- affirmed the importance of the Vienna Declaration and Programme of Action adopted by the June 1993 World Conference on Human Rights; and
- reiterated that all human rights are universal, indivisible, interdependent and interrelated: and
- stressed that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.

Noting further the increasing trends towards liberalisation and privatisation within the economies of many Commonwealth countries and the consequent need for human rights education to address the impact of the exercise of increased power by the private sector on the enjoyment of human rights

Recognising that effective human rights education is essential to the development and implementation of national human rights laws in Commonwealth countries

Further recognising the necessity to make human rights education relevant to the needs of local communities

Taking into consideration the equality, universality, indivisibility and inter-dependence of all human rights as reaffirmed in the UNESCO Plan of Action adopted at the Congress of Human Rights in Montreal in March 1993 and the World Conference on Human Rights in Vienna in 1993

Emphasising that human rights education underpins the realisation of the goals of human rights and fundamental freedoms and helps to promote democracy and development:-

1. The Commonwealth Conference on Human Rights Education and Training committed to ensuring the effective Implementation of the recommendations of this conference, calls upon the Commonwealth and its member States to:
   - take cognisance of the Framework for developing a comprehensive programme for human rights education and training and to develop and implement within the framework, activities to suit the particular circumstances of each country and region;
   - strengthen the Human Rights Unit of the Commonwealth Secretariat; give more prominence to human rights education in Commonwealth Programmes by allocating appropriate resources and making human rights education an integral part of Commonwealth activities;
   - target Commonwealth programmes of human rights education at all groups, including vulnerable groups particularly, women, children, the aged, refugees, people with disabilities, rural communities, the urban poor, minorities and people affected by HIV/AIDS;
   - encourage and assist member governments to take all necessary steps to develop strategies for comprehensive human rights

education, including the setting up of national human rights institutions;

- develop national plans to implement human rights education programmes;

- encourage and support Commonwealth governments to implement formal and informal human rights education programmes in collaboration with NGOs involved in human rights education;

- include human rights education in formal education and training at all levels, including schools, tertiary institutions, vocational training and adult education programmes;

- assist and support NGOs involved in Human Rights Education Programmes in Commonwealth countries.

2. The Conference also calls upon all inter-governmental institutions and non-governmental organisations of the Commonwealth to seize the opportunities and challenges presented by the UN Decade on Human Rights Education to ensure the development of comprehensive and effective programmes on human rights education.

3. The Conference further calls upon Commonwealth Governments, to strengthen the capacity of the Commonwealth to respond to requests from member states for assistance in entrenching human rights education as an essential requirement for the realisation of the goals of human rights and fundamental freedoms and democracy and development.

COMMONWEALTH CONFERENCE ON HUMAN RIGHTS EDUCATION & TRAINING CHRIST CHURCH, OXFORD, 11-14 SEPTEMBER 1995

FRAMEWORK FOR DEVELOPING A COMPREHENSIVE PROGRAMME FOR HUMAN RIGHTS EDUCATION AND TRAINING

NATIONAL LEVEL

1. **Assessment Stage**

   - National Conference on developing strategies for human rights education leading to
   - Development of a national plan of action including:
     - Determining Legal Framework for the protection of Human Rights
     - Status of member countries regarding International Human Rights Instruments
     - Governments taking the initiative to establish planning committees including representatives from government, NGOs and other experts from civil society
     - Identification of key areas for human rights education
     - Survey of available programmes
     - Identification of available resources/materials
     - Identification of the roles of government and other organs of civil society and how their activities might be coordinated

2. **Planning Stage**

   - Strengthening capacities for training (including training of trainers)
   - Establishment and strengthening of National Human Rights Institutions
   - Developing programmes and courses for target groups
   - Development and production of directory of institutions, resource persons, including their credentials
   - Development and production of relevant materials, including formal and informal texts
   - Development of appropriate curricula for training of target groups
   - Development of resource and research centres
   - Making use of the media
   - Making use of forums in civil society such as religious, community and village meetings

3. **Implementation Stage**

   - Dissemination of materials
   - Holding of training programmes, workshops, talks and establishment of electronic media networks
   - Making full use of the media
   - Need to review and monitor the implementation programme

REGIONAL LEVEL

- Holding of widely representative regional workshops for relevant target groups
- Development of regional networking, resource and research centres
- Development of programmes to facilitate the electronic transfer of information

ROLE OF THE COMMONWEALTH SECRETARIAT

- Assisting with the preparation and holding of National Conferences

- Coordinating dissemination of materials
- Production and dissemination of Training Manuals
- Receiving and disseminating progress reports by member states when so requested
- Development of an information data base for the Commonwealth
- Liaising with other international human rights organisations in order to facilitate the obtaining of relevant materials for implementing programmes
- Ensuring that human rights education is on the agenda for the forthcoming Commonwealth Heads of Government Meeting
- Providing training and advisory services during the implementation of programmes including training in information technology
- Strengthening the Human Rights Unit of the Legal and Constitutional Affairs Division

COMMONWEALTH CONFERENCE ON HUMAN RIGHTS EDUCATION & TRAINING CHRIST CHURCH, OXFORD, 11-14 SEPTEMBER 1995

AGENDA FOR THE DECADE ON HUMAN RIGHTS EDUCATION AND TRAINING

FIRST PHASE

NATIONAL LEVEL

1. **Target for end of 1996**

   - National Conference to Review Activities and Develop and Adopt
   - National Plan of Action.

2. **Targets for 1996-97**

   - Determine Legal Framework for the promotion and protection of Human Rights
   - Determine status at National level regarding implementation of international instruments
   - Identify and examine existing programmes within government and professional institutions
   - Identify local NGOs and their areas of coverage
   - Compile directory of local NGOs
   - Establish National Coordinating Committee to Implement Plan of Action
   - Develop cooperation between government and civil society
   - Commence work on data base of information
   - Where possible, National Human Rights Institutions should be established

3. **Targets for 1997-98**

   - Establishment and strengthening of National Institutions
   - Establishment of research, resource and information centres, where necessary

4. **Targets for 1998-99**

   - Implementation of Training programmes for public officials
   - Implementation of human rights education programmes in the curricula of formal education and training institutions and in the non-formal sector
   - Evaluation

REGIONAL LEVEL

1. **Targets for 1996-7**

   - Regional review of existing activities and data, including identification of regional training programmes

2. **Targets for 1997-8 onwards**

   - Regional Conferences to review on-going activities and coordinate future activities
   - Establish regional research and resource centres
   - Roster of regional experts
   - Setting up of regional training programmes
   - Evaluation of regional programmes

ROLE OF THE COMMONWEALTH SECRETARIAT

- Strengthening of the Human Rights Unit
- Reviewing and coordinating pan-Commonwealth activities
- Facilitating the setting up of national/regional research and resource centres
- Assisting with national capacity building for human rights education on request by member countries
- Providing materials, manuals and access to electronic media
- Facilitating a pan-Commonwealth review conference in 2000

SECOND PHASE 2000-2005

Renewed commitment

Commence implementation of activities under revised Framework

YEAR 2005

Commonwealth Conference to review progress and plan future activities for the Commonwealth

NATIONAL HUMAN RIGHTS COMMISSIONS - NATIONAL AND INTERNATIONAL PERSPECTIVES[1]

A Paper prepared for the Commonwealth Secretariat by Brian Burdekin, Special Adviser to the United Nations High Commissioner for Human Rights on National Institutions, Regional Arrangements and Preventive Strategies[2]

INTRODUCTION

"The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information and education in human rights... The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level."[3]

1. Human rights now constitute a major strand in the fabric of international relations. Since the adoption of the Universal Declaration of Human Rights in 1948, a comprehensive body of international rules and standards has been developed, covering almost every sphere of human activity. Upon this substantial normative foundation has been built an embryonic network of international and regional human rights machinery - intended to ensure that these international instruments are respected and implemented.

2. While these mechanisms are important, and must be supplemented and strengthened, it is essential to recognize that the practical task of protecting human rights is primarily a national one - for which each state must ultimately be responsible. The current limitations of global and regional systems must be realistically appraised. The complaints procedures of the European Court of Human Rights, or of the United Nations Human Rights Committee, for example, will never be able to deal with more than a very small proportion of human rights violations. International investigators will seldom be able to do more than highlight trouble spots. The ability of a state to effectively discharge its responsibilities in the area of human rights will therefore depend predominately on the strength of its domestic institutions. A pluralist and accountable parliament, an executive which is ultimately subject to the authority of elected representatives and an independent, impartial judiciary are the minimal requirements in this respect.

3. These basic "institutions" must clearly be supported by other mechanisms. The development of a culture of human rights at the national level depends on the existence of a vigorous civil society - one which encourages the formation of community groups, which not only tolerates but encourages diversity and which enjoys a free and responsible press. One particularly useful mechanism for protecting individual liberties and freedoms, located somewhere between the sphere of government and that of civil society, is the "national human rights institution". This term is now commonly used to refer to a body which is established by government, under the constitution or by law or decree, for the specific purpose of promoting and protecting human rights. A variety of different institutional structures fall within this definition - including some types of ombudsmen and national human rights commissions.

4. This brief paper focuses on national human rights commissions - a concept defined in the first section. Part Two provides an illustrative (rather

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1 I would like to express my thanks to Anne Gallagher, Human Rights Officer in the United Nations Centre for Human Rights, for her assistance in preparing this paper. Additional technical information on the structure and functioning of human rights commissions and similar bodies may be found in the United Nations Publication: *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4, United Nations, New York and Geneva, 1995. (Copies available from the United Nations Centre for Human Rights, Geneva).

2 Mr Burdekin was previously Federal Human Rights Commissioner of Australia (from 1986-1994).

3 Vienna Declaration and Programme of Action, (adopted by the World Conference on Human Rights, Vienna, 25 June 1993) (A/CONF.157/24 (Part I, paragraph 36)).

than definitive) overview of the work of such commissions - with examples drawn from several Commonwealth countries and others. Aspects of the relationship between national human rights commissions and the courts are discussed in Part Three. Part Four outlines the basic features of an effective human rights commission. Part Five touches on recent developments in the area of national institutions. (The *Principles Relating to the Status of National Institutions*, which were adopted by the United Nations General Assembly in 1993, are reproduced in the annex to this paper).

DEFINING A NATIONAL HUMAN RIGHTS COMMISSION

5. Human rights commissions are generally concerned with a wide range of issues, usually including the protection of civil and political rights and the prevention of discrimination. Some commissions have jurisdiction over the public and private sector. Others are restricted to acts or practices occurring in the public sector. Commissions may also be empowered to promote and protect economic, social and cultural rights. The precise authority and functions of each particular commission are defined in the constitutional provisions, legislative acts or decrees under which it is established. Some commissions are limited to protecting rights prescribed in the national constitution. However, an increasing number are empowered to promote and protect human rights which are set out in international human rights treaties and other instruments. Several commissions which are about to be established in Commonwealth countries (for example, Papua New Guinea) will have a mandate to protect rights enshrined in the national constitution and in relevant international instruments.

THE WORK OF HUMAN RIGHTS COMMISSIONS

(a) Investigating alleged violations of human rights

6. One of the most important functions with which a human rights commission can be entrusted is the investigation of complaints from individuals (and sometimes from groups) alleging violations of human rights. Depending on the jurisdiction of the commission, these rights may be those enshrined in domestic law and/or those set out in international treaties which the state concerned has ratified. (These may be binding on the state in international law but may not have been given effect by domestic legislation in countries where treaties are not "self-executing"). The existence of a national mechanism with the power to investigate abuses and provide relief to victims can, of itself, discourage acts or practices inimical to the enjoyment of human rights.

7. In order to discharge its investigative responsibility effectively, a commission may be granted a range of powers enabling it to gather evidence and question witnesses. (Even if used only occasionally, these powers are important in ensuring that the person or body complained against cannot frustrate the investigation by refusing to co-operate). While there are considerable differences in the procedures followed by various commissions in the investigation and resolution of complaints, a number rely on conciliation and/or arbitration. In the process of conciliation, the commission attempts to bring the parties together to achieve an agreed settlement. If conciliation fails to resolve the dispute to the mutual satisfaction of all parties the commission may be able to resort to arbitration or a formal hearing, following which it may issue a determination. Human rights commissions are not usually empowered to impose legally binding decisions on parties to a complaint. This does not mean, however, that the settlement or remedial steps recommended by the commission can be ignored. In some countries, a special tribunal (constituted either independently of the commission or by senior members of the commission not previously involved in the case) has authority to hear and determine issues arising from an unresolved complaint. In other cases the commission may be able to transfer matters to the regular courts for a final and legally binding decision or for enforcement of the determination made by the commission. In several Commonwealth countries this is a rapidly evolving area of the law.

(b) Conducting public enquiries

8. Some human rights commissions are also empowered to conduct public enquiries on their own initiative. This is a particularly important power - in effectively addressing violations of the rights of the most vulnerable and disadvantaged groups in society; the homeless, mentally ill, those with intellectual disabilities and others - many of whom are not in a position to lodge individual complaints. (One recent example of the effectiveness of such activities was a major enquiry concerning the plight of homeless children, conducted by the Australian Human Rights Commission, which revealed serious deficiencies in government policies and practices. The recommendations made in the Commission's report were largely accepted by the Government and led to approximately $100 million being allocated by federal and state governments to ensure that the basic rights of these particularly vulnerable children were protected.)

(c) **Providing advice and assistance to governments**

9. Another important function of national commissions is providing assistance and advice to government in the field of human rights. The mandate given to a commission in this respect can be framed in different ways. Some are granted a general authority to bring matters concerning human rights to the attention of the parliament, the executive and/or the judiciary - to assist these institutions in promoting and protecting human rights. Commissions are variously able to submit opinions on proposed or existing legislation directly to parliament; to initiate and assist in the drafting of new legislation; to comment on existing legislation; or to intervene in legal proceedings involving questions of human rights (usually with the proviso that leave must be obtained from the court). Commissions may also be entrusted with responsibility for drawing governments' attention to situations of human rights abuse and making specific proposals aimed at ending such abuse. A number of human rights commissions are also playing an important role in monitoring the implementation of international human rights standards and assisting governments to fulfil their reporting obligations to various international human rights treaty-bodies.

10. The investigative and advisory functions of a national human rights commission are often interrelated. A commission which is able to receive and act upon individual complaints of violations is well-placed to identify areas where change is needed in legislation, administrative practices or policy. Similarly, a commission with power to initiate broad public enquiries into important human rights issues will be well-placed to comment on the need for systemic change

11. A capacity to advise will, of course, only be useful if there is a corresponding willingness on the part of government and its agencies to consider and act upon the information presented. Governments interested in maximizing the usefulness of national commissions should therefore ensure mechanisms exist for responding to such advice. If the recommendations of a national commission are ignored without reason, that institution will have little incentive to continue to perform these important tasks well.

(d) **Human rights education**

12. Perhaps the most important role of a national commission is to educate individuals that they have rights - balanced by responsibilities - which governments, the private sector and other individuals must respect.

13. As recent massive violations of human rights in Europe and Africa have graphically demonstrated, remedial action to stem atrocities emanating from ethnic and religious intolerance is extremely difficult. There is a growing awareness that preventive strategies must therefore increasingly absorb our attention and resources - and that among the most effective of these are appropriate education and training in human rights. (Indeed, without these, no other preventive strategy can or will succeed.)

14. Almost without exception, national human rights commissions are entrusted with this task. This function can involve a variety of different activities including the collection, production and dissemination of information; the organization of promotional events and the development and implementation of training programmes for a variety of audiences. National commissions have been quick to focus their attention on the need to develop practical strategies for effective education, not only in the more formal settings of primary, secondary and tertiary educational facilities, but also in the critical areas of training for police, prison, paramilitary, military and security forces.

15. Recent activity by national commissions has also reflected the evolving international debate. In the past three months, important conferences to address these issues have been hosted by the Philippines Human Rights Commission (in December 1995 in Manila) and the National Human Rights Commission of India (in February 1996 in New Delhi). The Manila meeting, which focused, significantly, on "Human Rights Education for Development", produced a consensus among governments and national institutions attending that:

"Human rights education must embody the right to development. At the same time development programs and activities must uphold human rights in all its dimensions."

16. This principle is important in that it accords appropriate recognition to the central importance of the right to development - a right as yet inadequately recognized in some quarters and of particular significance in many countries of the Commonwealth. The reference to "human rights in all its dimensions" is also significant - a reflection of the growing consensus that all human rights are interdependent and interrelated and a recognition that western preoccupation with civil and political rights needs to be balanced - including by

institutional structures which accord appropriate priority to the rights to adequate housing, health, education and other basic economic and social rights.

RELATIONSHIP BETWEEN NATIONAL COMMISSIONS AND THE COURTS

17. A national commission, irrespective of the breadth of its powers or the efficiency of its operation, is not, of course, in any sense, a substitute for a properly functioning judiciary. However, it has become increasingly obvious in recent years, even in developed countries, that the courts are, in reality, inaccessible to a large proportion of the population because of the extremely high costs involved. (Even in countries with substantial legal aid programmes, very few provide funding to pursue complaints of human rights abuses). There is, therefore, a demonstrable need, in all countries, for a mechanism which permits the informal, speedy, effective and cheap resolution of human rights complaints.

18. It is encouraging that national human rights commissions which have been established in several Commonwealth countries are effectively addressing this need. The quasi-judicial nature of many national commissions means they are not only more accessible, but also have the capacity to resolve complaints more speedily than the courts. Most commissions are able to investigate complaints without recourse to cumbersome rules of evidence and procedure. Several also have the power to settle complaints by conciliation or arbitration as described above - procedures which are not only more "cost effective" than more traditional adversarial or inquisitorial procedures, but are more "user friendly" to groups which have traditionally been disempowered and frequently find the trappings of traditional courts quite intimidating. Conciliating disputes is, in a number of Commonwealth countries, also the most culturally appropriate way of dealing with human rights violations.

FEATURES OF AN EFFECTIVE HUMAN RIGHTS COMMISSION

19. It is the right of each state to choose the framework for a national commission which best meets its needs. In determining the type of institution to be established, states must consider a variety of factors including political, cultural and economic realities. Accordingly, it is not possible to prescribe standards which will be universally and uniformly applicable.

20. What we can do, however, drawing upon the experience of the past few years, is identify "indicators for effectiveness". These indicators, summarized below, have received broad acceptance[4] and are therefore useful tools for evaluating institutions and encouraging their development.

(a) Independence

21. A national commission must be independent. While certain restrictions on absolute independence may be necessary, it is essential to ensure these do not impede its ability to discharge its responsibilities effectively. A commission should be legally and politically autonomous - to the extent that no branch of government - or any public or private entity - can interfere in or obstruct its work. A commission must also be able to control its own finances, with external accountability being limited to appropriate review and evaluation of financial reports and resource utilization. Clearly, any commission will only be as independent as the individuals of which it is composed. All members, acting individually and collectively, should be capable of generating and sustaining independence of action. The methodology and procedures by which members are appointed and dismissed are obviously important in this respect.

(b) An appropriate, clearly defined mandate

22. An effective national commission must enjoy a clearly defined area of jurisdiction. The commission and the community it serves should be in no doubt as to the functions which it is to perform. The legal powers conferred on it must be relative to its tasks. It is of no use, for example, granting a commission power to investigate complaints without also empowering it to collect evidence and subpoena witnesses. A carefully defined mandate should also serve to avoid possible conflict or overlapping of jurisdiction - with, for example, ombudsmen or other tribunals

(c) Pluralistic and representative composition

23. Diversity among those constituting the commission is important. An effective, credible national institution will be one which reflects, in composition, the community it is established to serve. A national commission composed solely of men, for example, or of one particular ethnic or

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4 The majority of the elements listed in this Part are identified in the *Principles Relating to the Status of National Institutions*, endorsed by the General Assembly of the United Nations in Resolution 48/134 of 20 December 1993.

religious group, is unlikely to reflect the diversity of society or inspire confidence in its impartiality.

(d) Accessibility

24. A national human rights commission must be readily accessible to its "clients" - to those individuals and groups whose rights it has been established to promote and protect. In this respect it is essential to recognize that many of the most important "clients" - those who are most in need of help - will often be difficult to reach through standard channels of communication. An effective commission will therefore be one which develops proactive initiatives for assisting those who are most vulnerable and disadvantaged.

25. Human rights commissions should, of course, be physically accessible. In several Commonwealth countries - for example India and Australia - physical accessibility of the respective commissions has been improved through the establishment of related bodies at state and provincial levels. Where decentralization in this context is not a practical option, national commissions may recruit field officers to serve in different regions. Flexible rules of procedure (e.g. accepting complaints through the post or over the telephone) will also increase a commission's accessibility.

(e) Co-operation with non-governmental organizations (NGOs)

26. All effective human rights commissions have established and maintain close relations with NOGs involved in human rights matters. NGOs are a vital information source for national commissions and are often very effective partners - particularly in the areas of education and training.

27. The charters of national commissions already established throughout the Commonwealth (or soon to be established in countries such as Papua New Guinea) either explicitly or implicitly recognize the important role played by NGOs and empower the respective commissions to work closely with them. In both recent regional meetings involving national commissions - one held in Africa, the other in Asia - the leaders of all participating institutions stressed the importance they attach to effective co-operation with the non-government community.

28. It is essential that the synergy of this relationship is appreciated by governments currently contemplating the creation of independent national commissions - and that there is no misapprehension that the establishment of such mechanisms in any way minimizes or derogates from the central role which a vigorous non-government sector has to play in protecting human rights.

(f) Adequate resources

29. Sufficient human resources and adequate funding are essential prerequisites for operational efficiency. Guarantees on these matters should therefore preferably be included in the commission's founding charter. As well as jeopardizing efficiency, a lack of resources can cripple a commission's credibility. (The commitment of a government which establishes and then fails to properly resource a commission must clearly be called into question.)

THE INTERNATIONAL DIMENSION

30. As mentioned in the introduction to this paper, national human rights commissions and similar bodies have now acquired an international dimension. In 1991, a meeting of heads of national commissions was convened in Paris. The result of this meeting was the "Paris principles on National Institutions" - a set of guidelines for the establishment and effective functioning of these bodies. These principles were formally endorsed by the General Assembly in 1993 - the same year that the World Conference on Human Rights, meeting in Vienna, emphasised the important role which national human rights institutions can play in protecting and promoting human rights[5].

31. In 1995, the United Nations Commission on Human Rights requested the Secretary-General to accord high priority to requests from member states for assistance in establishing and strengthening national institutions (CHR Resolution 1995/50). The High Commissioner for Human Rights has, accordingly, made this one of his highest priorities.

CONCLUSION

32. It is precisely their capacity to contribute substantially to the realization of human rights which makes independent commissions so significant. Democracy alone is no guarantee that the rights of all persons will be protected – as the history of all democracies clearly demonstrates. Nor is the constitutional entrenchment of human rights (much beloved of lawyers) any guarantee that they will not be frequently and flagrantly violated in practice.

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5 Vienna Declaration and Programme of Action, *supra* note 3.

33. But if there is an independent, autonomous, national commission or similar institution with a mandate and appropriate powers to monitor and protect human rights, the demonstrable deficiencies of democratic governments, constitutional "guarantees" and often inaccessible court systems can be considerably attenuated.

34. First, national human rights commissions can, by reaching so many, transform the rhetoric of the international instruments into reality for millions of people for whom the term "human rights" has previously had no meaning at all. Second, they can do this in a manner which is consistent with the standards prescribed in the international treaties, while accommodating constitutional peculiarities and the extraordinarily disparate challenges posed by local conditions and cultures - thus respecting ethnic, cultural, religious and linguistic diversity. Third, they can do this in a more informed and sensitive manner than any regional or international body. Fourth, they can do this without compromising a vigorous defence of the rights of minorities by reference to the wishes of the (sometimes overwhelming) ethnic, linguistic or religious majority - a feat sometimes beyond the capacity of democratically elected politicians who, in some countries, manifest an increasing tendency to formulate policies according to polls indicating what the majority want - irrespective of what human rights require. Fifth, they can contribute to and monitor the integrity of government reports to international treaty bodies, reflecting the reality of human rights beyond the perception of bureaucrats ensconced in national capitals. Sixth, they can provide constructive, well-informed criticism from within, which is frequently important in corroborating or balancing criticism from "foreigners" - often dismissed by governments subject to criticism for violating human rights as based on ulterior or illegitimate motives.

35. For these and other reasons, national commissions can therefore enhance national stability and security - and thereby contribute to national development - at the same time as promoting and protecting fundamental human rights. For the greater good of the Commonwealth, and indeed, of individuals in all countries, their establishment and development should be encouraged.

ANNEX

PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS

(adopted by the United Nations General Assembly, 1993)

See hard copy for document

Annex

PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS[a]

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, *inter alia*, have the following responsibilities:

(*a*) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organization, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

(ii) Any situation of violation of human rights which it decides to take up;

(iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

(*b*) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(*c*) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

(*d*) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence;

(*e*) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

(*f*) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

(*g*) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness; especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members; whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

(*a*) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

(*b*) Trends in philosophical or religious thought;

(*c*) Universities and qualified experts;

(*d*) Parliament;

(*e*) Government departments (if they are included, these representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

(*a*) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

(*b*) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(*c*) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(*d*) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

(*e*) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

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[a] Commission on Human Rights resolution 1992/54 of 3 March 1992, annex (*Official Records of the Economic and Social Council, 1992, Supplement No. 2* (E/1992/22), chap. II, sect. A); General Assembly resolution 48/134 of 20 December 1993, annex.

(*f*) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);

(*g*) In view of the fundamental role played by non-governmental organizations in expanding the work of national institutions, develop relations with non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

(*a*) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

(*b*) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(*c*) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(*d*) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

THE CANADIAN HUMAN RIGHTS COMMISSION

A Paper submitted by the Department of Justice, Canada (adapted from a publication of the Canadian Human Rights Commission)

INTRODUCTION

1. The Canadian Human Rights Commission, established in 1978 pursuant to the *Canadian Human Rights Act*,[1] is responsible for administering that Act by ensuring that the principles of equal opportunity and non-discrimination are implemented in all areas of federal jurisdiction. Specifically, the Commission deals with complaints of discrimination in employment and in the provision of services based on the grounds enumerated in the Act: race, colour, national or ethnic origin, religion, age, sex, marital status, family status, disability, and conviction for which a pardon has been granted. As a result of a court decision in 1992, sexual orientation is now deemed to be included as a prohibited ground.

2. The Commission also investigates complaints alleging inequities in pay between men and women who are performing work of equal value. In the field of employment equity, the *Employment Equity Act* requires that copies of annual reports filed by federally-regulated employers be made available to the Commission, which monitors their performance and, where appropriate, initiates or pursues actions brought under the Canadian Human Rights Act. It is anticipated that proposed amendments to the *Employment Equity Act* now before Parliament will considerably expand the Commission's responsibilities vis-a-vis the federal government and the federally-regulated private sector.

3. In addition to its duty to investigate complaints of discrimination, the Commission has a statutory responsibility to develop and conduct programs to foster public understanding of the principles enshrined in the *Canadian Human Rights Act*. The Act also requires that the Commission prepare an annual report on its activities including recommendations and suggestions concerning human rights and freedoms and a review or assessment of any rules, regulations or other instruments made pursuant to an Act of Parliament.

4. The Commission's statutory authority encompasses all areas of federal jurisdiction including federal departments and agencies, Crown corporations, private companies which regularly transport goods or people across provincial or national borders, chartered banks, interprovincial or international pipelines, federally-regulated broadcasting and telephone companies, grain elevator companies and companies which handle radioactive materials.

5. The *Canadian Human Rights Act* complements the *Canadian Charter of Rights and Freedoms*, which provides constitutional protection of human rights. The *Charter* applies only to government activities while the *Canadian Human Rights Act* applies both to the federal Government and to federally-regulated businesses. Beyond the federal arena, similar legislation has been enacted by the provinces to protect human rights. The Canadian Human Rights Commission co-operates with its provincial counterparts so that comparable human rights protection can be provided across the country.

6. The Commission is an independent agency which reports to Parliament through the Minister of Justice.

THE COMMISSION'S PURPOSE

7. The Commission fosters the principle that every individual should have equal opportunity to participate in all spheres of Canadian life consistent with his or her duties and obligations as a member of society.

HOW THE COMMISSION FULFILLS ITS MANDATE: COMPLAINT RESOLUTION, PROMOTION AND EDUCATION

8. The Canadian Human Rights Commission uses both compliance (including early resolution and conciliation) and promotional means to foster equality of opportunity.

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[1] The *Canadian Human Rights Act*, S.C. 1976-77, proclaimed March 1, 1978, was amended by S.C. 1980-81-82-83, c. 111 and 143, proclaimed July 1, 1983, and S.C. 1985, c. 26, proclaimed October 15, 1985.

9. Compliance primarily involves dealing with complaints of discrimination filed against individuals and firms within federal jurisdiction.

10. Commission staff have broad powers to investigate such complaints, and the findings of these investigations are submitted to the Commission for decision. The members of the Commission, after reviewing the findings and any submissions made by a complainant or respondent, may:

- decide not to act on a complaint (for example, if it is beyond the Commission's jurisdiction or is beyond the time limits allowed by the *Canadian Human Rights Act*);
- dismiss the complaint;
- refer the complainant to a more appropriate authority;
- appoint a conciliator to attempt to bring about a settlement;
- approve settlements which have been agreed to by the parties; or
- request the President of the Human Rights Tribunal Panel to appoint a tribunal.

11. The Commission also uses the data collected and published under the *Employment Equity Act*, as well as data provided through the Treasury Board's employment equity program, to identify areas of under-representation of aboriginal peoples, persons with disabilities, visible minorities and women in the federal and federally-regulated sectors. It then attempts to work cooperatively with employers to identify any barriers that cause under-representation and to develop appropriate plans to change these situations.

12. The Commission further endeavours to promote equality of opportunity and discourage discriminatory practices by conducting information and public education programs, issuing policy guidelines, conducting research, reviewing regulations and other forms of delegated legislation, and maintaining close liaison with human rights bodies and related interest groups.

ORGANIZATIONAL STRUCTURE

13. The Commission consists of a Chief Commissioner, a Deputy Chief Commissioner, and a maximum of six other members appointed by the Governor-in-Council. The Chief Commissioner and Deputy Chief Commissioner are full-time members appointed for a term not exceeding seven years; other members are appointed for a term not exceeding three years.

14. The Commission's program is delivered through the offices of the Chief Commissioner, the Secretary-General, the Executive Secretariat, six regional offices and the following headquarters branches: Anti-Discrimination Programs, Employment and Pay Equity, Communications, Policy and Planning, Legal Services, Corporate Services, and Personnel Services.

15. The **Office of the Secretary-General** provides advice to the Commissioners and oversees staff support to the Commission at headquarters and through its six regional offices.

16. The **Executive Secretariat** is responsible for preparing executive correspondence, for co-ordinating briefing materials and for providing support to the executive offices. It also plays a role in the Commission's new complaints processing system, and co-ordinates the Commission's strategic planning activities.

17. The **Regional Offices** investigate discrimination complaints, except those dealing with employment and pay equity. They also work with community representatives, employers and unions to inform the public of their rights. The Regional Offices are located in Halifax, Montreal, Toronto, Winnipeg, Edmonton and Vancouver.

18. The **Anti-Discrimination Programs Branch** provides functional direction to the regional offices with respect to the investigation of complaints. The Branch also provides a quality assurance function for cases presented to the Commission, trains staff involved in antidiscrimination activities, establishes performance standards and operational policies, and provides conciliation services for cases referred to conciliation by the Commission.

19. The **Employment and Pay Equity Branch** provides advice to the Commission on employment and pay equity matters, and offers educational programs to employers and community groups. The Employment Equity Directorate investigates employment equity complaints and conducts joint reviews with employers. The Pay Equity Directorate investigates equal pay complaints.

20. The **Communications Branch** explains the role and activities of the Commission, fosters public understanding of the Act and discourages discriminatory practices by means of information programs and activities in the community.

21. The **Policy and Planning Branch** monitors domestic and international human rights issues of interest to the Commission and develops policy papers and positions for its approval.

22. The **Legal Services Branch** provides advice to the Chief Commissioner, Commission members and staff. Legal officers also represent the Commission in litigation before tribunals, review tribunals and the courts.

23. The **Corporate Services Branch** provides headquarters and regional offices with support services in assets management, finance, access to information and privacy, informatics, information management, library and editorial services.

24. The **Personnel Services Branch** provides headquarters and regional offices with support services in staffing, classification, pay and benefits, staff relations, training and human resource planning, official languages and health and safety.

THE HUMAN RIGHTS TRIBUNAL

25. The **Human Rights Tribunal** is a quasi-judicial body which operates independently of the Commission. Members of the Human Rights Tribunal Panel are appointed by Order-in-Council and serve on a part-time basis. The President of the Human Rights Tribunal Panel selects from the Panel members to serve on each individually appointed tribunal. Tribunals conduct public hearings and make decisions based on the merits of the complaint and on the evidence adduced at the hearing. Support services for the tribunal operations across Canada are provided by a Registry based in Ottawa.

Integrity in Public Life

STRENGTHENING INTEGRITY IN COMMONWEALTH COUNTRIES

A paper prepared for the Commonwealth Secretariat by Transparency International (TI)

Background

1 The question of the maintenance of public integrity has assumed a central place in the concerns of many countries and international organisations. The concern of the latter stems in large part from recognition that the "grand corruption" which distorts development in developing countries has international dimensions. Not only does much of this have its origins in the North (principally in Western Europe) but also that the proceeds are remitted (or more usually kept) abroad by the corrupt beneficiaries.

2 It is appropriate for the matter to appear on the Agenda of Law Ministers, not just because Ministers are in their own countries largely responsible for the "deterrent" aspects of containing corruption through detection, investigation and prosecution, but because collectively this forum has long been a world leader in raising the scope and effectiveness of international mutual legal assistance in criminal, as in other, matters.

What is "corruption"?

3 Any discussion of corruption inevitably begins with the question of definition. In a general sense the word attaches to any act or omission by anyone (be he or she a public official or a private individual) that deviates from acceptable norms governing the performance of official duties with the intention of creating gain for personal or group advantage. It can thus apply to the private sector no less than to the public. Indeed, a number of Commonwealth anti-corruption agencies specifically have the private sector within their jurisdiction (e.g. the ICAC in Hong Kong).

4 However, in official circles it is more customary to adopt a narrower definition - that corruption is the *misuse of public* power for *private* profit. This is to accept two truisms: first, that the state has a direct duty to control its own employees, which it places in positions of trust vis-a-vis the public. And second, that the state has more scope in its own administration for doing so in generating working practices which limit the areas for corruption than it does in the management of the affairs of others.

Causes of corruption

5 The origins of corruption are many and varied, and there are as many theories as there are speakers on the topic. Clearly, some resort to corrupt behaviour by reason of poverty. For example, schoolteachers who are not paid for months, as has occurred in some places, are left with a stark choice: stop teaching and do something else to generate an income to sustain their families, or insist on "bribes" from the parents (in reality 'unofficial' school fees in an environment in which education is supposed to be free or at nominal cost). It is difficult to categorise this conduct as amoral, but to generalise and attribute corruption to poverty per se is to come close to inferring that all poor are corrupt - an assertion which would affront the vast majority of the poor and which most would attack.

6 Some (usually the business people from the North) claim that corruption is part of the culture of the countries where they do business. Of course, there are cultural differences, and conduct which is acceptable in one society will shock another. t is for each society to determine what is - and what is not - acceptable conduct. However, this is to overlook the fact that in every Commonwealth society laws have been made criminalising such conduct. In the context of Africa, the distinguished Nigerian leader, Olusegun Obasanjo, once said in an oft-quoted speech: "I shudder at how an integral aspect of our culture could be taken as the basis for rationalising otherwise despicable behaviour. In the African concept of appreciation and hospitality, the gift is usually a token. It is not demanded. The value is usually in the spirit rather than in the material worth. It is usually done in the open, and never in secret. Where it is excessive, it becomes an embarrassment and it is returned. If anything, corruption has perverted and destroyed this aspect of our culture."[1]

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1 Opening address to the Africa Leadership Forum seminar on Corruption, Democracy and Human Rights in East Africa, Entebbe, Uganda, 1994.

7 In the Far East, too, the complaint is that traditional practices have been subverted. "Once, the exchanging of gifts was a laudable social custom emphasising the importance of personal relations in social life. Now, *bongtoo* and *chongji* have distorted the practice into institutionalised bribery in the name of goodwill tokens."[2]

8 Of course there are significant differences in perceptions and practices between various cultures. What is accepted as reasonable and appropriate will differ very widely. These, however, may relate more to how business is conducted (through the giving of presents and of hospitality) rather than with blatant attempts to "buy" favourable decisions. There is a clear distinction between "reciprocity" and reciprocities classified as bribes: between legitimate culture conduct and attempts to pervert decision-making.[3]

Impact of corruption

9 Nobel Peace Prize laureate Dr Oscar Arias Sanchez has observed that achieving sustainable development requires the presence of a number of features:

- First, it demands prudent, rational and far-sighted decision-making;
- Second, it requires the best use being made of available resources; and
- Third, it needs a principled leadership which enjoys the understanding and support of the people.

10 Corruption strikes at all three elements:

- First, decisions are taken which are irrational, short-sighted and motivated by greed, not by need;
- Second, resources are squandered as projects are approved not on the basis of their suitability, but on the quick returns which they may yield to the decision-makers; and
- Third, a corrupt administration loses the confidence of its people, who are then gripped by cynicism and distrust of leadership.

11 Corruption, then, is a challenge to everyone, everywhere, and to the integrity, efficiency and effectiveness of many facets of life, both private and public. None of us is untouched by corruption, whether we live in the North, the South, the East or the West. Each of us pays a price, and comparatively few are beneficiaries. We all have a stake in the integrity not only of our own society but those of our neighbours, and in the wider world.

International initiatives

12 There have been a number of international initiatives in recent times. For example, in Southern and East Africa, an informal Ministerial Group Against Corruption was formed in Pretoria at the end of 1994, chaired by Minister Dullah Omar of South Africa with the aim of promoting regional harmonisation and assistance. The Organization of American States, too, have developed a comprehensive hemispheric anti-corruption strategy, envisaging much broader forms of mutual legal assistance, including the denial of the "political offences" defence to requests for extradition where a case for corruption has been made out. At the OECD, work is proceeding on developing recommendations addressed not only to member countries but to the wider international community for the ending of the tax deductibility of bribes where this exists (and it is commonplace in Europe) and the criminalising of cross-border corruption of public officials. Within the private sector, the International Chamber of Commerce is seeking to revive and strengthen its code of conduct against bribery in international business transactions (a code which hitherto has not worked as it has no monitoring mechanisms). At the UN, the General Assembly has sought to revive the ECOSOC initiative from the 1970's designed to achieve an international convention against corruption (a move which has some doubting that this is really the way to go, given the urgency of the problem and the length of time it takes for multi-lateral conventions to come into force). There is thus much activity taking place and it would be altogether appropriate, particularly in view of the commitments of member

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2 Gerald E. Caiden and Jung H. Kim in "A New Anti-Corruption Strategy for Korea", Asian Journal of Political Science, Vol. 1 No. 1 (June 1993).

3 See John T. Noonan, Bribes (University of California Press, Berkeley, Los Angeles; 1984). Judge Noonan's classic study of bribes records that reciprocities classified as bribes were censured, among others, in the ancient kingdoms of Egypt, Mesopotamia and Palestine, as well as, and even more harshly, in Cicero's Rome.

governments to the principles of just and honest government contained in the Harare Declaration, for the Commonwealth through its Law Ministers to examine the scope for increased action.

13 A particular concern has been the practice of most industrialised countries to permit the deduction for tax purposes of bribes paid abroad (euphemistically classified as "commissions") as being 'necessary business expenditures'. Similarly, most refuse to categorise the bribing of foreign officials as criminal, unless it takes place on the soil of the country in question. While this has been defended by some of these countries as being essential if their competitors are not to be given a competitive advantage (in bribery), and as underpinned by concerns for domestic unemployment, others see the practice as actively undermining developmental efforts abroad by those same countries. It is perhaps unrealistic to expect any major trading country unilaterally to discontinue these practices and so concede advantages to their rivals, however it may not be expecting too much to ask that these countries make determined efforts to move collectively to end tax deductibility in such circumstances and to criminalise such behaviour. It is noteworthy that Britain has been supporting efforts in the OECD designed to redress the position. The OECD recommendation will call for implementation by all major trading countries, and not just by its members.

Action at the national level

14 The first area for action for a concerned government would be at the national level. There is much that governments can do, and much that some have been doing, to minimise the opportunities for corruption to take place.

15 An obvious starting place is with the "demystification of government", by publishing e.g. tax collectors' handbooks, etc. (an open government approach which has been introduced, among others, by the British government). Another is to reverse the usual onus when it comes to government secrecy: to oblige a civil servant or Minister to make out a case for withholding a document instead of having the onus rest with the citizen (an approach being pursued, among others, by Belize and New Zealand through Freedom of Information legislation).

16 However, solutions are difficult to design because, unlike many other types of crime, there are benefits flowing to those on both sides of the equation. Both the payer of a bribe and its receiver have an interest in secrecy, and the victims do not know what has happened. Nevertheless, experience shows that corruption can be curbed by limiting the situations in which it can occur and by reducing the benefits to both recipients and bribe payers (i.e. by rendering both more vulnerable to detection and sanction).

17 The aims of an effective anti-corruption policy are simple: To reduce inclination, corruption should be seen by the community at large and understood by it to be a "high risk, low return" activity, opportunities for corruption to occur are minimised. Where corruption is endemic in a society, lasting development is unlikely to follow and democratisation is likely to be undermined (insofar as it is an instrument for accountability) unless and until public awareness is raised to actively oppose nepotism and the taking of bribes large or small, and vigorously to play its part in support of government efforts to end these practices. To achieve this there must be an effective public awareness campaign, perhaps taking a lesson from efforts to counter the threat of AIDS.

18 In pursuit of these aims no one single strategy is likely to be effective. Rather an holistic approach is required: one with a clearly-thought out internal logic. This involves -

- a clear commitment on the part of political leaders to the combating of corruption, no matter by whom;
- adopting comprehensive anti-corruption legislation implemented by a strong and an independent agency of manifest integrity;
- identifying the areas of government activity most prone to corruption and a review of relevant procedures (in particular, procedures which limit the scope for forms of nepotism and which strive to ensure that "only the best shall serve the state");
- ensuring as soon as possible that salaries of civil servants and political leaders adequately reflect the responsibilities of their posts and as are as comparable as conditions allow with corresponding levels in the private sector (this both to reduce the "need" for corruption and also to ensure that the best are available to serve the state);
- ensuring that legal procedures and remedies are such as to provide an effective deterrence (e.g. by rendering contracts induced by corruption both void and unenforceable, export

guarantee organisations would be compelled, for reasons of self-interest, to monitor much more closely the nature of the international transactions they are underwriting; by rendering void all licences and permits obtained through corruption , a powerful incentive is created for the general public to protect itself through reporting corrupt demands);

- forming a creative partnership between government and the community through its civil society organisations (including the private sector, the professions and religious organisations).

19 Much of this, plainly, is outside the technical boundaries of the jurisdiction of many Law Ministers. However, for the deterrence factor to function, there must be a likelihood of detection, and there must also be the expectation of prompt, efficient and effective punishment. Law Ministers therefore have a keen interest in fostering prevention work in other areas of government. Likewise they have an interest in fostering greater public understanding and awareness off how their individual countries' integrity systems operate. In this regard, in some countries civil society groups are starting to assemble national integrity system handbooks, a process which Ministers may wish to encourage.

Relationship between government organisational complexity and corruption

20 The redesign of programmes to render them more efficient will almost invariably have the effect of rendering them less susceptible to corruption. The converse also applies: the more elaborate an integrity system is made to be, the more likely it is that the very complexity of the system will defeat the ends for which it is designed.

21 There is a general consensus that there is a direct connection between the complexity of the organisation of government and the levels of corruption within it. The more steps there are to be taken, the more approvals needed before a business can start or a building constructed and the greater the number of people involved, the greater the number of "gatekeepers" who are able to exact a toll from those who cannot wait, or who feel that necessary government approvals depends on providing sweeteners. One standard technique in reducing corruption is to simply radically to reduce the number of steps needed to gain government approvals and payments for goods supplied.[4]

22 The greater the area of discretion, too, the greater the scope for corruption. One way of limiting this is to restrict these areas to the barest minimum. There will, of necessity, always be some need for flexibility if government business is to be conducted efficiently and not wholly hide-bound. But even there it is possible to contain potential abuse by laying down guidelines in writing - and then, and most importantly, publishing the guidelines to a department's customers, By making transparent the factors which should be taken into account, and those which should not, in arriving at a decision the degree of accountability for the officials is raised and the prospect of successful appeals to higher authorities is enhanced. Such transparency, coupled with swift and appropriate appeal mechanisms, has also been found to be effective.

23 Clarity of procedures and a public understanding of their rights to service and at a given price - or no cost at all - are also important, as again, corruption can thrive where government procedures are obscure and where unnecessary complexities serve only to baffle the public.

Redesign of programmes etc. to reduce incidence of corrupt incentives

24 Singapore is a country in which entrenched corruption has been brought under control. It also flies in the face of conventional wisdom, namely that corruption can only be brought under control where state intervention in the economy is minimised.

25 Given this high degree of involvement, the experience in Singapore is of considerable relevance to developing countries in which the state must continue to be a significant actor in the nation's development programmes.

26 A comprehensive approach was adopted in July 1973 (shortly after independence), with the issuing by the Ministry of Finance of a circular instructing them to review and improve the measures taken to

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[4] Not infrequently does the private sector protest that not only does it "have" to bribe to get a contract, but subsequently it must bribe again in order to obtain payment for the goods or services! Countries who have taken the "reduction of steps" approach include Uganda, Singapore and Mauritius.

prevent corruption among their officers by minimising the opportunities for corrupt practices.

27 Among other things, the permanent secretaries (heads of ministries) were asked "to make their officers aware of the PAP government's serious efforts to eradicate corruption and to advise them to report any cases of corruption." They were also requested to take appropriate anti-corruption measures in those departments particularly exposed to corruption. Such measures included:

- improving work methods and procedures to reduce delay;
- increasing the effectiveness of supervision to enable superior officers to check and control the work of their staff;
- including measures for the rotating of officers to ensure that no officer or group of officers remain too long at a single operational unit (but keeping under check the possibility of abuse by rotation being used to "punish" those who will not join in undesirable working practices);
- carrying out surprise checks on the work of their officers;
- making the necessary security arrangements to prevent unauthorised persons from having access to a department's premises;
- ensuring the effective accountability of the supervisors themselves; and
- reviewing the anti-corruption measures taken once in three to five years with the aim of introducing further improvements."[5]

Diversification of decision-making, i.e. subsidiarity, privatisation as routes to combat corruption

28 Privatisation (the removal of state-run enterprises to the private sector) can result in a diminution of opportunities for corrupt practices, simply because private sector accounting methods and the need to operate to a profitable "bottom line" are strong incentives to management to implement internal anti-corruption strategies. Some exponents go so far as to argue that privatisation is a form of cure for corruption, although others would see this as taking a sledge-hammer to crack a nut: there should be sound social, economic and political reasons in favour of privatisation quite apart from corruption before that path is pursued. Indeed, it is difficult to find any privatisation the prime objective of which has been to counter corruption.

29 There can, of course, be the danger of creating a monopoly situation in the private sector through privatisation (e.g. of water and other essential public utilities) whereby corruption at the petty level may be eliminated but other abusive practices implemented. Discussion among anti-corruption campaigners in developing countries tends to a definition of corruption (the abuse of public power for private profit) as extending to an abuse of economic power over the public.

30 Such commercial behaviour is not only unethical: it can constitute an abuse of market position, and as such can be illegal. It is, however, an area of activity that is outside the remit of this blueprint.

The elimination of unnecessary or ineffectual programmes

31 If a programme is unnecessary or ineffectual, then simply on grounds of economic lack of utility it will need rethinking. A classic example of this occurred recently in Switzerland, where a corrupt "restaurant inspector" was profiteering: on analysis, it transpired that there was no reason why his particular job should even exist, and it was abolished. He was jailed.[6]

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5 Jon S. T. Quah, "Singapore's Experience in Curbing Corruption" in Political Corruption: A Handbook , ed. Arnold J. Heidenheimer et ors (New Brunswick; Transaction Publishers; 1989) at page 845.

6 Formal charges have been laid against eight people, including a prominent magazine publisher. The affair centres on Raphael Huber, the canton of Zurich's former restaurant and bar inspector, alleged to have taken some US$1.84 million in bribes from permit applicants in the ten years to 1991. The story has shocked a country where the honesty of public officials has always been taken for granted. No one had suspected that cantonal regulations giving inspectors immense discretionary powers could be so abused. Among other things, applicants had to show that there was a "need" for the establishment. According to the prosecutor, Huber established a "reign of fear", taking payments in the form of loans or encouraging applicants to buy, at

32 In any review of government expenditure, programmes should be looked at to determine not only if they are necessary (they often will be), but invariably whether they are constructed in a cost-effective manner. Frequently this will mean paying some attention to corruption:

- how easy is it to rip off the particular system under review?
- is there any evidence that this is happening?
- can the procedures be simplified and areas of discretion removed without at the same time rendering the programme unnecessarily inflexible and unworkable?

33 It is apparent that measures to counter corruption can have a wider and beneficial impact on the integrity of government and institutions as a whole, on streamlining bureaucracies and rendering them more cost-effective and efficient, etc.

A possible way forward for the Commonwealth

At the Commonwealth level

34(a) Law Ministers might invite other Commonwealth fora (and particularly Finance Ministers) to place the question of tax deductibility for bribes on their own agenda with a view to examining how they might add the Commonwealth's collective weight to the OECD initiative to end tax deductibility for bribes in international business transactions and to criminalise such conduct. For their part, Law Ministers might declare their own support for the continuing efforts at the OECD and invite the Secretariat to study the legal implications of any move to criminalise such conduct.

(b) Law Ministers might invite the Secretariat to examine ways in which international public procurement can be conducted more transparently and more accountably, with a view to rendering the procedures more cost effective and less susceptible to manipulation induced by corrupt incentives. This could involve the preparation of a study which might then be considered by a small expert working party convened by the Secretary-General and then forwarded to Law Ministers for consideration as well as to other interested parties.

(c) Pan Commonwealth codes of conduct for public officials could be developed (there has been an effort at the UN to do this but it has slowed down: the Commonwealth is uniquely placed to produce a meaningful code expeditiously).

(d) Commonwealth Schemes for mutual legal assistance in criminal matters and extradition might be reviewed to determine their adequacy to meet the particular challenge of absconding public officials with large sums of publicly-owned money (e.g. the investigation of bank accounts in Commonwealth financial centres; and creating an exception to the "political offences" defence where extradition requests involve public corruption.

(e) A deepening of exchanges of experience in techniques adopted in individual countries to improve and simplify systems, and to minimise opportunities for corruption to occur (including analysis of success stories to facilitate these being replicated).

(f) The holding of specialist workshops in particularly challenging areas to deepen insights in practical ways into measures which have been found to be effective, or which have not lived up to expectations (e.g. in customs, revenue collection, and perhaps public awareness-raising) so intensifying the value of exchanges of information.

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excessive prices, pictures painted by his deceased father. Though earning only a modest salary, Huber managed to maintain two flats in Zurich and to build up a 90-hectare estate in Chianti, Italy, complete with vineyard and artificial lake. The case is expected to come to trial early next year. Meanwhile the cantonal government has introduced new regulations under which applicants no longer have to prove a "need" for their establishments. Financial Times, 8 July 1994. Since then Zurich prosecutors are quoted in Sonntags Zeitung, promising further cases and last week five Swiss government internal auditors are placed under investigation on suspicion of taking money for favours to government suppliers, and Zurich motor vehicle bureau officers were arrested for taking bribes to issue incomplete registration papers to falsify documents for used car exports to Africa. In mid-July, the head of a corruption ring in Fribourg who had bribed the canton's finance director and police chief was sentenced to 27 months' jail. Financial Times, 1 August 1994 quoted in TI Newsletter, September 1994.

Measures at the national level

35 These might include -

(a) considering, as appropriate in each country's circumstances, establishing a national integrity system oversight committee to an ensure an holistic approach to the raising of levels of integrity (perhaps along the lines introduced in Uganda in 1994 which is chaired by the Inspector-General of Government, the principal law enforcer of anti-corruption laws but which includes all stakeholders, including the government-run radio service, the Ministry for the Civil Service and representatives of civil society).

(b) reviewing the law and regulations regarding public procurement, and post procurement monitoring procedures (perhaps in conjunction with such other interested parties as the Auditor-General and the parliament's Public Accounts Committee) to ensure that these adequately protect the public interest

(c) reviewing the adequacy of public access to official information, as well as the appropriateness of the protection afforded to complainants (particularly where these are within the public service and wish to complain against the corrupt conduct of superiors without risking retribution).

(d) involving civil society more closely in participating in oversight committees and in feeding its own insights into reform procedures.

(e) developing, or encouraging civil society to develop, a national integrity sourcebook to render accessible to the public the various documentation that comprises the country's national integrity system.

INTEGRITY IN PUBLIC OFFICE: PROPOSED MINISTERIAL STATEMENT AND DRAFT CODE

A Paper by the Commonwealth Secretariat

INTRODUCTION

OUTLINE OF PAPER

1. This paper:

- explains why this topic is included on the agenda and notes briefly some of the issues raised by it (paragraphs 3-10);
- proposes for discussion a Ministerial Draft Statement on Prevention of Corruption (paragraphs 11-20); and
- notes the ongoing work of the Secretariat in this area (paragraphs 21-23).

2. In addition, an extensive amount of material has been placed for reference in three Appendices. These are referred to where relevant in the main text. They contain:

- the Ministerial Draft Statement (Appendix I)
- a previous Secretariat paper which proposes a Commonwealth Draft Integrity Code (Appendix II)
- a list of relevant materials (laws, codes, cases, other documents) held by the Secretariat (Appendix III)

BACKGROUND

3. Integrity in public office was first considered by Law Ministers at the 1990 Meeting in Christchurch, New Zealand, and then at the 1993 Meeting in Mauritius. In light of subsequent major developments in relation to other multinational organisations, the issue was raised again at the Meeting of Senior Officials of Commonwealth Law Ministries (May-June 1995). That meeting drafted an outline ministerial statement on the topic for finalisation by the Secretariat and submission to Senior Officials prior to the 1996 Meeting of Commonwealth Law Ministers. The draft statement is the subject of paragraphs 11-20 below.

4. The Secretariat was also requested to collect and disseminate examples of national laws and experiences in combating misuse of public office. Further, in line with international developments, the Secretariat prepared a draft "Integrity Code" for Commonwealth states. This Draft Code was considered by the Fifth Meeting of Law Officers of Small Commonwealth Jurisdictions (September 1995). Both of these projects are referred to again in paragraphs 21-23, below.

EXTENT AND NATURE OF THE PROBLEM

5. The growing threat presented by corruption to economic development and to democratic institutions - particularly in developing countries - is well documented and has resulted in a rising chorus of international alarm. To take one example of the scope of corruption in just one area, a recent United Nations study estimates that between 1988 and 1992 the top ten arms exporters sold US$20 billion of arms a year to ten developing countries. It assumes that at least 15 per cent of this value was paid to politicians and military chiefs as bribes and questions the necessity of much of this hardware to the countries concerned - possibly a diversion of much needed finance.

6. It does not follow, however, that the focus ought solely to be on the conduct of officials in developing countries, who are often poorly paid and thus highly vulnerable. The view has been expressed that the problem lies at least equally with those who offer the bribes. Often these people are nationals of rich countries, many of which not only approach the problem in a complacent manner (it is claimed), but even, in many cases, offer substantial tax concessions in respect of the payment of business-related "inducements".

SCOPE AND MEANING OF "INTEGRITY IN PUBLIC OFFICE"

7. "Integrity in public office" is a potentially huge subject. It could require consideration of ministerial responsibility, of every aspect of the proper conduct of all public officials, and of all relevant fields of law (constitutional, commercial and criminal). However, the critical issue which has motivated concern has been corruption, sometimes defined as the misuse of public power for private gain. The two terms are not always simply two sides of the same coin. "Integrity in public office" covers a wider range of official good conduct than that which is eroded by corruption, yet corruption, without narrower definition, can describe the actions of people in the public *and* private sectors. It is

suggested that corruption should continue to be the main focus of the inquiry. This is reflected in the Draft Ministerial Statement which continues to be headed "Prevention of Corruption" (see Appendix I to this paper). However, this more precise focus should be accompanied by an openness to any measures - to whomever they apply - which can prevent and overcome corrupt practices. Clearly, most measures which strengthen integrity in public office will be relevant and beneficial.

ANALYSIS OF ISSUES

8. Corruption raises many complex issues for analysis. These include the definition of corruption, the causes and effects of corruption, and a consideration of appropriate measures to combat corruption and their effective enforcement. The discussion of these and other issues in recent Secretariat papers (see next heading) and in the Transparency International paper which has been prepared for this Meeting, "Strengthening Integrity in Commonwealth Countries", is not repeated here.

RECENT SECRETARIAT PAPERS

9. These comprise *Integrity in Public Office: A Role for the Commonwealth?* (SOLM(95)10 and SOLM(95)10 (Supplement)), and *Integrity in Public Office: Consideration of Proposal for a Possible "Integrity Code"* (LOSJ(95)9). These were prepared, respectively, for the Meeting of Senior Officials of Commonwealth Law Ministries (Malta, May-June 1995) and for the Fifth Meeting of Law Officers of Small Commonwealth Jurisdictions (Namibia, September 1995).

10. The first paper (SOLM(95)10 and SOLM(95)10 (Supplement)), is reprinted at page 244 of the published proceedings of the meeting which considered it, *Meeting of Senior Officials of Commonwealth Law Ministries, Malta 29 May - 1 June 1995* (Commonwealth Secretariat, January 1996) and the discussion of it is recorded at pages 92-110 of that publication. For ease of reference, the second paper (LOSJ(95)9) is reproduced (with minor modifications and without most of the documents which were attached to the original as background material) as Appendix II. The Draft Integrity Code itself can be found near the end of that paper.

MINISTERIAL DRAFT STATEMENT ON PREVENTION OF CORRUPTION

WHY THE NEED FOR A MINISTERIAL STATEMENT?

11. It is suggested that an unequivocal statement by Law Ministers which opposes corruption and proposes a concrete programme of action would signal to the international community that the Commonwealth takes this problem very seriously, is committed to change, and desires to lend its considerable collective resources to a co-ordinated international campaign.

12. Further, it is felt that a *Commonwealth* programme of action is merited by the special contribution which Commonwealth members can offer to work being undertaken by other international bodies. There is a need for more in-depth analysis of the measures which can help to create an anti-corruption culture. Also, much can be achieved through the sharing and dissemination of Commonwealth national laws and experiences. This point was made repeatedly by Senior Officials at their 1995 meeting. Several delegates outlined schemes undertaken in their own jurisdiction to combat corruption. A number of these schemes appear to have been highly effective.

THE TEXT

Background and sources

13. The Draft Ministerial Statement is attached as Appendix I. The original draft statement - annexed to Appendix I for comparison - has been revised and (to a modest extent) expanded by the Secretariat, as requested by Senior Officials at their meeting in 1995.

14. The revision continues to reflect the issues and concerns expressed by Senior Officials at that meeting and takes into account that part of the Communiqué issued by them which is reproduced here:

> "INTEGRITY AND CORRUPTION
>
> 27. ... Senior Officials recognised the great importance of this topic, for corruption was a constant threat, if not a present reality, in almost every jurisdiction.
>
> 28. Senior Officials were unanimously of the view that the mere establishment of legal and administrative mechanisms for combating corruption was not enough and that it was also important to examine the socio-economic causes of corruption. They further believed that concrete steps needed to be taken, specifically in the field of public education.
>
> 29. Some delegates were also of the opinion that the network of mechanisms for combating

corruption needed to be widened to cover the private sector, particularly in view of the increasing trend towards privatisation of services previously performed by government entities.

30. The meeting invited the Commonwealth Secretariat to undertake a programme of work in this area, taking into account the activities of the [other international] organisations. It was hoped that the outcome of this work which should be given the widest possible publicity would be a study of best practice in terms of legal provisions and organisational structures, a study which would provide an assessment of the relative success of various approaches as a basis for the further development of national and international strategies ..."

15. Other sources are:

- the Entebbe Communiqué, issued following the Conference on Corruption, Democracy and Human Rights in East Central Africa held in December 1994;

- the Final Communiqué of the Ministerial Forum Against Corruption which met in Pretoria in November 1994.

Form of statement

16. A matter left for discussion by Ministers is in what form the statement will be issued. It could comprise a stand-alone declaration to be issued with the Communiqué. A stylistic precedent is the Lusaka Statement on Government under the Law, endorsed by the 1993 Meeting of Commonwealth Law Ministers in Mauritius. Alternatively the statement could be used as the basis for the relevant text of the communiqué itself. Both approaches appear to meet the immediate needs outlined above (at paragraphs 11 and 12).

Key revisions

Elaboration and style

17. As requested, the revised version elaborates upon the outline statement provided by Senior Officials. In doing so, it adopts a different style which resembles more a narrative than the "resolution" format of the outline. It was felt that this fitted better with past practice, although there is nothing to prevent Ministers from adopting a new style if they wish.

Allocation of functions

18. The original draft called upon the Secretariat and a "self-funding working group" to undertake certain overlapping tasks. As a practical measure, a number of tasks are now conferred upon the Secretariat only, which must however convene, and consult with, an advisory working group. The wording of the Draft Statement is intended to be broad enough to permit work on measures proposed in the paper prepared for this meeting by Transparency International (referred to above at paragraph 8), to the extent that these measures are considered appropriate.

International co-operation in the investigation and prosecution of offences, etc.

19. The call upon member governments to enact national laws to ensure international co-operation in the criminal field is inserted because a number of member states have not yet abolished the list approach to extraditable crimes. The inclusion of this statement emphasises the practical importance of implementing reforms in this area which have been promoted by the Secretariat.

Omission of references to "causes of corruption"

20. The original draft calls upon the Secretariat to identify the causes of corruption but this has been omitted in the revision. Of course, no measure aimed to combat corruption can ignore its causes and this is an inquiry which must continually be held at the forefront of the mind. However, a focus on this as a distinct and preliminary area for specialised research and analysis may divert resources away from a consideration of concrete and specific strategies achievable by Law Ministries in the immediate future.

ONGOING WORK OF THE SECRETARIAT

21. Paragraphs 22-23 outline two initiatives which the Secretariat has developed since the 1995 Senior Officials meeting, and which will be continued if appropriate following Ministerial discussion of this topic.

DATABASE OF NATIONAL LAWS AND EXPERIENCES

22. In August 1995 the Secretariat requested member states to supply copies of national laws, codes and case law relevant to combating the misuse of public office. Drawing on materials received in response and on materials already held by the Secretariat, work has continued on the development of a database. The content of this database is

recorded in Appendix III and members are requested to supply relevant materials not held by the Secretariat. There is much still to be done on the analysis and more precise classification of this material, which will be essential to its accessibility and usefulness.

DRAFT INTEGRITY CODE

23. The purpose of a Draft Integrity Code is to provide a set of clearly articulated standards against which member states could measure national legislation and practice. The main reason for formulating a Draft Code at this stage has been to prompt a discussion on the many issues which a Code raises - it should be viewed as a first draft which has drawn on limited sources. These issues include the following:

- *Is a Code a useful approach?* A Code may provide the Commonwealth with an opportunity to identify, articulate and promote shared values and clear standards in an area of considerable international concern. At the same time, it would be of limited use and essentially cosmetic if, for example, compliance and enforcement were neglected and root causes of corruption left unaddressed.

- *What activities should the Code regulate?* Should the Code require, for example, that public office holders keep confidential information confidential and refrain from participation in political activity (clauses 6 and 8 of the Draft Code), or does this go too wide?

- *To whom should a Code apply?* The Draft Code applies to "holders of public office". However, it does not attempt to define this term.

- *Should a Code require mandatory reporting and specify appropriate disciplinary action?*

- *How should a Code be implemented and enforced?* The criminal, electoral, civil, administrative and constitutional law of most Commonwealth states will already provide sanctions against many if not most breaches of the proposed Draft Code. Some states have enacted specialised legislation and have created bodies with specialist enforcement powers. In addition, the promotion of good government - in particular through public sector auditing, public education, and the fair remuneration of officials - comprises a non-legislative measure of prime importance. Finally, the transborder aspects of breaches of the Draft Code make participation in international initiatives essential (for example in regard to mutual assistance in criminal matters and extradition).

March 1996

DRAFT MINISTERIAL STATEMENT ON PREVENTION OF CORRUPTION

Prevention of Corruption

Commonwealth Law Ministers, meeting in Kuala Lumpur from 15 to 19 April 1996, acknowledged the existence of corruption as a serious multidimensional national and international problem which inhibits development, creates poverty, and undermines good government.

In terms of the threat represented by corruption to democratic institutions and good government, Ministers recognised that it was necessary to combat corruption effectively in order to achieve the goals set out in the Harare Declaration, as elaborated upon by the Millbrook Commonwealth Action Programme.

It was considered of primary importance in this context that national leaders demonstrate by their personal conduct a commitment to integrity and that they support those officially responsible for preventing and combating corruption. Further, no measure which might nurture the evolution of a democratic society - characterised by an independent judiciary, an adequately-remunerated public service, open government and a democratically elected parliament operating by way of transparent procedures - should be neglected.

In terms of the economic effects of corruption, it was noted that corruption in international transactions can contribute to the initiation of unnecessary projects and to the diversion of funds and resources from projects which are vitally necessary. Ministers expressed particular disapproval of the fact that bribes paid by foreign businesses from industrialised countries are often tax deductible in their home countries.

The links between corruption, drug trafficking, and organised crime were recognised and the need for continuing and improved mutual legal assistance in investigations and prosecutions in relation to criminal offences emphasised.

Ministers noted the diversity of national laws and experiences of Commonwealth jurisdictions in the field of preventing and combating corruption and stressed the need to share knowledge of these. They were encouraged by those strategies which have achieved some success, and identified the need for an "holistic" approach which combines a number of strategies rather than pursues one or two in isolation. Key strategies to be applied in combination might include a political commitment to the eradication of corruption, independently enforced and effective anti-corruption legislation, adequate remuneration of public officials, and the creation through education of a culture hostile to corruption.

The initiatives of other international bodies were also noted with interest and the need emphasised for the Commonwealth to co-ordinate and liaise with them. In particular, the efforts of the OECD to end the tax deductibility of bribes and to criminalise the cross-border corruption of officials should be supported.

Ministers therefore:

1. Express their collective commitment to work on both the domestic and international fronts to combat corruption;

2. Undertake to implement strategies to prevent and combat corruption, to the extent that they have not already done so, and to keep the Secretariat fully informed of relevant developments;

3. Call upon the Secretariat, in consultation with member governments, to examine all aspects of the problem, to advise Ministers on developments and initiatives in the field, to propose courses of action which may assist member jurisdictions to address and to resolve the problems of corruption more effectively, and in particular to:

   (a) collect and disseminate examples of national laws and experiences in combating corruption, and advise on developments and initiatives in the international field;

   (b) identify those strategies which have been effective in changing national and international standards, especially those strategies which have helped to promote an "anti-corruption" culture; and

   (c) develop model legal strategies for combating corruption. This will include the development of minimum standards for Commonwealth members in the form of an "Integrity Code".

4. Request the Secretariat to co-operate with other intergovernmental and non-governmental organisations working to combat corruption;

5. Commit themselves to enacting national laws, to the extent that they have not already done so, to ensure that international co-operation in the investigation and prosecution of offences, and in the surrender of fugitives, is available in respect of corruption offences;

6. Agree to establish an advisory working group which shall be convened by the Secretariat and which shall advise and assist the Secretariat in the performance of its tasks.

DRAFT MINISTERIAL STATEMENT PREPARED BY SENIOR OFFICIALS MALTA, 1995

INTEGRITY AND CORRUPTION

REPORT OF THE DRAFTING GROUP

The Group appointed to draft a proposed statement by Law Ministers on Integrity and Corruption, having taken into account the views expressed by delegations during the debate on this subject, determined that it would be unable to produce a final draft in the time available. Accordingly the Group recommends that Senior Officials:

(a) endorse the outline statement set out below; and

(b) ask the Secretariat to produce from this outline a full draft statement for Law Ministers and to circulate it to members of the Group for settling before submission to Senior Officials at their April 1996 meeting with a view to approval and final submission to Ministers for consideration at their Kuala Lumpur Meeting.

PREVENTION OF CORRUPTION

Commonwealth Law Ministers, meeting in Kuala Lumpur from 15 to 20 April 1996,

Acknowledged the existence of corruption as a serious multidimensional national and international problem which affects development, the economic well-being of countries and the effective operation of society;

Noted existing efforts by Commonwealth jurisdictions to address the issue and that such efforts had achieved some success;

Committed their governments to continue to work to combat corruption;

Recognised the need to effectively combat corruption at both the public and private levels in order to achieve the goals set out in the Harare Declaration;

Expressed their collective commitment to work on both the domestic and international fronts to combat corruption;

Called for support from the Secretariat to undertake work which, with the assistance of member governments, will:

(a) identify the causes of corruption;

(b) collect and disseminate examples of national laws and experiences in combating corruption;

(c) identify those strategies which have been effective in changing national standards so as to promote an "anti-corruption culture";

Expressed the wish that the Secretariat co-operate with other intergovernmental and non-governmental organisations working to combat corruption;

Called upon the Secretary-General of the Commonwealth to facilitate a Secretariat-wide approach to the issue which will involve not only the Legal and Constitutional Affairs Division but all other relevant areas of the Secretariat;

Agreed to establish a self-funding working group, convened by the Secretariat, to examine all aspects of the problem, advise Ministers on developments and initiatives in the field and to propose courses of action to assist member jurisdictions to better address and resolve the problems of corruption.

FIFTH MEETING OF LAW OFFICERS OF SMALL COMMONWEALTH JURISDICTIONS WINDHOEK, NAMIBIA, 4-8 SEPTEMBER 1995

INTEGRITY IN PUBLIC OFFICE: CONSIDERATION OF PROPOSAL FOR A POSSIBLE "INTEGRITY CODE"

A memorandum by the Commonwealth Secretariat

I. INTRODUCTION

Outline of paper

1. The purposes of this paper are to suggest the possible form which an Integrity Code might take and to give some preliminary idea of the steps necessary to implement it.

2. Thus the paper considers:

(a) the possible content and application of an Integrity Code (Part II); and

(b) implementation from two perspectives: (i) legislative and non-legislative change, and (ii) participation in international initiatives (Part III).

Commonwealth Secretariat Initiatives: Update

3. Three papers on "Integrity in Public Office" were presented at the 1993 Meeting of Commonwealth Law Ministers, and the Meeting of Senior Officials of Commonwealth Law Ministries (May-June 1995) endorsed an outline statement on the topic for finalisation by the Secretariat and submission to Senior Officials before the Meeting of Commonwealth Law Ministers in April 1996. Further, the Secretariat was requested to collect and disseminate examples of national laws and experiences in combating misuse of public office. Work is continuing on this project.

Meaning of "integrity" and "public office"

4. This paper focuses on "*the wrongful exercise of public duty for direct or personal gain*" (background paper para 1) or, more succinctly still, "*the misuse of public power for private profit*". Thus it was not thought relevant to include in the Code suggested in Part II a provision requiring a senior public servant to give a Minister impartial advice or requiring a public servant to treat the public with courtesy (as is contained in some Codes regulating integrity in public office). At the same time, para 4 of the background paper acknowledges the obvious benefit, in the fight against abuse of the defined type, of many measures which strengthen democratic institutions and the rule of law. This is reflected in several of the Integrity Code provisions suggested in Part II of this paper which may err on the side of going too wide.

5. What comprises "wrongful exercise of public duty" may differ according to cultural norms. Unambiguous examples might be the payment of a bribe to a public official or politician to win a defence contract, to procure public services which should be available to all but are not, to influence an election or to affect the outcome of a judicial process. Greyer cases might comprise a politician's grant of public money to a group in a marginal constituency, the grant of a ceremonial gift to a minister of state by the successful tenderer for a capital works project, or the donation of large sums by a corporation to a campaign fund. Differing norms might be reflected in an Integrity Code by specifying those provisions which are optional.

6. Yet Commonwealth countries should scrutinise critically any plea for exemption on the basis of culture. For example, Dr Kamal Hossain, Minister of Foreign Affairs and Justice for Bangladesh, insisted recently that bribery impoverishes the poor and rejected the thesis that it is part of the culture of that country.

7. The scope of "public office" is addressed in Part II, which discusses the holders of public office to whom a Code, or Codes, might apply.

Scope of problem

8. The background paper analyses the great harm caused by the wrongful exercise of public duties, particularly to developing countries (paras 2-3). To take one example, a recent UN paper estimates that between 1988 and 1992 the top ten arms exporters sold US$20 billion of arms a year to ten developing countries, assumes that not less than 15% of this value was paid to politicians and military chiefs as bribes, and questions the necessity of much of this hardware to the countries concerned - possibly a massive diversion of much needed finance. The Council of Europe has added its voice to the rising

international chorus of alarm, noting in particular the undermining effect of corruption on the efforts to build up democratic institutions and to promote the rule of law in Central and Eastern Europe.

II. CONTENT AND APPLICATION OF INTEGRITY CODE

CONTENT: KEY ELEMENTS

9. The proposed Draft Integrity Code is contained in the Appendix. It is based largely on the United Nations Draft International Code of Conduct for Public Officials (April 1995) as a starting point. However, it also draws on:

- the Leadership Code, a code of ethics entrenched under s 27 of the Constitution of Papua New Guinea, and complemented by the Organic Law on the Duties and Responsibilities of Leadership;

- Standards in Public Life (UK, May 1995), the First Report of the Committee and bearing that name, chaired by Lord Nolan, which proposes sets of guidelines targeted respectively at ministers, MPs, senior civil servants and executives of non-departmental public bodies; and

- several Council of Europe working documents (March-May 1995).

10. The following narrative restricts itself to a few brief points about each clause and should be read together with the Draft Code. The intention is that most discussion will focus on the Draft Code itself.

Clause 1: Statement of general principles

11. The outline of general principles at the start of the Code stresses the overriding duty to act in the public interest; openness and accountability; and the duty to avoid conflict of interest. Primary sources are the "seven principles of public life" outlined in the Nolan Report and the "general principles" section of the Draft International Code of Conduct for Public Officials (United Nations).

12. The purpose of the statement is educative, and there is likely to be considerable debate as to the specific measures which would be necessary to give effect to them. For example, the requirements of "accountability to the public" (1(f)) may differ greatly depending on jurisdiction and office-holder. Some of the principles are of more limited application than others, a point true of most of the clauses below and addressed below in the discussion of to whom the Code might apply.

Clause 2: General duties of holders of public office

13. This clause derives from section 27 of the Leadership Code in the Constitution of Papua New Guinea. While breach of those general duties can in themselves comprise "misconduct in office" under the Constitution, they are supplemented by more specific provisions (under the Organic Law, noted above) of the type found in clauses 3-5 of the Code. Arguably they form a useful measuring stick for a range of behaviour, some of which may fall outside the more specific provisions.

Clause 3: Conflicts of interest and disqualification
Clause 4: Disclosure of assets and financial accounting
Clause 5: Acceptance of benefits

14. These clauses derive from a wide range of the sources noted above at para 9 and form the core of the provisions aimed at the misuse of public office for private gain.

15. Some of these provisions, though generally phrased, could require quite strict regulation in order to implement them. For example the requirement to observe restrictions imposed on the holding of private interests (clause 3) might be thought to require provisions similar to those found in the Organic Law of Papua New Guinea. These provisions restrict the holding of shares and directorships. More specifically, no person to whom it applies (among others politicians, constitutional office holders and heads of public service departments) may hold an investment in a foreign enterprise without the Ombudsman Commission's approval, or in any profit-seeking organisation which could place that person in a conflict of interest.

Clause 6: Confidentiality
Clause 8: Political activity

16. These clauses may not be strictly necessary in a Code of this nature. Further, the misuse of confidential information is caught already by clause 3(c). However, the provisions derive from the United Nations Draft International Code, a direct response to corruption, and are retained here for the moment.

Clause 7: Appointment to public office

17. This provision stems from the Nolan Report. It

could provide a useful counter to the use of appointment, particularly to senior public office positions, as a reward for services rendered or expected.

Clause 9: Reporting

18. Mandatory reporting would be a contentious measure. Reporting should perhaps remain optional.

Clause 10: Disciplinary action

19. While strong sanctions seem appropriate in light of the harm caused by corruption, care would be needed to observe human rights fundamentals. This point is touched on again under Part III, in the section which discusses non-legislative implementation measures.

TO WHOM SHOULD THE CODE APPLY?

20. This section attempts merely to outline some of the issues which will need to be addressed in tackling this question. As with issues concerning the content and implementation of the Code, much careful and detailed work is likely to be required.

How to define "Holders of Public Office"?

21. "Holders of public office" is intended in the Draft Code to include:

* heads of state, including a prime minister or president and their staffs
* ministers of state
* elected representatives in general
* officers appointed under the constitution, if any (including judicial and legal officers)
* heads of department and other senior public servants
* heads of non-departmental public bodies (for example state owned corporations)
* public servants in general, at all levels

22. Yet even this basic list is incomplete and problematic. It does not mention, for instance, the staff of a Governor-General or of a leader or deputy-leader of the opposition; not all countries have a written constitution; senior military, diplomatic and law enforcement staff do not fall easily into any of the categories; and so on.

23. Further, it is obvious that provisions of the Draft Code will have to be applied to different groups selectively; none of the Codes reviewed apply in their entirety to all of the classes of public office listed above. Thus, clauses 1(i),(j), 3(h), 4(e), 5(c) can only apply to elected representatives and/or ministers of state. However, other cases are not so clear: should middle ranking public servants be subject to clause 4 disclosure requirements?

24. Other Codes do not provide a ready made answer to the definition problem. The UN Draft Code does not define "Public Official", while the Papua New Guinean Leadership Code defines "Leader" by carefully listing a wide selection of public offices by title. However, some definition is needed and the approach of listing office holders by title runs the risk, in the context of an international code, of omitting important functionaries and of using nomenclature which does not fit all jurisdictions.

25. Perhaps the best approach for present purposes lies in defining *types* of office by describing the nature and extent of the particular decision making powers and of the official's control over resources. Also relevant is the effect of the correct performance of particular functions on the perception of the government's integrity: as pointed out by several commentators, only when corruption at the highest levels has been eliminated are lower ranking officials likely to follow suit. Finally, an appreciation of to whom the duties of the office are owed will assist consideration of appropriate accountability mechanisms.

26. One result of this exercise may be the drafting of a number of Codes tailored to different groups.

Further points

27. Further miscellaneous points to consider are:

* The Codes reviewed are also notable for whom they do not specifically apply to, namely those persons who offer corrupting inducements. Nor does the Code apply to private corruption. This approach is continued here; whether it should requires careful thought.
* One Code reviewed applies to the conduct of leaders holding public office in both their public *and private* lives .
* Provisions of the Code regulating the holding and disclosure of certain property interests should apply also to the spouses and dependants of the holder of public office.

III. IMPLEMENTATION OF CODE BY COMMONWEALTH MEMBER STATES

28. This section outlines some of the legislative and non-legislative measures which may be necessary to implement the Code. Depending on the particular country, some of these measures will already exist, some will exist but need to be improved, and some will need to be introduced. This is a brief overview only: the material which the Secretariat has undertaken to provide (para 3 refers, above) will cover the same areas in more depth at a later date.

LEGISLATIVE AND NON-LEGISLATIVE MEASURES AT THE DOMESTIC LEVEL

Legislative Measures

29. The criminal, electoral, civil, administrative and constitutional law of most Commonwealth states will already provide sanctions against many if not most breaches of an Integrity Code similar to the one proposed above, with appropriate jurisdiction being granted to the courts. These laws will also often contain sanctions against the conduct of the person offering the corrupt inducement (though this conduct may not come within the Code proposed here).

Criminal

30. The criminal codes of many countries contain provisions which criminalise aspects of corrupt behaviour. However, improvements can still be made in the area of transnational corruption (see below at para 55). Attached as Annex A is an indicative list of corruption offences.

Evidence

31. Most corruption offences are consensual and may not involve an obvious victim, meaning it can be rare to obtain confessions and witness testimony and thus legally reliable evidence which will stand up in court, or provide the "reasonable grounds" frequently prerequisite to investigative and enforcement action. Data held by financial institutions may be protected by confidentiality. This can also be problematic in civil proceedings.

Electoral

32. Again, the law of many countries will allow a challenge to the result of an election where corrupt influence is alleged.

Employment

33. In many countries, breach of the Code could lead to a civil claim in damages under an employment contract, and certainly provide grounds under the same for dismissal.

Civil and commercial

34. Several points arise:

* Claimants for damages caused by corruption might include the government and the competitor not awarded the contract. A recent Council of Europe paper advocates the civil liability of an administration to a private person for damage caused by corruption. Procedural remedies such as injunctive relief may be important.

* In the USA, the Securities Exchange Commission helps with the civil enforcement of FCPA, and failure to make proper disclosure leaves top management open to civil liability.

* In terms of reform, legislation could provide, where this does not already flow from the general law, that a contract obtained by means of a bribe is voidable with damages obtainable by a third party who suffered loss from missing out on the original contract award.

* Stringent public sector and corporate auditing regulations would be an essential handmaiden to laws prohibiting the corrupt practices themselves, greatly enhancing chances of detection and thereby increasing deterrence.

Tax

35. Many developed countries offer tax incentives for offering "commissions" to procure foreign contracts. Clearly this is unacceptable. Simultaneous and collective action by countries is required so that those acting sooner are not placed at a competitive disadvantage.

Constitutional and Administrative

36. Misuse of public office for private gain is often the subject of specific constitutional provisions, as for example under s 27 of the Constitution of Papua New Guinea (noted above, and also below in the context of enforcement). Core administrative law principles allow for the judicial review of decisions taken mala fides.

37. The legal position in regard to members of parliament can be less clear in the absence of

express legal provisions. Thus in the United Kingdom, pursuant to the jealously guarded doctrine of parliamentary privilege, the House formulates and enforces its own rules regulating, among many other things, members' interests. A recent report has investigated whether enforcement under current procedures suffers from political bias and makes a case for investigation by an independent Commissioner appointed by the House. It also suggests, in respect of bribery, that there is a case for altering the traditional boundary between courts and parliament.

Specialised legislation

38. Hong Kong (the Prevention of Bribery Ordinance 1971, Corrupt and Illegal Practices Ordinance 1955, Independent Commission against Corruption Ordinance 1976) and Singapore (the Prevention of Corruption Act) are among several countries which have introduced legislation targeted at misuse of public power for private profit. Papua New Guinea has already been mentioned. Aspects of this legislation are considered further under the next heading.

Enforcement

39. President Musevini of Uganda recently stated that, "The real problem is that the guards in Africa have themselves got to be guarded and this is clearly a vicious circle. Without moral authority in our top leadership it is very difficult to eliminate corruption ... moral suasion is not enough. We need legal sanctions and we need the enforcement of the laws that govern corruption ..."

40. Australia (at a state level), Hong Kong, Singapore and Zambia are four Commonwealth countries which have attempted to address this problem by setting up independent Anti-Corruption enforcement bodies, with some notable successes. These bodies have a selection of investigation, arrest, prosecution (with the consent of the prosecuting authority), prevention and community education functions.

41. Papua New Guinea has also adopted this broad approach, and in a distinct and innovative way. An "Ombudsman Commission" has wide powers to investigate alleged breaches of the Leadership Code and the Organic Law on the Duties and Responsibilities of Leadership which. If these appear substantiated, the Commission must refer them to the Public Prosecutor which decides independently whether to initiate proceedings before the Leadership Tribunal. This Tribunal's mandate is to investigate and determine allegations of misconduct and can recommend dismissal (or a lesser penalty) to the Governor-General, who is constitutionally obliged to implement it.

42. As an alternative to referring the matter for prosecution, the Ombudsman Commission can in appropriate cases publish the benefits or interests which a particular leader or group of leaders are prohibited from holding. If, following an investigation by the Commission, it is found that the leader or leaders hold that interest etc., then the Commission can make an order as to the restitution or forfeiture of the property in question.

43. Finally, the Commission also has the power to give directions as to the distribution of discretionary "slush funds" available to individual members of Parliament for disbursement to the electorate. The Commission also carries out the functions normally associated with an Ombudsman, as defined elsewhere in the Constitution.

44. Clearly, a specialised anti-corruption body may be impractical and even unnecessary for small states with few resources. The same may apply to closely policed disclosure requirements and "registers of interests". Further ideas are sought for appropriate enforcement mechanisms.

Non-Legislative Measures

Public administration

45. Close and independent administrative auditing is an essential tool for detecting misuse of public office. Negligent failure to detect could be a ground for civil liability (see above).

46. Disciplinary procedures within the administration may require attention. Tough disciplinary sanctions may be inappropriate in the absence of fair trial procedures and may lead to multiple sanctioning, if liability also exists under penal and civil law. Post-employment sanctions are important given that the new position may owe itself to corrupt inducement while in public office. Administrative sanctions might also apply to private persons, for example blacklisting a corporation.

47. Public procurement is the most important domain of corruption, given the usually substantial sums involved. Attribution procedures can render it far more difficult, for example by sharing the decision between several persons, fair and equal tendering, detailed itemisation of quotes, and transparency at every stage.

Changing public attitudes and prevention

48. Several commentators note the limited effect that any system of rules can have in this area unless they are accompanied by an appropriate change in attitudes and behaviour by those to whom the Code will apply, preferably beginning at the highest levels.

49. In this context it is worth noting the public education and prevention functions of the Hong Kong Independent Commission Against Corruption ("ICAC") and of the New South Wales body of the same name. Thus, both Commissions are responsible for educating the public against the evils of corruption and for examining public bodies to identify opportunities for corruption in order advise on prevention.

Economic Fundamentals

50. Clearly, fairly remunerated officials are likely to be less vulnerable to corrupting inducements.

Fundamental values

51. Advances in promoting democratic government, a free press and the rule of law will help to provide the framework in which public office holders are actually accountable, and in which breaches are actually detected and punished by an independent and incorruptible prosecution authority and judiciary respectively. President Musevini noted an even more basic obstacle:

"The problem sometimes is that the corrupt leaders, who are also the law makers, do not make laws to curb corruption because they would, by so doing, be creating problems for themselves."

Participation in International Initiatives

52. The transborder aspects of breaches of an Integrity Code must be addressed if the Code is to operate successfully against relevant types of international economic crime, for example the taking of bribes in international trade transactions. Several detailed studies undertaken by international bodies stress that it will not be possible to combat international economic crime of this nature without comprehensive international co-operation, both in enforcement and the harmonisation of laws. Commonwealth countries will need to pay particular attention to the areas outlined in the following.

Mutual Assistance in Criminal Matters and Extradition

53. In a recent paper, the acting Chief Ombudsman of Papua New Guinea noted that it would be able to exercise its powers much more effectively if it received more assistance from other jurisdictions in some of its transnational enquiries.

Money Laundering

54. International co-operation is necessary to combat the laundering of the proceeds of corruption.

Criminal offences and extraterritoriality

55. Two approaches are possible to combat transnational corruption. One approach is that taken under the Foreign Corrupt Practices Act 1977 (USA) ("the FCPA") , which criminalises the payment of bribes to foreign officials, political parties or candidates for public office, which are made in order to secure foreign orders. Another approach is to facilitate, by means for example of improved extradition procedures, the prosecution of a foreign national by and in the country where the offence took place.

Civil actions

56. Where the parties come from two or more states, questions may arise as to jurisdiction, applicable law, and the enforcement of judgments. These issues require further consideration.

August 1995

DRAFT "INTEGRITY IN PUBLIC OFFICE" CODE

1. Statement of general principles

Holders of public office shall:

(a) take decisions solely in terms of the public interest

(b) administer resources in the most effective and efficient manner

(c) not place themselves under financial or other obligation that might influence the performance of their official duties

(d) make choices on the basis of merit when carrying out public business

(e) be attentive, fair and impartial in the performance of their functions

(f) be accountable for their actions to the public through appropriate mechanisms

(g) be as open as possible about all actions, giving reasons for decisions unless the public interest requires otherwise

(h) declare any private interests relevant to their exercise of public duties

(i) be accountable to parliament

(j) not mislead parliament

2. General duties of holders of public office

Holders of public office shall not behave in a way that:

(a) demeans their office;

(b) diminishes their official or personal integrity;

(c) leads to doubt as to whether they are complying with the duties of their office; or

(d) diminishes respect for and confidence in the integrity of government

3. Conflicts of interest and disqualification

Holders of public office shall:

(a) not use their authority for the improper advancement of their own interest, or have any function or interest incompatible with their office

(b) disqualify themselves from decision making when any conflict of interest arises between private interest and public duty

(c) not use public property, services or information, acquired or available in the course of their public duties, for activities unrelated to those duties

(d) observe restrictions on the holding of interests which lead, or could lead, to a conflict of interest

(e) not hold an interest in a government contract

(f) not engage in paid employment which is additional to the public office held, without approval from the appropriate authority

(g) for an appropriate period after leaving public office, obtain governmental permission

  (i) prior to accepting employment or consultancy assignments from concerns that are or were in a financial relationship with the agency which employed the official; or

  (ii) prior to engaging in a business activity related to their previous position

(h) keep their role as minister and constituency Member separate

4. Disclosure of interests and financial accounting

Holders of Public Office shall:

(a) on request from the appropriate authority on reasonable grounds, disclose all personal property, assets and liabilities

(b) on entering public office, declare any interest or activities undertaken for financial gain which are relevant to the exercise of their public duties

(c) on request from the appropriate authority on reasonable grounds, provide detailed

information on the source of an acquisition made after their appointment

(d) lodge annual financial statements, providing those financial details prescribed by the appropriate authority

(e) declare financial interests in the approved manner when taking part in House business or approaching the executive on a matter concerned with that business

5. **Acceptance of benefits**

Holders of public office shall:

(a) not place themselves in the position of being under a moral obligation to give special treatment to any person, for example by accepting any benefit above a certain value

(b) not ask for benefits

(c) where appropriate, not promote any matter in Parliament in return for payment

6. **Confidentiality**

Holders of public office shall keep confidential matters confidential, unless disclosure is necessary in the performance of that officer's duty or in the needs of justice.

7. **Public appointments**

Public Office positions are to be widely advertised, and appointments should be on the basis of merit and publicly announced.

8. **Political activity**

Holders of Public Office shall not undertake any political activity, being activity external to the usual functions and duties of their office, which harms or may harm confidence in the impartial performance of their official functions.

9. **Reporting**

Holders of Public Office shall be under a duty to report violations of the Code to the relevant authorities.

10. **Disciplinary action**

(a) Knowing, deliberate or reckless disregard of the Code is to be subject to appropriate disciplinary measures

(b) Serious violations may be punishable by criminal sanctions, including forfeiture and confiscation, with compensation to the injured party in appropriate cases

(c) Breach of the Code will lead to dismissal from office in serious cases

A. NATIONAL LAWS

Australia

Crimes (Offences Against the Government) Act 1989 - Sections 14-16, 20 (Australian Capital Territory)

Crimes (Superannuation Benefits) Act 1989

Crimes Act 1914 - (Commonwealth) Sections 73 and 73A

Crimes Act 1958 - Extract (Victoria)

Crimes Act 1990 No. 40 - Part 4A (New South Wales)

Criminal Code - Chapter XIII (Western Australia)

Criminal Code - Sections 199, 257-261 (Queensland)

Criminal Code Act - Sections 83-85 (Tasmania)

Criminal Justice Act 1989 (Queensland)

Criminal Justice Amendment Act (No. 2) 1992 (Queensland)

Criminal Justice Amendment Act 1992 (Queensland)

Criminal Justice Amendment Act 1993 (Queensland)

Criminal Law Consolidation Act 1935 - Sections 249, 251-253 (South Australia)

Independent Commission Against Corruption (Amendment) Act 1994 (New South Wales)

Independent Commission Against Corruption Act 1988 (New South Wales)

Public Interest Disclosure Act 1994 (Australian Capital Territory)

Secret Commissions Act 1905 (Commonwealth)

Secret Commissions Prohibition Act 1920 (South Australia)

Whistleblowers Protection Bill 1992 (No. 2) (New South Wales) (lapsed)

Whistleblowers Protection Act 1994 (Queensland)

Belize

Prevention of Corruption in Public Life Act 1994

Prevention of Corruption in Public Life Bill 1993

Botswana

Corruption and Economic Crime Act 1994

Penal Code - Sections 99-110

Bulgaria

Criminal Code (Extracts)

Canada

Criminal Code (Extracts)

Cyprus

Criminal Code - Sections 100-107

Denmark

Criminal Code - Sections 100-107

The Gambia

Evaluation of Assets and Properties and the Prevention of Corrupt Practices Act No. 17 of 1982

Ireland

Ethics in Public Office Bill 1994

Hong Kong

Acceptance of Advantages (Governor's Permission) Notice 1992

Corrupt and Illegal Practices Ordinance 1987

Heung Yee Kuk Election Expenses Order 1993

Independent Commission Against Corruption Ordinance 1992

Independent Commission Against Corruption (Treatment of Detained Persons) Order 1987

Independent Commission Against Corruption (Treatment of Detained Persons) Order 1992

Independent Commission Against Corruption Ordinance 1987

Legislative Council Election Expenses Order

Prevention of Bribery (Appeal Against Confiscation Order) Rules 1987

Prevention of Bribery (Exclusion of Bodies and Members of Bodies of Educational Institutions) Notice 1992

Prevention of Bribery Ordinance

Prevention of Bribery Ordinance 1987

Prevention of Bribery Ordinance 1992

Resolution of the Legislative Council 1993

Theft Ordinance 1986

Urban Council, Regional Council and District Boards Election Expenses Order 1993

Hungary

Criminal Code (Extracts)

Italy

Criminal Code (Extracts)

Jamaica

Contractor-General Act 1983

Kenya

Penal Code, Chapter X

Malawi

Corrupt Practices Act 1995

Forfeiture Act 1969

Malaysia

Anti-Corruption Agency Act 1982

Emergency (Essential Powers) Ordinance No. 22 1970

Prevention of Corruption Act 1961

Malta

Permanent Commission Against Corruption Act 1988

Namibia

Privileges and Immunities of Parliament Act 1995

Portugal

Penal Code (Extracts)

Singapore

Constitution of Singapore - Sections 17-220

Corruption (Confiscation of Benefits) Act 1989

Penal Code - Sections 21, 161-171, 216B-222, 228

Prevention of Corruption Act 1960

Prevention of Corruption Act 1993 (Revised Edition - 1993)

Sri Lanka

Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994

Special Presidential Commissions of Inquiry (Amendment) Act No. 38 of 1986

St Christopher and Nevis

Integrity in Public Life Act 1994

Trinidad and Tobago

Integrity in Public Life Act 1987

Prevention of Corruption Act 1987

Vanuatu

Constitution of Vanuatu - Chapter 10

Ombudsman Act No. 14 of 1995 - Section 23

Zambia

Corrupt Practices Act 1980

Zimbabwe

Prevention of Corruption Act 1985

Public Service (Officers) (General) Regulations 1979

B. CODES OF CONDUCT

Australia

Code of Conduct for Public Employees in South Australia 1994

Code of Conduct for Officers of the Queensland Public Service (date not known)

Guidelines on Official Conduct of Commonwealth Public Servants (Public Service Commission, Canberra 1995; 1979 and 1987 editions also held)

Commonwealth Procurement Guidelines (Australian Department of Administrative Services 1989)

Canada

Conflict of Interest and Post-Employment Code for Public Office Holders (Office of the Ethics Counsellor, Ottawa 1994)

Hong Kong

Conflict of Interest (Civil Service Branch Circular 19/92, 1992)

Revised Rules on Investments and Declaration of Investments by Civil Servants (Civil Service Branch Circular 6/95, 1995)

Namibia

Guidelines for Political Office Bearers: Reconciliation of Public Duty and Private Interests 1993

New Zealand

Public Service Code of Conduct 1990

Singapore

Instruction Manual for Public Servants (extract)

United Kingdom

Open Government: Code of Practice on Access to Government Information (Citizen's Charter)

Code of Best Practice for Board Members of Public Bodies (HM Treasury, 1994)

The Civil Service Code

C. Reports and Other Material

Produced by States

Australia

Report of the Public Servants Ethical Conduct Committee on Conflict of Interest (Victoria, 1976)

Codes of Conduct for Public Officials - Issues Paper No.15 (Electoral and Administrative Review Commission, Queensland 1991)

Report on Protection of Whistleblowers (Electoral and Administrative Review Commission, Queensland 1991)

Defending the Fundamental Political Values of the Commonwealth Against Corruption - Paper presented at LMM 1993 (Independent Commission Against Corruption, New South Wales)

Conflict of Interest and Local Government (Independent Commission Against Corruption, New South Wales 1991)

Canada

Conflict of Interest in Canada: Comparative Tables, 1994 (Office of the Ethics Counsellor, Ottawa)

Hong Kong

Corporate Code of Conduct (Independent Commission Against Corruption)

Serving the Community with Integrity (Independent Commission Against Corruption)

Independent Commission Against Corruption: Annual Report (1986 and 1987)

Papua New Guinea

Serious Economic Crime - the Threat to Us All (on investigation of crimes under the Leadership Code, Sir Charles Maino)

Trinidad and Tobago

Report of the Integrity Symposium 1993 (Trinidad & Tobago)

United Kingdom

Report of the Royal Commission on Standards of Conduct in Public Life 1974-1976 (Salmon Report) (Cmnd 6524, 1976)

Standards in Public Life: First Report of the Committee on Standards in Public Life (Nolan Report) (Cmnd 2850-I, 1995)

The Government's Response to the First Report from the Committee on Standards in Public Life (Cmnd 2931, 1995)

Review of Guidance on Public Appointments: Report by the Public Appointments Unit (Cabinet Office, 1995)

Produced by International Organisations

Conflict of Interest: A Commonwealth Study of Members of Parliament (Gerard Carney for the Commonwealth Secretariat, 1992)

Corruption: The Abuse of Public Office for Personal Benefit (Transparency International)

D. CASE LAW

Abd Khalid bin Abd Hamid v Public Prosecutor [1995] 1 MLJ 692

Amerasekere v Mitsui & Co Ltd & Ors [1992] LRC (Comm) 636 (Sri Lanka)

Felix Njagimarete v AG [1987] Nairobi Law Monthly 38

Frank Roncarelli v The Hon. Maurice Duplessis [1958] SCR 121 (Canada)

Greiner v ICAC/Moore v ICAC (1992) 28 NSWLR 125

Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor [1981] 2 MLJ 230

Herscu v R [1992] LRC (Crim) 606 (Australia)

Ibrahim Helmi bin Mohd. Liki v Public Prosecutor [1984] 2 CLJ 46

Mohamed Mokhtar v Public Prosecutor [1972] 1 MLJ 122

Public Prosecutor v Abdul Malik bin Maharaji & Anor [1994] 2 MLJ 430

Public Prosecutor v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166

Public Prosecutor v Kang Hwi Wah [1994] 2 Singapore Law Reports 420

Public Prosecutor v Rahman [1993] 3 LRC 695 (Brunei)

Public Prosecutor v Tiw Ah Boon [1995] 1 Singapore Law Reports 333

Public Prosecutor v Yuvaraj [1969] 2 MLJ 89 (Privy Council)

R v Allen (1992) 27 NSWLR 398

R v Boston & Ors (1923) 33 CLR 386 (Australia)

R v Cobcraft (1966) 85 WN (Pt I) (NSW) 608

R v Dillon & Riach [1982] VR 434 (Victoria)

R v Gallagher [1986] VR 219 (Victoria)

R v Jamieson [1988] VR 879 (Victoria)

R v Scott [1907] VLR 471 (Victoria)

Re Kisima Farm Ltd [1978] The Kenya Law Reports 36

Sumitomo Bank Limited v Kartika Retna Thahir & Ors [1993] 1 Singapore Law Reports 735

Yeo See Koon Jimmy v Public Prosecutor [1994] 3 Singapore Law Reports 539

Wanyiri Kihoro v AG (1993) 49 Nairobi Law Monthly 34

INTEGRITY IN PUBLIC LIFE - COMMITTEE INTO STANDARDS OF PUBLIC LIFE (NOLAN COMMITTEE)

A Memorandum by the Government of Britain

1. The Nolan Committee was set up by the Prime Minister in November 1994 in response to a number of well-publicised scandals in public life, particularly in Parliament, and culminating with two Members of Parliament being accused of accepting payment for tabling Parliamentary Questions (the "cash for questions" scandal). The Committee's terms of reference are: "To examine current concerns about standards of conduct of all holders of public office, including arrangements relating to financial and commercial activities, and make recommendations as to any changes in present arrangements which might be required to ensure the highest standards of propriety in public life.

For these purposes, public life should include Ministers, civil servants and advisers, Members of Parliament and UK Members of the European Parliament, members and senior officers of all non-departmental public bodies and of national health service bodies, non-ministerial office holders, members and other senior officers of other bodies discharging publicly-funded functions, and elected members and senior officers of local authorities."

2. The Chairman of the Committee is Lord Nolan, a senior judge. Its members are nominees of the Government or of the main political parties. They are:

Sir Clifford Boulton, GCB	former Clerk of the House of Commons
Sir Martin Jacomb	Chairman of the British Council
Professor Anthony King, CH, MP	Professor of Government, University of Essex
The Rt. Hon. Tom King, CH, MP	Member of Parliament for Bridgwater, former Cabinet Minister
The Rt. Hon. Peter Shore, MP	Member of Parliament for Bethnal Green and Stepney, former Cabinet Minister
The Rt. Hon. The Lord Thomson of Monifieth, KT, DL	formerly Secretary of State for Commonwealth Affairs and an EC Commissioner. Chairman of the Independent Broadcasting Authority, 1981-1988
Sir William Utting, CB	Chairman of the National Institute for Social Work
Dame Anne Warburton, DCVO, CMG	formerly with HM Diplomatic Service, 1957-1985, and President of Lucy Cavendish College, Cambridge, 1985-1994
Diana Warwick	Chief Executive, Committee of Vice-Chancellors and Principals.

The Committee's First Report

3. The Committee's first Report was published on 11 May 1995. Among the Report's key recommendations were:

- a Parliamentary Commissioner for Standards to oversee new rules on MPs' interests;
- ex-Ministers to seek clearance for jobs they take on within two years of leaving office;

- a new Public Appointments Commissioner to ensure the highest standards of propriety in appointments to Quangos.

4. The Report made 55 recommendations dealing with MPs, Ministers and Civil Servants, and the big spending Quangos including National Health Service trusts. A full list of the recommendations is at **Annex A**. The Report followed receipt of almost 2,000 written submissions from organisations and members of the public and evidence from over 100 witnesses at public hearings which were held at Westminster Central Hall, London from Tuesday, 17 January to Thursday, 23 February 1995.

5. The response to the Report divided into the dozen or so recommendations which concerned MPs; and the rest. The former were a matter for Parliament to respond to, while the latter were the concern of the executive.

6. The Government response, a White Paper dealing with all the recommendations addressed to Government itself, was issued in July 1995. At the same time, the House of Commons set up an all-Party Select Committee to advise on how the recommendations on MPs could be clarified and implemented. This Committee produced two Reports, which were debated on 19 July and 21 October respectively. Finally, a debate on the Government's White Paper took place on 2 November.

7. Ultimately, the great majority of recommendations in the Report were accepted by Government or Parliament respectively. In particular:

- A Parliamentary Commissioner for Standards (Sir Gordon Downey) was appointed in November 1995.

- New rules on MPs' conduct were introduced at the beginning of the current parliamentary session in November 1995. These include a ban on paid advocacy (meaning that MPs are no longer allowed to initiate parliamentary proceedings which relate specifically and directly to the interests of an outside body from which the MP receives remuneration).

- Business Appointment Guidelines for former Ministers have been published, and arrangements for Ministers to take advice from the Advisory Committee on Business Appointments were implemented in November 1996.

- A Commissioner for Public Appointments (Sir Len Peach) was appointed on 23 November, and began work the following month. The Commissioner will be issuing Guidance on Public Appointments in April 1996, an initial Report on his work in October 1996, and a full First Annual Report in July 1997.

- A review of the legal framework governing propriety and audit in public bodies began in May 1995. A consultation paper setting out the review's preliminary conclusions is due to issue by early March 1996.

The Committee's Second Report

8. Having examined Parliament and aspects of central government, the Committee decided that its Second Report should concentrate on standards in organisations providing public services at a local or regional level.

9. Accordingly, the Committee is undertaking a broad brush review of certain aspects of the management of local public spending bodies, including: Higher and Further Education Bodies (including Universities), Grant-maintained Schools, Training and Enterprise Councils (Local Enterprise Companies in Scotland), and Housing Associations.

10. The Committee is examining the arrangements for the appointment of members to Board and Management Committees, the role of Boards and Management Committees in relation to the officers and staff of such bodies, and the safeguards in respect of conflict of interest. By concentrating on these aspects, and by looking at them across a wide range of bodies, the Committee hopes to identify principles of best practice which will be widely applicable.

11. On 31 July 1995 the Committee published an "issues and questions" paper on these matters (a similar consultation paper had been published during the First Enquiry). Copies were sent to a wide range of interested organisations and were available for consultation in most main libraries. The closing date for responses to the paper was 31 October 1995.

12. Public hearings were held in London between 14 November and 13 December 1995, in Cardiff on

24 and 25 January, and in Edinburgh on 30 and 31 January 1996. The Committee aims to complete its work on Local Public Spending Bodies during the Spring, and to issue its Second Report in May 1996.

Future Work

13. Almost as much controversy has been generated by speculation about which issues the Committee might subsequently deal with, as about the work that it has actually done. There have been demands for future reports to cover MPs' pay, the funding of political parties, freemasonry in the public services, and individual cases of alleged corruption in central or local government.

14. In practice, many of these areas are outside the Committee's terms of reference. In particular, the Prime Minister, in setting up the Committee, made it clear that its remit does not extend to investigating individual allegations of misconduct.

15. The Committee's exact programme of future work is uncertain, though Lord Nolan has indicated that this is likely to include studies into aspects of local government and the utility regulators.

16. The Committee will consider other topics for study as its work load permits. During the course of 1996 the Committee will also wish to examine progress on recommendations in the First Report. In particular, the Committee has said that it will review changes in both Houses of Parliament following their first year of operation.

March 1996

Recommendations

We set out below our specific recommendations.
More details on each are in the relevant chapter of our report.

We believe it would be helpful to those to whom we have addressed the report if we gave some broad indication of the timescale within which we consider that recommendations could be implemented. We therefore place our recommendations into one of three broad categories:

A those recommendations which we believe could be implemented with the minimum of delay;

B those recommendations which could in our view be implemented—or on which we would expect to see significant progress towards implementation—by the end of this year;

C recommendations which we recognise will take longer to implement, but on which we would wish to re-examine progress in the latter part of next year.

Members of Parliament

1. Members of Parliament should remain free to have paid employment unrelated to their role as MPs. [A]

2. The House of Commons should restate the 1947 resolution which places an absolute bar on Members entering into contracts or agreements which in any way restrict their freedom to act and speak as they wish, or which require them to act in Parliament as representatives of outside bodies. [A]

3. The House should prohibit Members from entering into any agreements in connection with their role as Parliamentarians to undertake services for or on behalf of organisations which provide paid Parliamentary services to multiple clients or from maintaining any direct or active connections with firms, or parts of larger firms, which provide such Parliamentary services. [B]

4. The House should set in hand without delay a broader consideration of the merits of Parliamentary consultancies generally, taking account of the financial and political funding implications of change. [A]

5. The House should:

- require agreements and remuneration relating to Parliamentary services to be disclosed; [B]
- expand the guidance on avoiding conflicts of interest; [B]
- introduce a new Code of Conduct for Members; [B]
- appoint a Parliamentary Commissioner for Standards; [B]
- establish a new procedure for investigating and adjudicating on complaints in this area about Members. [B]

6. On disclosure of interests we recommend:

- the Register should continue broadly in its present form, and should be published annually. [B]

However the detailed entry requirements should be improved to give a clearer description of the nature and scope of the interests declared;

- updating of the Register should be immediate. The current updated version should be made more widely available electronically; [B]
- from the beginning of the 1995/96 session (expected in November) Members should be required to deposit in full with the Register any contracts relating to the provision of services in their capacity as Members, and such contracts should be available for public inspection; [B]
- from the same time, Members should be required to declare in the Register their annual remuneration, or estimated annual remuneration, in respect of such agreements. It would be acceptable if this were done in bands: eg under £1,000; £1,000–5,000; £5,000–10,000; then in £5,000 bands. An estimate of the monetary value of benefits in kind, including support services, should also be made; [B]
- Members should be reminded more frequently of their obligations to Register and disclose interests, and that Registration does not remove the need for declaration and better guidance should be given, especially on first arrival in the House. [B]

7. Members should be advised in their own interests that all employment agreements which do not have to be deposited should contain terms, or be supported by an exchange of letters, which make it clear that no activities relating to Parliament are involved. [B]

8. The rules and guidance on avoiding conflict of interest should be expanded to cover the whole range of business pertaining to Parliament, and particular attention should be paid to Standing Committees. [B]

9. The House should draw up a Code of Conduct setting out the broad principles which should guide the conduct of Members; this should be restated in every new Parliament. [B]

10. The Government should now take steps to clarify the law relating to the bribery of or the receipt of a bribe by a Member of Parliament. [C]

11. On procedure we recommend:

- the House should appoint a person of independent standing, who should have a degree of tenure and not be a career member of the House of Commons staff, as Parliamentary Commissioner for Standards; [B]
- the Commissioner should have the same ability to make findings and conclusions public as is enjoyed by the Comptroller and Auditor General and the Parliamentary Commissioner for Administration; [B]

- the Commissioner should have independent discretion to decide whether or not a complaint merits investigation or to initiate an investigation; [B]
- the Commissioner should be able to send for persons, papers and records, and will therefore need to be supported by the authority of a Select Committee with the necessary powers; [B]
- we consider that a sub-committee of the Committee of Privileges, consisting of up to seven very senior Members, would be the best body to take forward individual cases recommended by the Commissioner for further consideration; we recommend that such a sub-committee should be established; [B]
- in view of the fact that there would be a prima facie case to investigate, we recommend that hearings of the proposed sub-committee should normally be in public. We also recommend that the sub-committee should be able to call on the assistance of specialist advisers and that a Member who so wishes should be able to be accompanied by advisers before the sub-committee; [B]
- the sub-committee should be given discretion to enable an adviser to act as the Member's representative at hearings; [B]
- as the sub-committee would report to the full Privileges Committee this would have the practical effect of giving the Member a right of appeal to that Committee. Only the most serious cases should need to be considered by the whole House. [B]

The Executive: Ministers and Civil Servants

12. The first paragraph of Questions of Procedure for Ministers (QPM) should be amended to say: 'It will be for individual Ministers to judge how best to act in order to uphold the highest standards. It will be for the Prime Minister to determine whether or not they have done so in any particular circumstance.' [A]

13. The Prime Minister should put in hand the production of a document drawing out from QPM the ethical principles and rules which it contains to form a free-standing code of conduct or a separate section within a new QPM. If QPM is to remain the home for this guidance, we recommend that it is retitled 'Conduct and Procedure for Ministers' to reflect its scope. [A/B]

14. Careful consideration should be given to ensuring that the most appropriate means is used for the investigation of cases of alleged impropriety affecting Ministers. Other than in exceptional circumstances, the general rule that advice from civil servants to Ministers should not be made public should apply in these cases. [A]

15. A system similar to the civil service business appointment rules should apply to Ministers. The system should operate on an advisory basis, and it should be administered by the existing Advisory Committee on Business Appointments. [A]

16. In parallel with the civil service arrangements for permanent secretaries, an automatic waiting period of three months should apply to former Cabinet Ministers, but not to other Ministers or Whips. In cases where a further waiting period is recommended, the maximum waiting period should be set at two years from the date of leaving office. [A]

17. The advisory committee should be able to advise an applicant, whether a civil servant or a former Minister, that they feel that the application is not appropriate, and to make public that advice if it is not taken. [A]

18. Former Ministers, having received the advice of the advisory committee, should have the right of appeal to the Prime Minister of the day, who would be able to reduce any waiting period or relax any conditions if the appeal were well-founded. [A]

19. The system should be as open as possible, while protecting the personal privacy of Ministers. [A]

20. The Government should monitor the workload of the advisory committee under the new arrangements and put in place contingency arrangements for its staffing to be augmented to deal with the aftermath of any change of administration. [B]

21. Departments, as well as maintaining records of gifts, should maintain records of hospitality accepted by Ministers in their official capacity and should make these records available if asked to do so. [A]

22. The new performance pay arrangements for the senior civil service should be structured so as not to undermine political impartiality. [A]

23. The draft civil service code should be revised to cover circumstances in which a civil servant, while not personally involved, is aware of wrongdoing or maladministration taking place. [A]

24. The operation of the appeals system under the Code should be disseminated as openly as possible, and the Commissioners should report all successful appeals to Parliament. [B]

25. Departments and agencies should nominate one or more officials entrusted with the duty of investigating staff concerns raised confidentially. [A]

26. The new civil service code should be introduced with immediate effect, without waiting for legislation. [A]

27. The Cabinet Office should continue to survey and disseminate best practice on maintaining standards of conduct to ensure that basic principles of conduct are being properly observed. [A]

28. There should be regular surveys in departments and agencies of the knowledge and understanding staff have of ethical standards which apply to them; where such surveys indicate problem areas, guidance should be reinforced and disseminated appropriately, particularly by way of additional training. [A]

29. The Advisory Committee on Business Appointments should, when an appointment has been taken up, give the reasons for its decision in that particular case. [A]

30. The operation, observance and objectives of the civil service business appointment rules should be reviewed. [B]

31. Special advisers should be subject to the business appointment rules. [A]

32. A central or local record of invitations and offers of hospitality accepted should be kept in all departments and agencies. There should be clear rules specifying the circumstances in which staff should seek management advice about the advisability of accepting invitations and offers of hospitality. [A]

Quangos

(Executive Non-Departmental Public Bodies and National Health Service Bodies)

Appointments

33. The ultimate responsibility for appointments should remain with Ministers. [A]

34. All public appointments should be governed by the overriding principle of appointment on merit. [A]

35. Selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds. The basis on which members are appointed and how they are expected to fulfil their role should be explicit. The range of skills and background which are sought should be clearly specified. [A]

36. All appointments to executive NDPBs or NHS bodies should be made after advice from a panel or committee which includes an independent element. [C]

37. Each panel or committee should have at least one independent member and independent members should normally account for at least a third of membership. [C]

38. A new independent Commissioner for Public Appointments should be appointed, who may be one of the Civil Service Commissioners. [B]

39. The Public Appointments Commissioner should monitor, regulate and approve departmental appointments procedures. [C]

40. The Public Appointments Commissioner should publish an annual report on the operation of the public appointments system. [C]

41. The Public Appointments Unit should be taken out of the Cabinet Office and placed under the control of the Public Appointments Commissioner. [B]

42. All Secretaries of State should report annually on the public appointments made by their departments. [B]

43. Candidates for appointment should be required to declare any significant political activity (including office-holding, public speaking and candidature for election) which they have undertaken in the last five years. [B]

44. The Public Appointments Commissioner should draw up a code of practice for public appointments procedures. Reasons for departures from the code on grounds of "proportionality" should be documented and capable of review. [C]

Propriety

45. A review should be undertaken by the Government with a view to producing a more consistent legal framework governing propriety and accountability in public bodies, including executive NDPBs, NHS bodies and local government. This should involve all relevant departments and be co-ordinated by the Cabinet Office and the Treasury. [C]

46. The adoption of a code of conduct for board members should be made mandatory for each executive NDPB and NHS body. [B]

47. It should be mandatory for the board of each executive NDPB and NHS body to adopt a code of conduct for their staff. [B]

48. Board members and staff of all Executive NDPBs and NHS bodies should be required on appointment to undertake to uphold and abide by the relevant code, and compliance should be a condition of appointment. [B]

49. Sponsor departments should develop clear disciplinary procedures for board members of executive NDPBs and NHS bodies with appropriate penalties for failing to observe codes of conduct. [C]

50. The role of NDPB and NHS accounting officers should be redefined to emphasise their formal responsibility for all aspects of propriety. [B]

51. The Audit Commission should be authorised to publish public interest reports on NHS bodies at its own discretion. [B]

52. The Treasury should review the arrangements for external audit of public bodies, with a view to applying the best practices to all. [C]

53. Each executive NDPB and NHS body that has not already done so should nominate an official or Board Member entrusted with the duty of investigating staff concerns about propriety raised confidentially. Staff should be able to make complaints without going through the normal management structure, and should be guaranteed anonymity. If they remain unsatisfied, staff should also have a clear route for raising concerns about issues of propriety with the sponsor department. [B]

54. Executive NDPBs, supported by their sponsor departments, should:

- develop their own codes of openness, building on the government code and developing good practice on the lines recommended in this report; [B]
- ensure that the public are aware of the provisions of their codes; [B]

sponsor departments should:

- encourage executive bodies to follow best practice and improve consistency between similar bodies by working to bring the standards of all up to those of the best; [B]

the Cabinet Office should:

- produce and periodically update guidance on good practice for openness in executive NDPBs and NHS bodies. [B]

55. New board members should on appointment make a commitment to undertake induction training which should include awareness of public sector values, and standards of probity and accountability. [B]

Copies of the First Report of the Committee on Standards in Public Life are available from HMSO, their Agents and all good booksellers.

Volume 1: Report (Cm 2850–I) £11.80

Volume 2: Transcripts of Oral Evidence (Cm 2850–II) £38.00

INTEGRITY IN PUBLIC LIFE: ACCESS TO GOVERNMENT INFORMATION

A Paper by the Department of Justice, Canada

INTRODUCTION: ACCESS TO INFORMATION LEGISLATION IS ONE OF MANY TOOLS TO ENSURE INTEGRITY IN PUBLIC LIFE

1. There are many different tools to develop integrity in public life. Our basic premise for ensuring there is integrity in public life is to find ways to make government accountable to the people it serves. This paper stresses the importance of access to government information legislation for ensuring integrity in public life. There are approximately a dozen countries in the world that have successful access legislation. Beginning in 1977, every federal, provincial and territorial government in Canada (except Prince Edward Island) has adopted a freedom of information law. There were approximately 100,000 access requests to the federal government in the first decade of the federal *Access to Information Act* and approximately 10,000 requests per year. It is clear that Canadians support their freedom of information rights and the accountability and public integrity it promotes.

2. Although we believe that access to information legislation is important, we recognize that that access to information is only one of a number of building blocks that should be used to ensure integrity in public life.

3. Any discussion of integrity in public life should begin with the twin pillars of our commonwealth heritage: a commitment to the rule of law and to the accountability of the Executive to the people. The rule of law ensures integrity by making it clear that every one in the country, from the most powerful to the weakest, is subject to the same laws. The rule of law also ensures that senior leaders cannot rule by decree. To support the rule of law we have developed a strong, independent judiciary, one that has the power and indeed the duty, to strike down laws which do not accord with our Constitution, which includes our *Charter of Rights and Freedoms*.

4. The second pillar of integrity in public life is the accountability of the Executive to the people of the country. In our commonwealth heritage this is seen in our strong Parliamentary tradition, where the Executive Branch of government is accountable to the elected representatives. In Canada, this means that the Executive is formed from among those persons elected by the public, and the other elected representatives of the people have the right to ask questions of the Executive, introduce their own legislative proposals and call votes of non-confidence against the government of the day. This accountability of the Executive to the people is supported by fair elections and universal suffrage. Thus, the rule of law, a strong judiciary, an Executive accountable to Parliament and free elections, are the cornerstones for ensuring integrity in public life. However, these are not enough.

5. Basic human rights play an important role in ensuring integrity in public life, and most especially, freedom of speech and of the press. The media play a very important role in helping ensure that there is integrity in public life by exposing examples where such integrity does not exist. However, freedom of the press, the rule of law and free elections all depend to a large extent on the literacy of the population.

6. Although "literacy" is not stated as a right in our *Charter of Rights and Freedoms*, we recognize that without literacy, citizens have a very limited ability to hold governing officials accountable. It is probably fair to say that illiteracy is a problem for all countries, including Canada. Although we are fortunate to have very high rates of literacy, we know there are significant numbers of Canadians who have a very limited ability to read and write. Our Department of Heritage has a National Literacy Secretariat whose role is to try to address this problem. It is difficult to imagine how any country can achieve genuine accountability of the Executive unless it devotes its energies to the literacy of its people.

7. In Canada, we are very fortunate. We take for granted literacy, the rule of law, an independent judiciary, the accountability of the Executive to the people, fair elections and freedom of the press. With this base, we have been able to explore other methods to further enhance integrity in public life (including, for example, conflict of interest guidelines for elected officials and public servants). One of those other methods was the enactment of freedom of information laws. The first such law in Canada was passed by the province of Nova Scotia in 1977. Today, almost every provincial and territorial government in Canada has freedom of

information legislation. The federal government's access law, known as the *Access to Information Act,* was enacted in 1982 (the same year our *Charter of Rights and Freedoms* came into force).

8. Many other countries around the world have also adopted freedom of information legislation. To the south of Canada, we have the example of the United States, where the federal government and most state governments have freedom of information laws, which include "Open Meeting" laws and are sometimes known as "Government in the Sunshine" laws. Among our Commonwealth cousins, Australia and New Zealand have freedom of information laws, and we understand that South Africa is developing its own freedom of information law.

ACCESS TO INFORMATION LAWS: BASIC PRINCIPLES

9. Access laws have a variety of differences between them, both within Canada and around the world, but the basic principle is the same for all of them: providing a guaranteed, statutory right of access to government records. Here are the other basics of most freedom of information regimes.

I. What records are subject to the Act?

10. The Act should explain which records are subject to the law. Generally, this is done in two ways. First, by defining "records", and second, by explaining which institutions are subject to the law. Some Acts list the institutions which are subject to the Act. If an institution is not on the list, it is not subject to the Act. Other Acts define "public body": if an institution is a "public body", it is subject to the Act. Most Acts give a very broad definition to the word "records". Generally, a "record" is any document, video, audio recording or electronic file, and any copy of such a record. Thus, it does not matter if the original is located somewhere else.

11. Canada's federal *Access to Information Act* says that the Act applies to records "under the control of" any government institution listed in the Schedule to the Act. Courts have interpreted the phrase "under the control of" very broadly. Thus, any record in the physical possession of a government institution, no matter how that record was obtained, no matter what promise of confidentiality was made to obtain the record, is subject to the Act. In addition, where a government enters into a contract or funding agreement with a third party, and the agreement specifies that the government has a right to receive or review records produced under that agreement, then those records are also subject to the Act, even if the government has never had physical possession of them.

II. What records does the government hold?

12. The Act should require the government to tell its citizens what records it holds. The federal government in Canada does so through a publication called *InfoSource*, which names all of the government institutions subject to the federal Act, describes the programs and activities of those institutions and describes their various information holdings.

III. Who will respond to a request?

13. The Act should request government institutions to provide a mechanism for responding to access to information requests. Each federal institution has an office that is responsible for providing access to information. This office receives requests for information, seeks out that information from the various places within the institution, and provides a reading room where requesters can review the records, or makes copies to send to the requester. Under most freedom of information laws, it is the requester who chooses whether to receive copies or to read the documents, not the institution.

IV. What time limits and fee limits are there?

14. The Act should limit how long an institution can take to respond to a request for information and how much it can charge for that information. If institutions can delay their responses indefinitely, or can charge high fees for access to information, then either of these mechanisms could defeat the entire purpose of the freedom of information regime. Under Canada's federal law, institutions must respond to a request within 30 days but can extend that limit for a reasonable period of time if there are special circumstances, such as an unusually large number of records to deal with. Under our federal Act, fees are limited and the government recovers almost none of the costs of providing access to information.

15. Some people argue that requesters should pay more for the access they receive, but this depends very much on one's perception of the role of the Act. If access to information is seen as an important tool to promote accountability of government to its citizens, then it may be appropriate to compare the cost of providing access to government information to the cost of conducting elections or operating the courts. No one would suggest that elections be paid

for on a user-pay basis, or that the cost of operating the courts be paid by the people who come before the courts. To have an open, democratic society, certain institutions are required and are in the general interest of all citizens, not just those citizens who vote, who use the courts or who make access to information requests.

V. Are there limits to what kinds of information must be disclosed?

16. The Act should allow some kinds of information not to be disclosed, especially if disclosure could cause harm. These limits are known as "exemptions" and will be discussed in greater detail later in this paper.

VI. What happens if there is exempt and non-exempt information in a record?

17. The Act should require the government to sever exempt information and disclose the remaining records, and to state the exemption it used to withhold some information. Generally this is done by blanking out exempt information when photocopies are made.

VII. What happens if there is a disagreement about how the law should apply?

18. One of the principles of the rule of law generally is that there should be an independent review of the decisions made under the law. This can be done in a number of ways. In Canada, we use a combination of Commissions and the courts. In our federal scheme, the Information Commissioner is an investigator, mediator and can make recommendations and reports to Parliament, but has no decision-making power. The Commissioner can apply to court if he or she disagrees with the way an institution handled a particular request, and so can the requester.

19. In a number of our other jurisdictions, such as Ontario, Quebec and British Columbia, the Commissions perform investigation, mediation and quasi-judicial functions. In their quasi-judicial function, they can order institutions how to respond to specific requests. Appeals to court from these Commissions can only consider whether the Commission exceeded its jurisdiction, not whether it was correct or incorrect in a particular case.

EXEMPTIONS: BALANCING ACCESS WITH OTHER OBJECTIVES

20. Governments are allowed to refuse to disclose some records if they fall within the exemptions set out in the laws. The exemptions represent those areas where law-makers believe that the public interest may be better served by non-disclosure than by disclosure. Thus, it is important to understand that freedom of information laws do not behave like bulls in a china shop. They are subject to limits. The challenge for law-makers and courts is to provide as much access as possible without jeopardizing other important social objectives and personal rights.

21. Most access laws set out similar exemptions. Here are the exemptions in Canada's *Access to Information Act*:

Third party concerns

* personal information (there is a federal *Privacy Act*; the other jurisdictions in Canada combine data protection law with their freedom of information law)
* confidential commercial information
* safety of individuals

Government concerns

* international and federal-provincial affairs
* national defence
* information obtained in confidence from other governments
* Cabinet confidences (if less than 20 years old, they are "excluded" from the Act)
* other exemptions in other Acts specifically recognized by the Access to Information Act (the general rule is that the Access to Information Act applies notwithstanding the provisions of any other Act)
* advice and recommendations to the Goverment (20 year limit)
* economic interests of Canada
* law enforcement
* auditing and testing procedures
* solicitor-client privilege
* information already available to the public (on the principle that the purpose of the Act is to ensure access to information; if that access has been achieved outside the Act, there is no need to go through the expense of providing access under the Act)

22. Many of the above exemptions can only be claimed if there is a reasonable expectation that disclosure would cause harm. This is true for international and federal-provincial affairs and national defence (but note that information obtained in confidence from another government can be exempted without an expectation of harm). It is also the case for law enforcement information (but note that our federal law permits 10 designated investigative bodies to withhold information they obtain in the course of an investigation, even without an expectation of harm).

23. There must be a reasonable expectation of harm to use the "safety of individuals" and "economic interests of Canada" exemptions (but note that it is not necessary to show harm to withhold government trade secrets or commercial information with a substantial value). Although confidential commercial information supplied by a third party can be withheld without demonstrating that disclosure would cause harm, the Act also provides for non-disclosure of information which could harm the competitive or contractual negotiating position of a third party. Finally, there must be a reasonable expectation of harm before an institution can refuse to disclose government audit and testing procedures.

24. There are observers who claim that the law does not provide as much access as it should, that the exemptions are worded too broadly, that they give the government too much discretion to refuse to disclose records, and that the law has not kept up with the realities of electronic information. These are important, legitimate concerns. The federal Information Commissioner recently issued a set of recommendations to amend the federal Act, we now have more than a decade of experience with the federal Act and a variety of more modern provincial laws from which to draw comparisons.

25. We can see places where some provincial laws provide more access than the federal law, particularly by providing a "public interest" override, where institutions will not be able to withhold documents under some exemptions if there is an overriding public interest in disclosure. Provincial laws can extend to more of their public bodies than the federal law, in part because they apply to municipal governments as well as to provincial government agencies and even to self-governing professions, and in part because the definition of "public body" is broadly defined. In some cases, provincial laws have narrower exemptions, for example, by requiring that there be a reasonable expectation of harm resulting from disclosure in situations where the federal law does not impose a harm test. In some provinces, the Information Commissioner has the power to order departments to disclose information, thus avoiding the cost of going first to the Commissioner and then to the courts before getting an Order, which is the case under the federal Act. Officials within the federal Department of Justice are currently reviewing the federal *Access to Information Act* with a view to suggesting possible amendments.

EXAMPLES OF ACCESS CONTRIBUTING TO ACCOUNTABILITY

26. No taxation without representation is a bedrock principle from our Parliamentary heritage. It has evolved into a variety of rules, the most basic being that there will be no taxation unless it is approved by Parliament. In Canada, other rules have developed to ensure accountability for public expenditures. These include a detailed accounting of how each institution *plans* to spend money in the next year (the Main Estimates and the Budget); a detailed accounting of how each institution *actually spent* money in the past year (the Public Accounts); and a variety of financial controls and accounting requirements, under the *Financial Administration Act*, other Acts and government policies. Also, there is the Office of the Auditor General who has broad power to audit government institutions and report to Parliament (and the public).

27. In addition to the above financial accountability rules, the *Access to Information Act* (in combination with the definition of "personal information" in the *Privacy Act*) enhances accountability for expenditure of public moneys. The following financial information is accessible under the Act: expense accounts of public servants and Ministers; details of discretionary financial benefits provided by government to individuals; the names of recipients of government gifts; the salary *ranges* of the positions of all public servants; and contracts signed with individuals (by definition this is not "personal information" for the purposes of the *Access to Information Act*. However, note that a different section of the Act provides that government institutions must not disclose confidential commercial information supplied by a third party. There is case law suggesting that negotiated contract terms are not information "supplied by" a third party.)

28. The Act also provides accountability for public health and safety, the environment and other

public policy concerns. The Act has proved useful in ensuring there is public access to information relating to an ill-fated peace-keeping mission in Somalia in the early 1990s; controversial contracts relating to privatizing a major airport and purchasing airplanes; the activities at a coal mine where there was a tragic accident, amid allegations of poor safety regulations and political considerations; and information relating to the environmental impacts relating to a proposed water-diversion project for an aluminum smelter.

29. There are numerous examples where requesters or the Information Commissioner were able to convince institutions to disclose records they might not have disclosed if the Act were not in place, and where requesters or the Commissioner were able to convince courts that a government institution's application of the law was incorrect. One of the most famous of these involved a court action against the Prime Minister of Canada which ultimately forced disclosure of public opinion research the government had been undertaking and caused the government to adopt a new, more open policy to releasing public interest research results.

30. As painful as it may be for governments to be confronted with facts and to be held accountable, there can be no doubt that allowing such access promotes good government and integrity in public life.

ACCESS LAWS: SUPPORTED BY A VARIETY OF OTHER LAWS, POLICIES AND NOW, BY NEW TECHNOLOGIES

31. Although the focus of this paper has been on access to information statutes, such laws are supported by a variety of other laws and policies. For Canada, one of the most important is the *National Archives of Canada Act*. The *National Archives Act* provides that no one within government can destroy government records without the consent of the National Archivist (who does consent to the destruction of most government records, but ensures that the more important records are kept for historical purposes). Thus, it is not possible to avoid the *Access to Information Act* by destroying records in an unauthorized fashion.

32. Also, rules of natural justice and rules of court ensure that parties who are involved in litigation with the government or whose rights may be affected by administrative tribunals have access to the information they need to properly present their arguments and to collect relevant evidence. The Government of Canada has policies on the management of government information holdings, on the application of the *Access to Information Act*, and on the duty to inform the public of its activities. All of these are important tools to ensure that the public has access to information, without having to rely on the formal process under the *Access to Information Act*.

33. One of the most recent tools available to help provide citizens with access to information is the Internet. In the past year, the federal government became the first jurisdiction in Canada to make its consolidated laws available to the public free on the Internet. Before summer, we expect that the regulations will also be available on the Internet. The Northwest Territories have followed, the Yukon Territory has begun posting its annual statutes, and a few statutes from other provinces are also available free on the Internet. In addition, we are selling the laws (and regulations) on CD ROM and other publishers are welcome to use our data to sell the law themselves (one publisher is currently selling the federal laws on CD ROM for as little as $25). Australia has its federal laws freely available on the Internet as does the federal government of the United States and many state governments. In the United States, most appeal courts have their judicial decisions available on the Internet, as does the Supreme Court of Canada and the High Court of Australia.

34. The federal government has embarked on a voyage of using new technologies as an important tool for providing greater access to information to its citizens. All of the federal and provincial governments in Canada have home pages on the Internet, and provide a varying degree of information at those sites. Although the Internet is only available to those persons with access to computers, modems and Internet service provider accounts, access can be obtained increasingly in the workplace and public libraries. With the development of wireless technologies, there is good reason to believe that countries that do not have extensive telephone wire infrastructures may nonetheless be able to join the Internet. In addition, recent reports indicate that computers now outsell televisions. Thus, countries where there are few computers but many televisions may find this trend will reverse relatively soon. The Internet will prove to be a good way to provide citizens with information about their governments, and therefore to promote accountability and integrity in their governments.

CONCLUSION: CITIZEN ACCESS TO INFORMATION PROMOTES INTEGRITY IN PUBLIC LIFE

35. Generally speaking, Canada's access to information legislation is working well in providing access to government information that might not otherwise have been disclosed. The legislation was adopted because it was seen as an important way to ensure government institutions and political leaders are accountable to the people they serve. We believe that accountability is the key to promoting integrity in public life. It is certain that Canada's access to information laws can be improved and that our institutions could be more open without harming important government interests or third party rights.

36. It has also been argued, with some justification, that when governments adopt access to information legislation, they run the risk of actually reducing access to information. This happens because governments can force requesters to use the slow, expensive, somewhat formal processes under the Act, because they can charge fees which could deter some requesters and because they can delay their responses despite a 30 day limit in the Act itself. Governments have sometimes been accused of hiding behind the discretion that access laws provide them, such that they are "managing exemptions" rather than truly living up to the spirit of the access laws. It is important to keep these criticisms in mind. Often, government must be pushed and prodded by citizens to being more open. Now that virtually every jurisdiction in Canada has enacted an access to information law, it is highly unlikely these laws will ever be repealed. It is likely that over time they will come to be seen as essential to democracy as the rule of law, an independent judiciary and fair elections. Access laws, in conjunction with the development of the information highway*, will likely continue a trend towards more open government that focuses on routine disclosure of information to the public without reference to the formal access laws. (In addition, there is reason to believe that government disclosure of information benefits the economy, as commercial firms take raw government information, add value to it, and sell the new value-added product, thus creating new, private sector jobs.)

37. We recognize that access to information legislation is no panacea. Without the fundamentals - the rule of law, fair elections, free speech and literacy - access to information legislation can do relatively little to promote integrity in public life. But even if the legislation is only symbolic in nature, it is an important symbol of openness and integrity. As the other basic tools of accountability and integrity develop in a country, access to information legislation will develop as well, serving the citizens and the long term interests of any country brave enough to adopt such a law.

April 1996

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* The federal Department of Justice is **http://canada.justice.gc.ca/ index_en.html.**

To see the federal *Access to Information Act*, once at the Justice site, go to "Laws", then "Consolidated Statutes" then *Access to Information Act*.

COMMONWEALTH LAW MINISTERS' STATEMENT ON PREVENTION OF CORRUPTION

Commonwealth Law Ministers, meeting in Kuala Lumpur from 15 to 19 April 1996, acknowledged the existence of corruption in the provision of services in the public interest, whether by the public or the private sector, as a serious multidimensional national and international problem which inhibits development, creates poverty, destroys confidence in te legal and political systems, and undermines good governance.

Ministers recognised the threat posed by corruption to democratic institutions and good governance, and the need to combat corruption effectively in order to achieve the goals set out in the Harare Declaration, as elaborated upon by the Millbrook Commonwealth Action Programme.

They therefore considered it essential that those holding leadership positions demonstrate by their personal conduct their commitment to integrity and that they support all those responsible for preventing and combating corruption. Further, they emphasised that measures which nurture the evolution of a democratic society - characterised by an independent judiciary, open government operating by way of transparent procedures, democratically constituted institutions, an adequately-remunerated public service, and free and responsible mass media - should be protected and encouraged. In this context, Ministers noted various structural devices that had been employed by a number of member countries, such as financial accountability requirements, anti-corruption commissions, freedom of information legislation and public accounts committees.

In terms of the economic effects of corruption, it was noted that corruption in international business transactions and foreign aid projects can contribute to the initiation of unnecessary projects and to the diversion of funds and resources from projects which are vitally necessary. Ministers expressed approval of the work of the OECD in addressing the fact that bribes paid by foreign businesses, particularly from industrialised countries and which are often tax deductible in their home countries, are conducive to the creation of corrupt cultures.

Ministers also noted that there is a growing need for the network of mechanisms for combating corruption to cover the provision of services in the public interest by the private sector, given the trends towards contracting out and the privatisation of services previously provided by government entities and the shift in the nature of governance which this entails.

The links that often exist between corruption, drug trafficking, and organised crime were recognised and the need for continuing and improved mutual legal assistance in investigations and prosecutions in relation to criminal offences emphasised.

Ministers noted the diversity of national laws and experiences of Commonwealth jurisdictions in the field of preventing and combating corruption and stressed the need to share knowledge of these. They were encouraged by those strategies which have achieved some success, and identified the need for an "holistic" approach which combines a number of strategies rather than pursuing any of them in isolation. Key strategies to be applied in combination should include a political commitment to the eradication of corruption, effective anti-corruption legislation, and adequate remuneration of public officials. They recognised, however, that none of these strategies would succeed without the creation of a culture hostile to corruption and that in this regard public education has an important role to play.

The initiatives of other international bodies such as the International Anti-Corruption Conferences and the OECD were also noted with interest. Ministers emphasised the need for the Commonwealth to co-ordinate and liaise with them.

Ministers therefore express their collective commitment to work on both the domestic and international fronts to combat corruption. In particular they:

1. Undertake to implement strategies to prevent and combat corruption, to the extent that they have not already done so, and to keep the Secretariat fully informed of relevant developments;

2. Call upon the Secretariat, in consultation with member governments, to examine all aspects of the problem, to advise Ministers on developments and initiatives in the field, to propose courses of action which may assist member jurisdictions to address and to resolve the problems of corruption more effectively, and in particular to:

(a) collect and disseminate examples of national laws and experiences in combating corruption, and advise on developments and initiatives in the international field;

(b) identify those strategies which have been effective in changing national and international standards, especially those strategies which have helped to promote an "anti-corruption" culture; and

(c) develop model legal strategies for combating corruption, including an appropriate legal framework which takes into account the increasing role of the private sector in the system of government. This will include the development of minimum standards for Commonwealth members in the form of a Model Integrity Code.

3. Request the Secretariat to co-operate with other intergovernmental and non-governmental organisations working to combat corruption;

4. Commit themselves to ensure that national responses to Commonwealth initiatives on mutual assistance in criminal matters and the rendition of fugitive offenders are fully applicable to corruption offences; and

5. Agree to establish an advisory working group which shall be convened by the Secretariat and which shall advise and assist the Secretariat in the performance of its tasks.

Commonwealth Co-operation in the Administration of Justice

SIMPLIFYING EXTRADITION PROCEDURES : A PROPOSAL TO EXTEND THE SCOPE OF THE LONDON SCHEME FOR THE RENDITION OF FUGITIVE OFFENDERS

A paper by the Commonwealth Secretariat

INTRODUCTION

1. Law Officers of Small Commonwealth Jurisdictions met in Namibia in 1995. Having considered the question whether the London Scheme in its current form gave sufficient flexibility to their jurisdictions to enter into simple extradition arrangements with other countries and, in particular, with near neighbours, they requested that the issue of adding provisions to the London Scheme on the Rendition of Fugitive Offenders to facilitate simplified regional arrangements be considered by Law Ministers at their next meeting. Law Ministers may be interested to know that the Pacific Island Law Officers Meeting (PILOM) has already embarked on an exercise to revise national extradition laws in the region and to include in those national laws provisions which will permit simplified extradition arrangements to be adopted on bilaterally agreed bases between member countries.

BACKGROUND

2. As crime becomes increasingly global in nature and as criminals become internationally mobile there is a need for countries to consider whether their extradition laws are adequate to enable them to seek and grant extradition. Most Commonwealth jurisdictions have extradition laws which facilitate surrender of fugitives to other Commonwealth countries. These laws are, by and large, modelled on the 1966 London Scheme for the Rendition of Fugitive Offenders and relatively few of these laws have been amended to deal with changing global trends and an increase in crimes having an international element - even if that international element is merely the location of the fugitive.

THE COMMONWEALTH SCHEME FOR THE RENDITION OF FUGITIVE OFFENDERS (THE LONDON SCHEME)

3. Since the adoption of the London Scheme in 1966, Law Ministers of the Commonwealth have amended its provisions on three occasions. In 1983 provision was made to limit the scope of the political offence exception by permitting countries to declare that certain acts may not be held to be of a political character. The 1986 amendments abolished the list of offences for which extradition could be granted and replaced it with a simple dual criminality/minimum punishability test. The 1986 changes also introduced the concept of temporary surrender of fugitives. In 1990 an optional annex was added to the Scheme to permit countries, on a bilateral basis, to modify the documentary requirements by, in effect, abolishing the application of the hearsay rule as it applied to documentary evidence submitted in support of extradition requests.

4. To the extent that Commonwealth countries have

(a) enacted laws to give effect to the London Scheme; and

(b) amended those laws periodically to reflect changes made to the Scheme by Commonwealth Law Ministers

the extradition relations between Commonwealth countries are reflective of modern extradition practice amongst common law countries. It is, however, fair to say that a significant number of member countries have not yet abolished the list approach to the determination of extraditable offences with the result that many crimes of major international concern are crimes for which extradition cannot be granted by those countries. It is equally fair to say that many countries, despite having laws capable of permitting positive responses to requests for extradition, have few if any extradition cases and that the reason for this is, in part, the difficulties experienced in conducting extradition proceedings and in making successful extradition requests.

A MEANS OF SIMPLIFYING EXTRADITION RELATIONS

5. Some Commonwealth countries have been giving preliminary consideration to suggestions that

extradition relations between member countries could be significantly simplified and that consideration could be given to the revival of the **backing of warrants** system which operated between colonies and dependencies in specific regions. In this context it is relevant that the London Scheme itself envisages that additional or different arrangements may be appropriate between certain member countries. It provides in Clause 18 that "Nothing in this Scheme shall prevent the making of arrangements between two or more parts of the Commonwealth for further or alternative provision for the return of offenders."

6. Former British Colonies surrendered fugitive offenders between themselves on the basis of "backed warrants". Very simply explained, there was no requirement for the submission of formal documentation - other, of course, than the warrant issued in the requesting country, there was no inquiry into the merits of the case and, usually, little or no governmental involvement in the process. The police in one country, having secured a warrant for the arrest of a person suspected or accused of committing an offence, took that warrant to a magistrate in the country of refuge, had it "backed" or endorsed, executed it (usually with the assistance of local police, brought the fugitive before the courts, presented oral evidence to the magistrate and, subject to the right of the magistrate to refuse to issue a surrender warrant on specific grounds (now reflected in paragraph 10(3) of the London Scheme), was granted a surrender warrant and took the prisoner back to the country where he/she was wanted.

7. As former colonies enacted new extradition laws which reflected the London Scheme so they repealed the Imperial legislation which used the backing of warrant provisions between colonies in close geographical proximity to each other. There was a logical reason for this - the former colonies had attained status as sovereign nations and with that went the notion that sovereign nations dealt with the surrender of fugitive criminals between each other as an incident of sovereignty and with due formality which took into account differing legal systems and traditions.

8. The question could now be asked whether in taking on individual sovereignty Commonwealth countries really needed to throw out the benefits which came to them as constituent territories of a single sovereign? Did the attainment of independence make a real change to the relationship between them - was there a real need to abolish the structures which had worked between different colonies? Obviously some countries did not see a necessity to restructure extradition laws when they gained independence and still extradite to Commonwealth countries on the basis of the Fugitive Offenders Act 1881 (UK). New Zealand is an example. The backing of warrants provisions of the 1881 Act applied between colonies within regions defined in UK Orders in Council. Certain groups of former colonies in Africa have continued special extradition relationships between themselves despite the attainment of independence. Despite having twice enacted new extradition legislation Australia has maintained the backing of warrants system between it and New Zealand by re-enacting the old provisions which provide the sole means of dealing with New Zealand requests. The procedures are used often and successfully by both countries - each of which (we understand) surrenders more fugitives to the other each year using these provisions than to the whole of the rest of the world.

9. Where there are special bilateral relationships between countries in a regional grouping there would seem to be good reason to give serious consideration to developing extradition relations between those countries which reflect the reality of the close relationship. Clearly the question whether a country is prepared to so simplify extradition relations with another country that it reintroduces the "backing of warrants" procedure must be determined in accordance with national policy which will take into account any relevant developments in laws to protect the interests of accused persons. It will also take into account foreign relations issues.

ADDING TO THE LONDON SCHEME

10. The London Scheme embodies agreed principles governing rendition. Annexes to the London Scheme contain principles which, while accepted as being a valid part of national extradition practices, are not necessarily acceptable in their content, detail or emphasis to all member countries. In other words, annexes contain discretionary provisions and alternatives to provisions in the Scheme.

11. A backing of warrant procedure is recognised as being inherently a practice which will not be universal in its adoption nor is it likely to be adopted by any one country in respect of all other countries in the Commonwealth. It is therefore appropriate that the question be considered only in the context of the adoption of an additional annex to the Scheme being an annex reflecting one form of alternative procedure already contemplated in Article 18. It would, of course, be possible to simply leave the Scheme as it is and acknowledge that it

already accepts the adoption of additional procedures. The alternative argument is that the very countries which have most need for simplified procedures are the countries which would benefit most from assistance to formulate those procedures. There is therefore very good reason for Law Ministers to consider the issue and to endorse a set of principles which will guide the small jurisdictions in their efforts to introduce simpler extradition procedures where these are appropriate.

12. The first question is whether Ministers agree in principle that the London Scheme would be enhanced by the addition of an annex which sets out a backing of warrant procedure which can be incorporated into national law and brought into practice with appropriate member countries following bilateral agreement between two governments to so do. If the answer to this questions is yes (and Law Officers of Small Commonwealth Jurisdictions have expressed the preliminary view that they would find such an annex useful) Ministers must then consider the proper form of such an annex.

13. The great benefit to small jurisdictions of the system is that it removes the need for reliance on the diplomatic channel (which is often almost non-existent in such countries), it is inexpensive to run because it does not take up the time of legally trained government lawyers but is administered (in most cases) by police, it does not rely on voluminous paperwork and it takes little court time.

14. Traditional backing of warrants procedures contemplate nothing more than the issue of a warrant for the arrest of a person accused or convicted of a crime and the delivery of that warrant to an appropriate officer in the jurisdiction of refuge (usually a magistrate) who endorses the warrant so as to permit its execution in the country of refuge. When the warrant is executed the wanted person is brought before a court (again usually a magistrate) who, having heard from both the arresting police officer and the fugitive as to certain specified issues, makes a determination on surrender. If the decision is to surrender the magistrate issues his or her warrant and the person is conveyed (after any necessary committal to custody for periods necessary to enable the making of an appeal against the decision) to the requesting jurisdiction. The critical feature of traditional backing of warrants procedures is that there are fewer protections available to the person sought, for example:

. dual criminality is not a prerequisite;

. the minimum punishability test is not applied;

. the rule of speciality does not apply (with one notable recent exception);

. the political offence exception is not relevant and none of the statutory safeguards are applied.

To the extent that there are protections for the fugitive they reside in the magistrate's power to refuse surrender on the ground that the offence is trivial, the accusation is not made in good faith, there has been a lengthy lapse of time since commission of the offence or that surrender would be unjust, oppressive or too severe a punishment.

15. As mentioned earlier, the Fugitive Offenders Act 1881 (Imp.) is still in force in New Zealand (with minor modifications). The backing of warrants procedure in that Act is attachment 1 to this paper. It represents the simplest form. In its various revisions of its extradition laws Australia has on each relevant occasion re-enacted provisions which maintain this system for its extradition relations with New Zealand. The most recent Australian re-enactment is attachment 2. It maintains the traditional elements but adds to them provisions for consent surrender and temporary surrender together with modernisation of the appeal procedures.

16. Between countries with very close links the traditional system is clearly entirely workable, but to be useful to a range of small Commonwealth jurisdictions a Commonwealth-wide procedure may need to take account of differing traditions, policies and laws. A new Annex to the London Scheme may therefore need to contemplate a wider range of protections for the fugitive and for the surrendering jurisdiction. These could include issues like prejudice, political offence, dual criminality and seriousness. If protections are to be listed in an additional annex to the Scheme, consideration could be given to simply replacing the existing discretions to refuse surrender with more modern equivalents.

17. Attachment 3 to this paper is a draft annex to the London Scheme for the Rendition of Fugitive Offenders entitled "Alternative Provisions for Dealing with Requests for Surrender". While essentially adopting the traditional backing of warrants system it includes - in square brackets - some provisions designed to reflect recent international developments in extradition practice. The draft has been prepared by the Secretariat at the request of the Law Officers of Small Commonwealth Jurisdictions and is submitted for consideration. Where the London Scheme contains provisions which would facilitate administration of

a backing of warrants scheme these have been duplicated in the draft.

18. Attachment 4 to this paper contains a draft amendment to clause 19 of the Scheme which will be required if an additional annex to the Scheme is adopted.

February 1996

PART II

INTERCOMMONWEALTH BACKING OF WARRANTS AND OFFENCES

Application of this Part of Act

12. Application of this Part of Act to group of Commonwealth countries—This Part of this Act shall apply only to those groups of [Commonwealth countries] to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Part of this Act shall apply to the group of [Commonwealth countries] mentioned in the Order, and by the same or any subsequent Order to except certain offences from the application of this Part of this Act, and to limit the application of this Part of this Act, by such conditions, exceptions, and qualifications as may be deemed expedient.

The references to Commonwealth countries were substituted for references to British possessions by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to the making or revocation of Orders under this section, see s. 31.

As to the effect of recent constitutional changes, see note to s. 18 of the Extradition Act 1870 (c. 52), Vol. 9, Halsbury's Statutes of England, 2nd Edn., p. 886. For the adaptation in relation to trust territories of enactments formerly applying to mandated territories, see the Mandated and Trust Territories Act 1947 (c. 8), Vol. 9, Halsbury's Statutes of England, 3rd Edn., p. 583.

As to Orders in Council applying Part II of this Act to groups of Commonwealth countries, see:

29th November 1884, S.R. & O. Rev. 1904; S.R. & O. 1938, No. 1362 and S.R. & O. 1939, No. 1896 (Jamaica, Turks and Caicos Islands, British Guiana, Trinidad, Leeward Islands, Barbados, St. Vincent, Grenada, St. Lucia, Tobago, the Bahamas, British Honduras, Cayman Islands, Dominica).

S.R. & O. 1913, No. 323 (Union of South Africa, Basutoland, Bechuanaland, Southern Rhodesia, Northern Rhodesia, Swaziland, Nyasaland).

S.R. & O. 1918, No. 28 (India and Pakistan, Ceylon, Hong Kong, Federation of Malaya, Singapore, Brunei, North Borneo, Sarawak).

S.R. & O. 1920, No. 2351 and S.R. & O. 1924, No. 1219 (Kenya Colony and Protectorate, Nyasaland Protectorate, Somaliland Protectorate, Tanganyika Territory, Uganda Protectorate, Zanzibar).

S R & O. 1924, No. 596 (Protectorates of Gambia, Sierra Leone; Northern Territories of Gold Coast, Nigeria; Colonies of Gambia, Sierra Leone, Gold Coast, Ashanti, Nigeria; trust territories of Togoland and Cameroons).
S.R. & O. 1924, No. 1401 (Zanzibar, Kenya Colony and Protectorate, Uganda Protectorate, Tanganyika Territory, India and Pakistan, Aden, Mauritius, and all British possessions and protectorates in Africa south of the Equator).
S.R. & O. 1925, No. 1031 (Commonwealth of Australia, Papua, Norfolk Island, New Guinea, Nauru, New Zealand, Western Samoa, Fiji, Gilbert and Ellice Islands, British Solomon Islands).
S.R & O. 1930, No 222 (Somaliland Protectorate, Aden, Zanzibar, Kenya Colony and Protectorate, Uganda Protectorate, India and Pakistan).
S.R. & O. 1946, No. 2260 (Muscat, Bahrein, Kuwait, Qatar, the Trucial States, Aden, India and Pakistan).
S.I. 1952, No. 458 (Tonga and Fiji).
S.I. 1961, No. 1505 (Tonga and Fiji).
S.I. 1961, No. 1506 (Western Pacific Islands).

As to Tokelau, see ss. 4A to 6 of the Tokelau Act 1948 and s. 6 of the Tokelau Amendment Act 1970, reprinted 1976, Vol. 5.

As to the application of this Act to Protected States, see s. 1 of the Fugitive Offenders (Protected States) Act 1915 (U.K.) and the notes thereto, reprinted *infra*.

Backing of Warrants

13. Backing in one Commonwealth country of warrant issued in another of same group—Where, in a [Commonwealth country] of a group to which this Part of this Act applies, a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that [Commonwealth country] and such person is or is suspected of being in or on the way to another [Commonwealth country] of the same group, a Magistrate in the last-mentioned [Commonwealth country], if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing Magistrate, the person named in the warrant, and bring him before the endorsing Magistrate or some other Magistrate in the same [Commonwealth country].

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to the grouping of Commonwealth countries, see s. 12 and the notes thereto.

As to the Cook Islands, see ss. 333 to 349A, and 618 of the Cook Islands Act 1915 (N.Z.), reprinted 1976, Vol. 4.

As to Niue, see Part VIII of the Niue Act 1966, reprinted 1976, Vol. 5.

As to Tokelau, see the second to last note to s. 12 of this Act.

As to Western Samoa, see the Extradition Act 1974 of Western Samoa.

As to a Magistrate, see s. 39.

14. Return of prisoner apprehended under backed warrant—The Magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenti-

cated as directed by this Act, and was issued by a person having lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the [Commonwealth country] in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the [Commonwealth country] in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the Magistrate making it, and may be executed according to the tenor thereof.

A Magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to authentication of warrants, see s. 29.

As to Magistrates and oaths, see s. 39.

Under this Part of this Act an offender is tried in the country from which he fled and not in the country where he was apprehended.

15. Backing in one Commonwealth country of summons, etc., of witnesses issued in another Commonwealth country of same group—Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a [Commonwealth country] of a group to which this Part of this Act applies, is or is suspected of being in or on his way to any other [Commonwealth country] of the same group, a Judge, Magistrate, or other officer who would have lawful authority to issue a summons requiring the attendance of such witness if the witness were within his jurisdiction may issue a summons for the attendance of such witness, and a Magistrate in any other [Commonwealth country] of the same group, if satisfied that the summons was issued by some Judge, Magistrate, or officer having lawful authority as aforesaid, may endorse the summons with his name; and the witness, on service in that [Commonwealth country] of the summons so endorsed, and on payment or tender of a reasonable amount for his expenses, shall obey the summons, and in default shall be liable to be tried and

punished, either in the [Commonwealth country] in which he is served or in the [Commonwealth country] in which the summons was issued, and shall be liable to the punishment imposed by the law of the [Commonwealth country] in which he is tried for the failure of a witness to obey such a summons. The expression "summons" in this section includes any subpoena or other process for requiring the attendance of a witness.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to the grouping of Commonwealth countries, see s. 12 and the notes thereto.

As to a Magistrate, see s. 39.

16. **Provisional warrant in group of Commonwealth countries**—A Magistrate in a [Commonwealth country] of a group to which this Part of this Act applies, before the endorsement in pursuance of this Part of this Act of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said [Commonwealth country] and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant shall be discharged unless the original warrant is produced and endorsed within such reasonable time as may under the circumstances seem requisite.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

For the corresponding provisions of Part I of this Act, see s. 4, which however has no provision for the discharge of an offender if the original warrant is not produced in a reasonable time.

As to the grouping of Commonwealth countries, see s. 12 and the notes thereto.

17. **Discharge of prisoner not returned within one month to Commonwealth country of same group**—If a prisoner in a [Commonwealth country] whose return is authorised in pursuance of this Part of this Act is not conveyed out of that [Commonwealth country] within one month after the date of the warrant ordering his return, a Magistrate or a superior court, upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person

holding the warrant, and to the Chief Officer of the Police of such [Commonwealth country] or of the province or town where the prisoner is in custody, may, unless sufficient cause is shown to the contrary, order such prisoner to be discharged out of custody.

Any order or refusal to make an order of discharge by a Magistrate under this section shall be subject to appeal to a superior court.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.).

As to similar provisions to this section in Part I of this Act, see s. 7, in which however there is no right of appeal.

As to Magistrate, and superior court, see s. 39.

18. Sending back of prisoner not prosecuted or acquitted to Commonwealth country of same group—Where a prisoner accused of an offence is returned in pursuance of this Part of this Act to a [Commonwealth country], and either is not prosecuted for the said offence within 6 months after his arrival in that [Commonwealth country], or is acquitted of the said offence, the [Minister of Justice or Attorney-General] of that [Commonwealth country], if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the [Commonwealth country] in or on his way to which he was apprehended.

The references to a Commonwealth country were substituted for references to a British possession by s. 5 (b) of the Fugitive Offenders Amendment Act 1976 (N.Z.), and the words in the third set of square brackets were substituted for the word "Governor" by s. 5 (c) of that Act.

19. Refusal to return prisoner where offence too trivial—Where the return of a prisoner is sought or ordered under this Part of this Act, and it is made to appear to a Magistrate or to a superior court that, by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or Magistrate may discharge the prisoner either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the Magistrate or court seems just.

Any order or refusal to make an order of discharge by a Magistrate under this section shall be subject to an appeal to a superior court.

As to Magistrate and superior court, see s. 39.

AUSTRALIA

PART III—EXTRADITION FROM AUSTRALIA TO NEW ZEALAND

Indorsement of New Zealand warrants

28. Where:

(a) an application is made, in the statutory form, on behalf of New Zealand to a magistrate for the indorsement of a New Zealand warrant under this subsection; and

(b) the magistrate is informed by affidavit that the person for whose arrest the warrant is in force is, or is suspected of being, in or on his or her way to Australia;

the magistrate shall make an indorsement on the warrant, in the statutory form, authorising the execution of the warrant in Australia by any police officer.

Provisional arrest warrants

29. Where:

(a) an application is made, in the statutory form, on behalf of New Zealand to a magistrate for the issue of a warrant in relation to a person under this section;

(b) the magistrate is informed by affidavit that a New Zealand warrant has been issued in relation to the person;

(c) no application is before the magistrate under section 28 for the indorsement of such a warrant; and

(d) the magistrate considers that the issue of a warrant in relation to the person under this section is, having regard to any information that the magistrate considers relevant, justified in all the circumstances;

the magistrate shall issue a warrant, in the statutory form, for the arrest of the person.

Search and seizure upon arrest

30. (1) Where a police officer:

(a) arrests a person under an indorsed New Zealand warrant or a provisional arrest warrant; and

(b) has reasonable grounds for suspecting that property in the vicinity of the person that is under the apparent control of the person:

(i) may be material as evidence in proving any offence in relation to which the provisional arrest warrant or any indorsed New Zealand warrant in relation to the person was issued; or

(ii) has been acquired by the person as a result of such an offence;

the police officer may seize that property.

(2) Where a police officer:

(a) arrests a person under an indorsed New Zealand warrant or a provisional arrest warrant; and

(b) has reasonable grounds for suspecting that there is on the person, in the clothing that the person is wearing or in or on any property in the vicinity of the person that is under the apparent control of the person, any thing, including a sum of money:

(i) that may be material as evidence in proving any offence in relation to which the provisional arrest warrant or any indorsed New Zealand warrant in relation to the person was issued; or

(ii) that has been acquired by the person as a result of such an offence;

the police officer may search that person, that person's clothing or that property, and may seize any thing found as a result of that search.

(3) Subsection (2) does not authorise a police officer to remove, or to require the person to remove, any of the clothing that the person is wearing.

(4) A person shall not be searched under subsection (2) except by a police officer of the same sex.

(5) A police officer may retain any property or thing seized under subsection (1) or (2) pending any direction from the Attorney-General as to the manner in which the thing is to be dealt with.

(6) Nothing in this section shall be taken to prevent or restrict the search of a person or of clothing worn by, or of property under the immediate control of, a person, upon the admission of the person as an inmate of a prison after having been charged with an offence.

(7) The powers conferred by this section are in addition to, and not in derogation of, any other powers conferred by law.

Search and seizure warrants

31. (1) Where a magistrate is informed by affidavit that there are reasonable grounds for suspecting that there may be in any place any thing:

(a) that may be material as evidence in proving any offence in relation to which an indorsed New Zealand warrant or a provisional arrest warrant was issued; or

(b) that has been acquired by a person as a result of such an offence;

and the affidavit sets out those grounds, the magistrate may issue a warrant, in the statutory form, authorising a police officer named in the warrant, with such assistance, and by such force, as is necessary and reasonable:

(c) to seize the thing;

(d) to enter upon or into the place and to seize the thing; or

(e) to enter upon or into the place, to search the place for any such thing and to seize any such thing found in the place.

(2) The magistrate shall not issue the warrant unless:

(a) there has been given to the magistrate by affidavit such further information (if any) as the magistrate requires concerning the grounds on which the issue of the warrant is being sought; and

(b) the magistrate is satisfied that there are reasonable grounds for issuing the warrant.

(3) The warrant shall state:

(a) the purpose for which it is issued, including a reference to the nature of any offence referred to in paragraph (1) (a);

(b) whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night;

(c) the kind of things authorised to be seized; and

(d) that it ceases to have effect on a specified day, not being later than 1 month after the day of issue of the warrant.

(4) If, in the course of searching in accordance with the warrant for a thing that may be material as evidence in proving an offence or that has been acquired as a result of an offence, being a thing of a kind stated in the warrant:

(a) a police officer finds any thing that the police officer believes on reasonable grounds to be connected with the offence, although not of a kind stated in the warrant; and

(b) the police officer believes on reasonable grounds that it is necessary to seize that thing in order to prevent its concealment, loss or destruction;

the warrant is deemed to authorise the police officer to seize the thing.

(5) Where a police officer seizes a thing in accordance with this section, the police officer may retain the thing pending any direction from the Attorney-General as to the manner in which it is to be dealt with.

(6) In this section:

"place" includes any public place, area of water, premises, vessel, aircraft or vehicle in any part of Australia;

"thing" includes a vessel, aircraft or vehicle.

Remand

32. (1) A person who is arrested under an indorsed New Zealand warrant or under a provisional arrest warrant shall be brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested.

(2) The person shall be remanded by a magistrate in custody, or, subject to subsection (3), on bail, for such period or periods as may be necessary for proceedings for the purposes of section 34 to be conducted.

(3) A magistrate shall not remand the person on bail unless there are special circumstances justifying such remand.

(4) Where a magistrate remands the person in custody after the person has made an application for bail, the person is not entitled to apply to any other magistrate for release on bail during that remand.

Release from remand

33. Where:

(a) a person has been remanded after being arrested under a provisional arrest warrant;

(b) an indorsed New Zealand warrant has not been obtained in relation to the person; and

(c) a magistrate is satisfied that there has been reasonable time for such a warrant to be obtained;

the magistrate shall:

(d) if the person is held in custody—order that the person be released; or

(e) if the person has been granted bail—order the discharge of the recognizances on which bail was granted.

Consent to surrender

33A. (1) Where:

(a) a person is on remand under section 32; and

(b) an indorsed New Zealand warrant has been obtained in relation to the person; and

(c) a request has been made to a magistrate by or on behalf of the person or New Zealand for proceedings to be conducted under section 34;

the person may inform the magistrate that he or she consents to being surrendered to New Zealand in relation to an offence for which the indorsed warrant has been obtained.

(2) Unless there is reason to believe that the consent was not given voluntarily, the magistrate must:

(a) advise the person that the effect of so consenting will be that:

(i) the person will be committed to prison without any proceedings being conducted under section 34; and

(ii) the person will be surrendered to New Zealand as soon as practicable; and

(b) if, after the person has been so advised, the person again consents to being surrendered:

(i) by warrant in accordance with subsection 38 (1), order that the person be surrendered to New Zealand as soon as practicable; and

(ii) by warrant in the statutory form, order that, pending the execution of the warrant referred to in subparagraph (i), the person be committed to prison.

Surrender warrants

34. (1) Where:

(a) either:

(i) a person has been remanded after being arrested under an indorsed New Zealand warrant; or

(ii) a person has been remanded after being arrested under a provisional arrest warrant and an indorsed New Zealand warrant has been obtained in relation to the person; and

(b) a request is made to a magistrate by or on behalf of the person or New Zealand for proceedings to be conducted under this section;

the magistrate shall, unless the magistrate makes an order under subsection (2):

(c) by warrant in accordance with subsection 38 (1), order that the person be surrendered to New Zealand; and

(d) by warrant in the statutory form, order that, pending the execution of the warrant referred to in paragraph (c), the person be committed to prison.

(2) If the magistrate is satisfied by the person that, because:

(a) the offence in relation to which any indorsed New Zealand warrant in relation to the person was issued is of a trivial nature;

(b) if that offence is an offence of which the person is accused—the accusation was not made in good faith or in the interests of justice; or

(c) a lengthy period has elapsed since that offence was committed or allegedly committed;

or for any other reason, it would be unjust, oppressive or too severe a punishment to surrender the person to New Zealand, the magistrate shall order that the person be released.

(3) The magistrate shall, after making an order in relation to the person under paragraph (1) (c), inform the person that he or she may, within 15 days after the day on which the order is made, seek a review of the order under section 35.

(4) In the proceedings under this section, the person is not entitled to adduce, and the magistrate is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct constituting an offence in relation to which any indorsed New Zealand warrant was issued.

Review of magistrate's order

35. (1) Where a magistrate of a State or Territory makes an order under section 34 in relation to a person:

(a) in the case of an order under paragraph 34 (1) (c)—the person; or

(b) in the case of an order under subsection 34 (2)—New Zealand;

may, within 15 days after the day on which the magistrate makes the order, apply to the Federal Court, or to the Supreme Court of the State or Territory, for a review of the order.

(2) The Court may, by order:

(a) confirm the order of the magistrate; or

(b) quash the order of the magistrate and direct a magistrate to:

(i) in the case of an order under paragraph 34 (1) (c)—order the release of the person; or

(ii) in the case of an order under subsection 34 (2)—order, by warrant, that the person be surrendered to New Zealand.

(3) The person or New Zealand, whether or not the person or New Zealand was the applicant for review under subsection (1), may appeal to the Full Court of the Federal Court from the order of the Federal Court or the Supreme Court.

(4) The person or New Zealand is not entitled to appeal to the Full Court more than 15 days after the day on which the order of the Federal Court or the Supreme Court is made.

(5) The High Court shall not grant special leave to appeal against the order of the Full Court made on the appeal referred to in subsection (3) if the application for special leave is made more than 15 days after the day on which the order of the Full Court is made.

(6) Where the person or New Zealand:

(a) applies under subsection (1) for a review of an order;

(b) appeals under subsection (3) against an order made on that review; or

(c) appeals to the High Court against an order made on that appeal;

the following provisions have effect:

(d) in the case of an application for review—the court to which the application is made shall review the order by way of rehearing, and may have regard to evidence in addition to or in substitution for the evidence that was before the magistrate;

(e) in the case of an appeal—the court to which the appeal is made shall have regard only to the material that was before the court that conducted the review;

(f) if, because of the order referred to in paragraph (a), (b) or (c), as the case requires, the person has been released, the court to which the application or appeal is made may order the arrest of the person;

(g) if:

(i) because of the order referred to in paragraph (a), (b) or (c), as the case requires, the person has not been released; or

(ii) the person has been arrested under an order made under paragraph (f);

the court to which the application or appeal is made may:

(iii) order that the person be kept in such custody as the court directs; or

(iv) if there are special circumstances justifying such a course, order the release on bail of the person on such terms and conditions as the court thinks fit;

until the review has been conducted or the appeal has been heard.

Temporary surrender warrants

36. (1) Subject to this section, where:

(a) a surrender warrant has been issued in relation to a person under subsection 34 (1) or in compliance with an order of a court under subparagraph 35 (2) (b) (ii) (including on any appeal referred to in section 35);

(b) no proceedings are being conducted or available under section 35 in relation to the order set out in the warrant or the order of the court, as the case requires;

(c) the person is serving a sentence or sentences of imprisonment in relation to an offence or offences against a law of Australia;

(d) the offence in relation to which any indorsed New Zealand warrant in relation to the person was issued is an offence of which the person is accused; and

(e) the Attorney-General is satisfied that:

(i) it is in the interests of the administration of justice that a warrant under this subsection should be issued; and

(ii) New Zealand has given adequate undertakings to the Attorney-General in relation to:

(A) the trial of the person in New Zealand for any offence referred to in paragraph (d) of which the person is accused;

(B) the return of the person to Australia; and

(C) the custody of the person while travelling to and from, and while in, New Zealand;

subject to subsection (4), the Attorney-General may issue a warrant under this subsection.

(2) For the purposes of paragraph (1) (c), the person shall be taken not to be serving a sentence of imprisonment if the person has been released on parole or licence, or has been otherwise conditionally released, for the remainder of the sentence.

(3) Where the Attorney-General issues a warrant under subsection (1), the surrender warrant referred to in paragraph (1) (a) is by force of this subsection cancelled.

(4) Where any offence referred to in paragraph (1) (c) is an offence against the law of a State, the Northern Territory or Norfolk Island, the Attorney-General shall not issue the warrant unless:

(a) the Attorney-General is satisfied that the law of the State, the Northern Territory or Norfolk Island, as the case may be:

(i) would permit the release of the person for the purpose of surrender to New Zealand under such a warrant; and

(ii) would, if the person were surrendered to New Zealand under such a warrant, permit the time spent by the person in custody in connection with the warrant (including time spent in custody outside Australia) to be counted towards the sentence or sentences in respect of the offence; and

(b) consent to the surrender of the person to New Zealand under such a warrant has been given to the Attorney-General by:

(i) the appropriate Minister of the Crown of the State;

(ii) the appropriate Minister of the Northern Territory; or

(iii) the Administrator of Norfolk Island;

as the case requires.

(5) Where, while the person is in New Zealand pursuant to the warrant, the person ceases to be liable to serve the sentence or sentences of imprisonment in Australia referred to in paragraph (1) (c), the Attorney-General shall inform New Zealand that the undertakings referred to in subparagraph (1) (e) (ii) are no longer required to be complied with.

(6) Where any offence referred to in paragraph (1) (c) is an offence against a law of the Commonwealth or of a Territory (other than the Northern Territory or Norfolk Island), any time spent by the person in custody in connection with the warrant (including time spent

in custody outside Australia) shall be counted as time served towards the sentence or sentences of imprisonment referred to in that paragraph.

Surrender warrants after temporary surrender

37. Where:

(a) a person is surrendered to New Zealand under a temporary surrender warrant;

(b) the person is returned to Australia in pursuance of undertakings referred to in subparagraph 36 (1) (e) (ii); and

(c) New Zealand still seeks the surrender of the person;

the Attorney-General may, in his or her discretion, issue a warrant for the surrender of the person to New Zealand under this section.

Form and execution of surrender warrants and temporary surrender warrants

38. (1) A surrender warrant or a temporary surrender warrant in relation to a person (in this subsection called the **"eligible person"**) shall:

(a) authorise a police officer to take the eligible person into custody, to transport the eligible person in custody and, if necessary or convenient, to detain the eligible person in custody, for the purpose of enabling the eligible person to be placed in the custody of a specified person (in this subsection called the **"New Zealand escort officer"**) and transported out of Australia;

(b) authorise the New Zealand escort officer to transport the eligible person in custody out of Australia to a place in New Zealand for the purpose of surrendering the eligible person to a person appointed by New Zealand to receive the eligible person; and

(c) be in writing in the statutory form.

(2) Subject to this section, a surrender warrant or a temporary surrender warrant shall be executed according to its tenor.

(3) A surrender warrant issued under paragraph 34 (1) (c) shall not be executed while any proceedings under section 35 in relation to the order of the magistrate set out in the warrant are being conducted or are available.

(4) A surrender warrant issued in compliance with an order of a court under subparagraph 35 (2) (b) (ii) shall not be executed while any proceedings under section 35 in relation to the order are being conducted or are available.

(5) Where a surrender warrant is issued in respect of a person:

(a) who is in custody; or

(b) to whom bail has been granted;

in respect of an offence that is alleged to have been committed, or of which the person has been convicted, in Australia, the warrant shall not be executed before the person has been released from custody in respect of that offence or any recognizances on which the person has been granted bail in respect of that offence have been discharged, as the case requires.

(6) For the purposes of subsection (5), a person who is serving a sentence of imprisonment shall be taken not to be in custody if the person has been released on parole or licence, or has been otherwise conditionally released, for the remainder of the sentence.

(7) Where:

(a) a surrender warrant or a temporary surrender warrant is issued in relation to a person;

(b) the person is in custody in Australia under the warrant, or otherwise under this Act, more than 1 month after the day on which the warrant was first liable to be executed;

(c) the person applies to the Federal Court or the Supreme Court of the State or Territory in which the person is in custody; and

(d) reasonable notice of the intention to make the application has been given to the Attorney-General;

the Court shall, subject to subsection (8), order that the person be released from that custody.

(8) Where the Court is satisfied that the person has not been conveyed out of Australia under the warrant within the period of 1 month or since the person last made an application under subsection (7), as the case may be:

(a) because to do so would have been dangerous to the life or prejudicial to the health of the person; or

(b) for any other reasonable cause;

the Court shall not order that the person be released from custody.

Delivery of property to New Zealand

39. Where:

(a) property or a thing is seized under section 30 or 31; and

(b) the property or thing:

(i) may be material as evidence in proving an offence in relation to which an indorsed New Zealand warrant or the provisional arrest warrant referred to in that section was issued; or

(ii) has been acquired as a result of such an offence;

the Attorney-General may, whether or not a surrender warrant or a temporary surrender warrant is issued in respect of the person to whom the warrant referred to in subparagraph (b) (i) relates, direct, by notice in writing, that the property or thing be sent to New Zealand.

PART IV—EXTRADITION TO AUSTRALIA FROM OTHER COUNTRIES

Requests for surrender of persons to Australia

40. A request by Australia for the surrender of a person from a country (other than New Zealand) in relation to an offence against a law of Australia of which the person is accused or of which the person has been convicted shall only be made by or with the authority of the Attorney-General.

Surrendered persons to be brought into Australia

41. Where a person is surrendered to Australia in relation to an offence against a law of Australia of which the person is accused or of which the person has been convicted (whether or not pursuant to a request under section 40), the person shall be brought into Australia and delivered to the appropriate authorities to be dealt with according to law.

Speciality

42. Where an extraditable person in relation to Australia is surrendered to Australia by a country (other than New Zealand), the person shall not, unless he or she has left, or has had the opportunity of leaving, Australia or, in a case where the person was surrendered to Australia for a limited period, has been returned to the country:

(a) be detained or tried in Australia for any offence that is alleged to have been committed, or was committed, before the surrender of the person, other than:

(i) any offence in respect of which the person was surrendered or any other offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the person could be convicted on proof of the conduct constituting any such offence; or

(ii) any other offence in respect of which the country consents to the person being so detained or tried, as the case may be; or

(b) be detained in Australia for the purposes of being surrendered to another country for trial or punishment for any offence that is alleged to have been committed, or was committed, before the surrender of the person to Australia, other than any other offence in respect of which the country that surrendered the person to Australia consents to the person being so detained and surrendered.

Evidence for purposes of surrender of persons to Australia

43. (1) Where the Attorney-General suspects that a person is an extraditable person in relation to Australia (whether or not the Attorney-General knows or suspects the person to be in a particular country or has made a request under section 40 or otherwise in relation to the person), the Attorney-General may, by notice in writing in the statutory form, authorise the taking of evidence for use in any proceedings for the surrender of the person to Australia.

(2) Where the Attorney-General authorises the taking of evidence under subsection (1), a magistrate may take the evidence on oath or affirmation of each witness appearing before the magistrate to give evidence in relation to the matter and the magistrate shall:

(a) cause the evidence to be reduced to writing and attach a certificate, in the statutory form, in relation to the taking of the evidence; and

(b) cause the writing and the certificate to be sent to the Attorney-General.

(3) At a proceeding in relation to a person before a magistrate under this section, a legal or other representative of the person is not entitled to appear.

Persons temporarily surrendered to Australia

44. (1) Where a person is surrendered by a country to Australia pursuant to an undertaking by the Attorney-General of Australia in relation to:

(a) the trial of the person in Australia in respect of a particular offence or offences;

(b) the return of the person to the country; and

(c) the custody of the person while travelling to and from, and while in, Australia;

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ANNEX 4

ALTERNATIVE PROVISIONS FOR DEALING WITH REQUESTS FOR SURRENDER

It may be provided by a law in any part of the Commonwealth that the procedures contained in this Annex to the London Scheme shall govern the rendition of fugitive offenders between it and any other part of the Commonwealth to which the provisions of a law reflecting this annex shall apply.

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 that warrant is endorsed by a magistrate in the part in which he is found (in which case, the endorsed warrant will be sufficient authority for his arrest).

2. 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 1, a magistrate 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 magistrate's opinion, justify the issue of a warrant 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.

3.(a) A person who is arrested under either a warrant which has been endorsed as mentioned in clause 1 or a provisional warrant issued in accordance with clause 2 shall be brought as soon as practicable before a magistrate.

(b) The person shall be remanded by a magistrate in custody or on bail for such period or periods as may be necessary for proceedings for the purpose of clause 5 of this Annex to be conducted.

4. Where a person has been remanded after being arrested under a provisional warrant and an endorsed warrant has not been obtained in relation to the person and the magistrate is satisfied that there has been reasonable time for such a warrant to be obtained, the magistrate shall, if the person is held in custody, order the release of the person or, if the person is remanded on bail, order the discharge of the recognizances on which bail was granted.

5. Where a person has been remanded after being arrested under an endorsed warrant or has been remanded after being arrested under a provisional warrant and an endorsed warrant has been obtained in relation to the person the magistrate shall either:

(a) (i) by warrant, order that the person be surrendered to the part of the Commonwealth in which the endorsed warrant issued; and

(ii) order that, pending the execution of the warrant referred to in paragraph (a), the person be committed to prison; or

(b) if the magistrate is satisfied by the person that because

(i) the offence in relation to which the endorsed warrant was issued is of a trivial nature;

(ii) the accusation was not made in good faith or in the interests of justice; or

(iii) a lengthy period has passed since the offence was committed or allegedly committed; [**or**

(iv) **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; or**

(v) **the offence is an offence only under military law or a law relating to military obligations; or**

(vi) **the offence in respect of which the endorsed warrant was issued is of a political character; or**

(vii) **the person may be prejudiced at trial or punished, detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinions]**

it would, having regard to all the circumstances of the case be unjust, oppressive or too severe a punishment to return the fugitive, he shall order the person to be released.

[(c) In proceedings under this clause, the person is not entitled to adduce and the magistrate is not entitled to receive evidence to contradict an allegation that the person has engaged in conduct constituting an offence in relation to which any endorsed warrant was issued.

(d) The magistrate shall, after making an order in relation the person under paragraph (a), inform the person that he or she may, within 15 days of the day on which the order is made, seek a review of the order.]

6. A fugitive offender may waive the right to have a hearing for the purposes of clause 5, and if satisfied that the fugitive offender has voluntarily and with an understanding of its significance requested such waiver, the magistrate may make an order by consent for the committal of the fugitive offender to prison, or for his admission to bail, to await return.

7.(a) an application may be made to a court of competent jurisdiction by or on behalf of a fugitive offender for a writ of habeas corpus or other like process.

(b) an application may be made to a court of competent jurisdiction by or on behalf of the government of the requesting part of the Commonwealth for review of the decision of the magistrate.

(c) the Court may by order confirm the order of the magistrate and order, by warrant, that the person be surrendered or quash the order of the magistrate and order the release of the person.

8.(a) Where after the expiry of the period mentioned in paragraph (b) 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

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

(ii) sufficient cause for the delay is not shown, the competent judicial authority will order his discharge.

(b) The period referred to in paragraph (a) will be one expiring either

(i) not later than two months from the fugitive's committal to prison as mentioned in clause 5, or

(ii) not later than one month from the date of the order for his return made as mentioned in clause 7.

9.(a) Subject to the following provisions of this clause, where a fugitive offender

(i) has been charged with an offence triable by a court in that part of the Commonwealth in which he is found, or

(ii) is serving a sentence imposed by a court in that part of the Commonwealth,

then until such a 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 for refusal by the competent executive authority as the law of the country or territory concerned may provide.

(b) Subject to the provisions of this Annex, a prisoner serving such a sentence who is also a fugitive offender may, at the discretion of the competent executive authority of that part of the Commonwealth in which the prisoner is held, be returned temporarily to another part of the Commonwealth in which he is accused of a returnable offence to enable proceedings to be brought against the prisoner in relation to that offence on such conditions as are agreed between the respective parts of the Commonwealth.

10.(a) In the case of a person who -

(i) 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

(ii) is found in some other part of the Commonwealth, the provisions set out in this Annex, as applied for the purposes of this clause by paragraph (b), will govern his return to the part of the Commonwealth in which he was convicted.

(b) For the purposes of this clause this Annex 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 any reference to a fugitive offender shall be construed as including a reference to such a person as is mentioned in paragraph (a), and

(c) 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.

11. Provisions of the law of the requested country relating to search for, seizure of and return (to the part of the Commonwealth in which the endorsed warrant was issued) of property which may be material evidence of the offence of which the person is accused shall apply *mutatis mutandis* to cases dealt with under this Annex.

12. Provisions of the law of the requested country relating to the transit of fugitive offenders through a part of the Commonwealth for the purpose of surrender to another part of the Commonwealth shall apply *mutatis mutandis* to cases dealt with under this Annex.

If an additional annex to the London Scheme for the Rendition of Fugitive Offenders is adopted there is a need to amend Clause 19 of the Scheme by adding a reference to the Annex and its intended scope of operation. The following draft is proposed for consideration:

(3) Two or more parts of the Commonwealth may make arrangements under which in matters of rendition between them the provisions of Annex 4 will replace the provisions of the Scheme.

RESOURCE IMPLICATIONS OF MUTUAL ASSISTANCE IN CRIMINAL MATTERS

A paper by the Commonwealth Secretariat

INTRODUCTION

1. Law Officers of Small Commonwealth Jurisdictions (LOSCJ) at their 1995 meeting considered the resource implications of mutual assistance in criminal matters. Their concluding statement records that the meeting "asked that the issue be placed before Law Ministers with a view to developing guidelines on the apportionment of costs in mutual assistance cases. They asked that Law Ministers be appraised of the effects on small jurisdictions of their participation in mutual assistance arrangements and be asked to ensure that the burdens incurred were shared in appropriate proportions between requesting and requested countries taking into account experience which shows that the burdens are not falling equally among members of the Commonwealth."

2. In considering resource implications LOSCJ noted the almost total "one way traffic" in requests from large developed countries to small jurisdictions and, in particular, where off-shore financial centres were concerned. The time spent responding to requests impacted upon police, advocates and prosecutors from the chambers of Attorneys-General and offices of public prosecutors, and well as upon the courts. In many cases the time spent on responding to foreign requests had resulted in back-logs in domestic work and delay in criminal trials. The time and effort taken to respond to legal challenges to decisions to grant assistance also adversely impacted on the running of a small jurisdiction law department. Law Officers expressed significant concern over the issue of costs being awarded against the authorities of a requested state when a court determined that a request should not have been acceded to.

3. In discussing possible solutions to the problems faced by their jurisdictions, LOSCJ asked that Law Ministers consider the following possible solutions:

(a) jurisdictions should consider permitting private practitioners, briefed by the Attorney-General of the requested jurisdiction, to represent the interests of the requesting jurisdiction before their courts;

(b) in complex commercial cases, jurisdictions could consider using the services of resident specialist accountancy firms to undertake the work necessary to respond to foreign requests;

(c) requesting jurisdictions should, where appropriate, be asked to bear the costs incurred in options (a) and (b) above; and

(d) in cases involving the restraint of alleged proceeds of crime in cases where a conviction and forfeiture was not ultimately ordered, the requested jurisdiction should have the requesting jurisdiction indemnify it against loss arising from a successful action by the owner of the property for diminution of value of the property while under restraint.

BACKGROUND

4. In reaching their conclusions LOSCJ had before them a paper prepared by the Secretariat outlining some of the issues which may have been relevant to the issue of costs. To assist Ministers to understand the context in which the discussions of LOSCJ occurred, to extracts from that paper form Attachment 1 to this paper. Paragraph 24 of Attachment 1 refers to the possibility of allowing the requesting state to represent itself before the courts of the requested state. LOSCJ felt strongly that foreign officials should NOT be permitted to participate in the execution of their own requests. Such participation was seen as a threat to sovereignty and national interest and as a potential legal "minefield" should the conduct of the foreign official result in a breach of the law of the requested jurisdiction.

5. The Harare Scheme deals with the question of expenses in article 12 which provides:

EXPENSES OF COMPLIANCE

12(1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against the requesting country for expenses incurred by the

Central Authority or other competent authorities of the requested country.

(2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.

(3) If in the opinion of the requested country the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

The Commentary on the Harare Scheme provides as follows:

"**Expenses of Compliance**

The question of the costs entailed in responding to requests for assistance was fully examined by senior officials at the January 1986 meeting. There was agreement that in most cases the costs would be borne by the requested country. This avoids the necessity for elaborate accounting and payment procedures; and as there will be a two-way traffic in requests for assistance, most countries should find that the expenditure is balanced by the services received from other countries. Paragraph 12 states the principle that the costs fall on the requested country but indicates three exceptions and a major qualification.

The exceptions concern the travel and subsistence costs of witnesses travelling to the requesting country (and of accompanying officials in the case, for example, of witnesses transferred in custody); fees payable to expert witnesses; and the costs of any translations required by the requesting country. It is thought that these costs, which are readily identifiable, should be met by the requesting country.

The qualification concerns exceptionally heavy costs. It is recognised that in complex cases, prolonged and extensive enquiries may be required. For example, investigations into a commercial fraud may require scrutiny of the records of the financial transactions of a group of companies over an extended period. The costs of such an enquiry would be very great, could be quite prohibitive for a small country, and would not necessarily ever be balanced by any reciprocal service from the requesting country. Paragraph 12(3) enables a requested country to negotiate special terms whenever it regards the potential expenses as "of an extraordinary nature". If terms cannot be agreed - and in some cases the required terms would include the salaries and expenses of officers seconded to a major investigation - the requested country would be entitled to refuse to comply with the request. No attempt is made to define the point at which expenses can properly be regarded as "extraordinary", which must be a matter of experience and judgement."

ISSUE FOR CONSIDERATION

6. In light of the serious concern expressed by LOSCJ it may be appropriate for Ministers to consider whether it would be appropriate for them to issue guidelines to member countries on the question of how to deal with "expenses of an extraordinary nature" so as to address the particular concerns of small states and jurisdictions.

7. Attachment 2 to this paper contains draft guidelines for consideration by Ministers if it is considered appropriate that the problems be addressed in this way. The draft guidelines draw heavily on the views expressed by LOSCJ.

February 1996

Extracts From A Paper Prepared by the Commonwealth Secretariat for Consideration by Law Officers of Small Jurisdictions on the Question of Costs of Providing Mutual Assistance in Criminal Matters

1. Although some small Commonwealth jurisdictions have enacted legislation to implement the Harare Scheme on Mutual Assistance in Criminal Matters there are still a number which have, since the Scheme was finalised nearly ten years ago, not found themselves in a position to do so. Of the jurisdictions eligible to attend the LOSCJ meeting, the Commonwealth Secretariat is aware of only six which have general "Harare Scheme" laws. Although inaction in this area may be due to scarce drafting resources, the Secretariat believes that the existence of a model law settled by senior officials during regional meetings in 1988 should have helped countries overcome this problem. This led the Secretariat to look for other reasons why countries have not taken the opportunity to put into place comprehensive mutual assistance in criminal matters laws.

2. On a number of occasions the Secretariat has heard concerns voiced about the cost to small jurisdictions of establishing mutual assistance networks. Costs can be basically broken into four categories:

(a) the cost of drafting the necessary laws and having them passed;

(b) the cost of establishing and maintaining a "central authority" to administer the legislation on behalf of the responsible minister;

(c) the cost of establishing bilateral relationships with other countries; and

(d) the costs which might be incurred in responding to requests from other countries - particularly large countries in the relevant region.

Drafting costs

3. Obviously few countries would wish to take a model law and present it to Parliament without giving consideration to the means by which it will be given effect and its inter-relationship with other laws. This does not, however, mean that countries cannot basically rely on the Commonwealth model or on laws passed by other jurisdictions with similar systems to minimise the costs involved.

Central Authority Costs

4. The concept of having to establish and maintain a "central authority" to administer the legislation on behalf of the responsible minister is something about which concern has been expressed by some jurisdictions. There is obviously a need to assist these countries to address the real or perceived problem.

5. Officers who administer MACM laws do not themselves execute the request except in the most unusual circumstances. Requests seek one of a few different types of assistance. Some of these can be provided by the police, others by the courts, and yet others by prosecutors. What the central authority does is to ensure that requests accord with the requirements of the domestic law, that their execution will not pose any threat to national interests and that a response is forwarded, in due course, to the requesting country. In other words, the central authority is a co-ordinating body whose task it is to ensure that incoming requests are responded to and that outgoing requests comply with the law of the requested country and (if necessary) with the law of the requesting country. Central authorities often give advice to local investigatory and prosecuting authorities on how to frame requests to other countries.

6. From this list of tasks which should be performed by a central authority it may be concluded that the person who runs (or is) the central authority should have:

(a) a working knowledge of the country's criminal justice system so that he/she can ensure that outgoing requests will produce evidence which can be used when it is supplied by the requested country;

(b) a basic knowledge of public international law, particularly the law of treaties;

(c) a familiarity with the domestic mutual assistance legislation, with police and court powers in their own country and, if final decisions to grant requests are made by a minister, an ability to advise ministers; and

(d) an ability to acquire a basic knowledge of the legal systems of other countries.

7. The larger countries which have introduced mutual assistance in criminal matters legislation have given its administration to those officers already having some familiarity with matters related to international law or criminal justice issues. Usually, but not always, these are the officers with responsibility for administering extradition laws. There are good reasons for following this practice. The first is that the number of people worldwide with knowledge of "international criminal law" is small and they all seem to know each other - an essential state of affairs if bilateral relations are to work with the minimum of difficulty and the maximum possible co-operation. Having a few officers whose task it is to participate in global efforts to combat crime and giving them all the relevant tasks is the most cost effective and, indeed, operationally effective way of running a mutual assistance central authority.

8. Clearly the financial resources of small states are limited and this will mean that fewer small states officers will attend global meetings - such as those of the United Nations relating to drug trafficking or crime prevention but experience shows that the time spent working at such meetings and meeting others involved in the same activities is time well spent and significantly enhances the capacity of central authority officers.

9. Concern has also been expressed about the capacity of small states to find people to staff a central authority. The number of people required will depend entirely on the number of incoming and outgoing requests which are processed each year. The number of outgoing requests will depend entirely upon the number of cases handled by the police each year which require evidence or other assistance from other countries. A realistic assessment of this number should be available from national police. The number of incoming requests will depend on the popularity of the country as a destination (final or transit) for criminals or the proceeds of their crimes. The United States has, as far as we are aware, the largest central authority. It deals with all aspects of international criminal law including policy formulation, bilateral and multilateral treaty negotiation, case work (extradition and MACM) and other relevant issues. It numbers about 20. The United Kingdom has 14 officers of whom 3 are involved in policy work and 11 in casework. Over 50% of the casework relates to the service of process (largely in respect of traffic offences by British motorists in Europe). Australia has 3 officers full time on MACM casework. Switzerland, which handles more requests than any other country in the world, has 10 officers who handle casework, policy and treaty negotiation and transfer of prisoners.

10. If one assumes that crime problems generally decrease proportionately with population size the result must be that the central authority required by a small state is proportionately smaller than that required, say, by the United States or the United Kingdom. In fact, it is not unreasonable to say that a small country should be able to provide an adequate central authority using part of the time of one officer - indeed the entire international crime policy and administration functions in a small state should not occupy more than part of the time of one officer.

11. It remains important, however, to ensure that the person given such responsibility be given as much opportunity as possible to participate in relevant international activities so as to increase his/her familiarity with other legal systems and to build the personal relationships which have proved crucial to the smooth operation of international relations in this area.

12. The other costs involved in establishing a central authority are minimal. Law books on the subject are few and far between and those that exist are not written by experts in the field. Some academic books provide useful background information - none tell how to go about doing the job. Library costs will therefore remain minimal or non-existent. The Commonwealth Secretariat is about to distribute the first part of a loose-leaf service containing the mutual assistance laws of as many countries as can be collected - both Commonwealth and non-Commonwealth - it is free to member jurisdictions. Both of the Commonwealth Secretariat newsletters in this area are free. To date we have not come into contact with any country which has failed to provide material on its own system totally free of cost to other countries.

13. One piece of equipment is essential - a fax machine and, if possible, a dedicated one with an international line open 24 hours a day for both incoming and outgoing messages. Without this piece of equipment life will be very difficult in a central authority. As technology progresses communications will, undoubtedly, be made by E-mail but it is our assumption that the fax machine

will be the main method of communication for some time to come.

Establishing Bilateral Relationships

14. Countries which enact mutual assistance laws in the form of the Commonwealth model will incur no cost in establishing relations with other Commonwealth countries having similar laws. Even countries which add to the model a procedure for designating Commonwealth countries to which they will render assistance should only incur the administrative costs involved in preparing and gazetting the instruments of designation. This leaves the question of establishing bilateral relations with other countries.

15. The global norm for mutual assistance in criminal matters is now the United Nations model treaty on the subject. Although the model Commonwealth law is generally similar there are some differences which could make the speedy conclusion of bilateral relations with non-Commonwealth countries a little more complicated - but by no means impossible. A law based on the Commonwealth model would provide a good basis for the start of negotiations because it contains a provision which allows it to be applied to other countries subject to such "limitations, conditions, exceptions or qualifications" as may be prescribed. In other words, the application of the Act to the other country can be specified to be subject to a bilateral treaty. The model specifically provides for the making of regulations giving effect to a bilateral treaty. This does mean, however, that where the two countries involved start from different bases a comprehensive treaty may have to be negotiated to resolve the differences and find a mutually acceptable middle ground. The larger/or more developed the country you are dealing with the more likelihood that they will require a resolution of differences and the more likely is the need for a comprehensive treaty. If a large or developed countries wants a bilateral treaty relationship with a small country badly enough it will pay for the negotiations.

16. That the model law speaks of giving effect to a treaty should not, however, deter small states. There are more small and developing states in the world than there are large and developed countries. Amongst themselves small states whose need to establish mutual assistance links revolves around a few cases a year could chose to enter into treaties which do no more than commit each party to grant assistance to the other in accordance with the law of the requested country. Of course there is less certainty in how such a treaty will operate in practice because either country can change the provisions of its law and hence change the assistance which can be made available and the rules under which it will be provided. The other side of the coin is that treaties such as these (which, provided both parties intend them to be binding at international law, are treaties despite their simplicity) can be concluded by diplomatic missions (where they exist) or even by mail between foreign ministries or between justice ministries if this accords with national practice.

17. Of course, those countries which do not yet have a law could always amend the provisions of clause 30 of the Commonwealth model to make it clear that the law can be applied to a non-Commonwealth country pursuant to treaty or otherwise.

18. There is much scope for inexpensive creativity in the creation of bilateral mutual assistance relationships between small Commonwealth jurisdictions and non-Commonwealth countries.

Responding to Requests

19. One of the most often expressed concerns of small states is that the establishment of mutual assistance relations will result in a rush of foreign requests which will consume police and court time and place immense burdens on the local system. This concern can be very real and ways of addressing it must be found if small states are to be able to participate in the international co-operation network.

20. Perhaps the first thing all countries should do is work out how many INTERPOL requests for the sort of assistance covered by mutual assistance laws and how many *commissions rogatoires* have been received in recent years. That total will roughly represent the interest other countries have in information and evidence in the country. To take a "ball park" figure, that figure could then be doubled because the range of assistance which can be provided will increase with the enactment of a mutual assistance law. Countries which do not provide off-shore financial services can assume that, in the initial stages at least, and barring major changes in criminal trends, those figures will be a guide to the amount of business likely to be generated. They can then make an assessment of the amount of police and court time (together

perhaps with legal staff time) which might be needed to respond to foreign requests.

21. Countries with problems related to drug trafficking will need to make other estimates as well. They will need to take into account possible requests for evidence to be taken and for investigations to be done in their territory. Guides to the approximate number and complexity can only be provided by past experience but it is fair to say that as assistance becomes available foreign investigators will be more likely to be seeking assistance. Countries which provide off-shore financial services are the most likely to find that the number and complexity of requests received will stretch resources. Any jurisdiction which offers international business companies, banking facilities and other products of potential use to money launderers is likely to receive requests from all of the members of the Financial Action Task Force - that is the G7 countries and 19 other developed economies.

22. Normally the costs of executing a mutual assistance request are born by the requested country - this practice being based on the presumption that requests will flow, over a period of time, equally between countries. This will never be so between large developed countries and small states (particularly small island states).

23. A number of different tests could be devised to determine who should pay and in what circumstances. The cause of international crime prevention and detection will not be helped if every small country refuses to execute a mutual assistance request unless the bills are paid. What needs to be determined is what sort of case should attract charges. If police forces serve process then they can serve foreign process (to the extent this is permitted by law) at little marginal cost. Similarly, police can locate people with little difficulty and may even be able to take voluntary witness statements without unduly disrupting their normal duties. In the normal case these services could be provided free. On the other hand a request that police conduct a surveillance exercise to detect drugs coming in by sea could use huge resources and cost a lot financially. There are two options here - one is to charge the requesting country for the unusual expenditure incurred (if the manpower to conduct the exercise can be found) and the other is to give permission to the requesting country to conduct the exercise itself with perhaps one national police officer in attendance (paid for if the time is excessive) to ensure that arrests are validly made or searches validly carried out.

24. Investigations into major corporate fraud cases which require that a large number of bank records be produced in court - that witnesses be sworn and that technical evidence be assembled are also costly and time consuming. If personpower to undertake the work is available perhaps a charge could be levied by the requested state. If personpower is not available then consideration could be given to permitting the requesting country to represent itself in court to obtain the necessary evidence and documents.

25. Perhaps the most important thing to consider in this context is the obverse side of the coin. It is often less expensive to collect evidence in small states than in large ones. Local wages are likely to be less, legal expenses (lawyers and courts) are likely to be less. If small states insist that large ones pay for all the mutual assistance they receive then it is quite possible that the large ones will apply the same test - thereby making it impossible for small states ever to seek assistance from countries where costs are prohibitively high in their terms. The optimum way to approach the problem is on a case by case basis. To do this the norm, of the requested country paying, should continue to apply except in unusual cases where the countries agree to conduct discussions on the question of payment.
An alternative approach, but more difficult to monitor and therefore not recommended, would be to agree to provide mutual assistance to a particular country to a value of $x each year and thereafter that country would pay for assistance received.
The difficulty with this approach is that each piece of assistance would have to be costed - a difficult thing to do when the people providing it are being paid from the public purse - so that the requested country would know when to start charging the requesting country.

February 1996

DRAFT

Law Ministers of the Commonwealth

Recalling that the purpose of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (the Harare Scheme) is to increase the level and scope of assistance rendered between Commonwealth governments in criminal matters;

Noting that Clause 12 of the Harare Scheme provides that, subject to sub-clause (2), unless expenses of an extraordinary nature are involved in responding to requests for assistance, the requested country will pay the costs of providing assistance; and

Noting the concern expressed by Law Officers of Small Commonwealth Jurisdictions over the impact on national resources caused by complying with requests for assistance

Adopted the following guidelines to assist member countries to deal with the financial and other costs incurred by jurisdictions in responding to requests for assistance:

Guidelines on the Apportionment of Costs Incurred in Providing Mutual Assistance in Criminal Matters

1. Where the execution of a request for assistance requires that the requesting country be represented before the courts of the requested country and where the human resources available to the Central Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may brief an appropriate member of the private profession to represent the requesting country on its behalf. In such case the [Attorney-General] shall use his or her best endeavours to ensure that the person so briefed has no conflict of interest and that the best interests of the requesting country are protected.

2. Where a request for assistance requires that voluminous or complex documentary or other records be located and retrieved and where the human resources available to the Central Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may secure the services of appropriate specialists to undertake the work necessary to respond to the request.

3. Where the Central Authority of the requested country is of the opinion that the circumstances described in paragraphs 1 and 2 above exist, it shall, before proceeding to secure non-government persons to perform the functions, consult with the requesting country on the proposed action and secure, if necessary, the agreement of the requesting country to pay for the services so contracted for on its behalf.

4. Where a request for assistance requires the taking of action by police officers in the requested country and the Central Authority of that country is of the opinion that such action would so divert the available police resources as to cause prejudice to the peace of the country the request may be refused.

5. Where a request for assistance seeks the making or enforcement of an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence and where the law of the requested country would permit any person with an interest in such property to take action for damages arising from such restraint in the event that the property was not later the subject of an order confiscating it the requested country may, if it considers it appropriate, require from the requesting country an indemnity against any loss incurred by the government of the requested country as a result of such action being successful.

6. Nothing in these guidelines shall be interpreted as detracting from the requirement contained in clause 12 of the Harare Scheme that countries consult in cases where the requested country is of the opinion that the expenses required in order to comply with a request are of an extraordinary nature.

SURVEY OF EXTRADITION, MUTUAL ASSISTANCE IN CRIMINAL MATTERS AND TRANSFER OF PRISONER LAWS IN COMMONWEALTH JURISDICTIONS

A Note by the Commonwealth Secretariat

1. In response to the request by Senior Officials of Law Ministries, the Secretariat has updated and extended the scope of the 1989 publication entitled Survey of Extradition and Fugitive Offenders Legislation as Between Commonwealth Jurisdictions. It is anticipated that the publication will require further modification prior to it being issued in loose leaf form to all governments. The revised volume contains information on the extradition, mutual assistance in criminal matters and transfer of prisoner laws of Commonwealth countries. It draws on all information available to the Commonwealth Secretariat as at February 1996. The information, although largely related to national laws designed to give effect to:

(a) The London Scheme on the Rendition of Fugitive Offenders;

(b) The Harare Scheme on Mutual Legal Assistance in Criminal Matters; and

(c) The Scheme for the Transfer of Convicted Offenders

also contains information on laws which permit member countries to co-operate with non-Commonwealth countries. Part II covering Mutual Assistance in Criminal Matters includes information on laws enacted to give effect to other mutual assistance obligations (for example those arising under multilateral conventions) and on laws permitting courts to render assistance to other countries pursuant to commissions rogatoire, letters of request and similar documents.

2. In compiling the information in the publication the Secretariat has relied on various sources including copies of national laws and information provided to it; information contained in the 1989 volume on the subject of extradition; answers to the 1995 survey and, where appropriate, Halsbury's Laws of England and Halsbury's Statutes.

3. The publication contains information which has not been certified as correct by all member countries and, accordingly, the Secretariat believes that its distribution should be limited until such time as each country has had a reasonable opportunity to peruse its entry and make such alterations and additions as it considers appropriate. The publication will therefore be made available to each delegation at the Kuala Lumpur Meeting where it is anticipated that Ministers may wish to set a date by which final confirmation of entries should be received so as to enable publication.

February 1996

PROPOSALS FOR THE ENHANCEMENT OF THE HARARE SCHEME ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS: REPORTS FROM THE 1994 OXFORD CONFERENCE ON MUTUAL LEGAL ASSISTANCE AND THE MEETING OF SENIOR OFFICIALS OF LAW MINISTRIES

A Paper prepared by the Commonwealth Secretariat

BACKGROUND

1. The theme for the 1994 Oxford Conference organised by the Commercial Crime Unit in conjunction with the United Nations Drug Control Programme and the United Nations Inter-regional Crime and Justice Research Institute was Mutual Legal Assistance. Delegates from 50 countries and six international organisations discussed their experience in administering both mutual assistance in criminal matters, and mutual assistance between business and customs regulatory agencies.

2. The intention of the Conference was to bring together delegates from all major legal systems and so facilitate exchanges of views, experiences and details of various legal systems. Thirty of the countries represented were common law countries and the remaining 20 countries included civil, Roman Dutch, Islamic and Chinese legal systems. All continents were represented.

3. In plenary session the Conference made five recommendations and requested that those recommendations be forwarded to Commonwealth Law Ministers for consideration and such action as they may deem appropriate. Copies of the Report were distributed by the Secretariat following the Conference. An additional copy for each delegation will also be available at the Kuala Lumpur Meeting.

CONFERENCE RECOMMENDATIONS

4. The five Conference Recommendations were:

A. Delegates agreed that each of their countries would use its best efforts to prepare and update national guides containing summaries detailing the essential procedures and practices of the country and specifying the basis on which mutual assistance was available. Such guides should be provided, upon request, to other countries and should be given to relevant international and regional organisations. It was agreed that each guide should cover the basic issues and list any restrictions on the granting of assistance. Details of the appropriate point of contact in the country would be included and where a central authority had been established the details of the central authority should be provided. Countries which considered it desirable could include model requests in their national guides.

B. International organisations should work towards the compilation and distribution of collections of national mutual assistance guides and should co-ordinate their efforts to ensure that collections of guides are distributed as widely as possible.

C. Rules of evidence in common law jurisdictions should be reviewed to ensure the admissibility of evidence obtained pursuant to mutual legal assistance requests.

D. Countries should consider the desirability of removing obstacles to the successful operation of mutual assistance schemes. It is desirable that when national laws are reviewed consideration is given to the question whether it is appropriate that grounds of refusal applying to extradition requests should apply, or continue to apply, to mutual assistance requests.

E. Future similar meetings should be arranged at approximately three-yearly intervals in order to review progress and address emergent issues including improvements in technology and the possible use of such technology.

CONSIDERATION OF THE RECOMMENDATIONS BY SENIOR OFFICIALS

5. Recommendations A and B were endorsed by Senior Officials and action has been taken by the Secretariat pursuant to these endorsements. All member countries have now received the first parts of the publication entitled "Mutual Assistance in Criminal Matters - Guide to National Practice and Procedure". Co-operation with other international organisations working in the area is ongoing. Recommendation E was also endorsed by Senior

Officials and the Secretariat, subject to resources being available, will convene further conferences to consider practical issues arising from experience in the administration of mutual assistance laws.

6. While the Oxford Conference participants recognised that rules of evidence are at the heart of common law principles, particularly those relating to criminal justice, they concluded that those rules were capable of unnecessarily frustrating legitimate attempts by law enforcement and prosecutorial authorities to administer criminal laws. Recommendation C therefore suggested that common law countries review their laws to ensure that evidence obtained from overseas can be adduced in evidence.

7. Senior Officials considered that Recommendation C raised difficult issues which required further consideration by governments. They requested the Secretariat to prepare a paper for Law Ministers on possible changes in the law on the admission of evidence obtained from foreign countries. The Annex to this paper outlines national practices which are relevant to this issue and are reflected in the laws of member countries.

8. Delegates to the Oxford Conference were of the view that the time had come for countries to consider whether the effective operation of mutual assistance arrangements may be hampered by very detailed provisions on refusal of assistance. While recognising that the detailed specification of grounds of refusal eliminated uncertainty they questioned whether the incorporation of each of the traditional grounds for refusing extradition was appropriate where the assistance sought related to the provision of information or evidence rather than the surrender of a person.

9. The scope of the grounds upon which requests for mutual assistance in criminal matters can be refused was also the subject of consideration by Senior Officials. Their recommendation to Ministers is that the grounds of refusal be kept flexible. In making this recommendation Officials took account of differing national priorities.

POSSIBLE ACTION BY MINISTERS

10. Ministers may consider that the question of whether national laws could or should be modified so as to facilitate the reception into evidence of material obtained pursuant to a mutual assistance request is a matter solely for individual member governments and need not be the subject of further work by the Secretariat. Alternatively Ministers may consider that their consideration of the issue could be assisted by the Secretariat distributing to them details of developments in this area. The Secretariat would appreciate guidance from Ministers on whether this issue is one upon which it should provide assistance.

February 1996

THE RECEPTION BY COURTS OF EVIDENCE OBTAINED IN RESPONSE TO REQUESTS FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS

A Note by the Commonwealth Secretariat

1. One of the major issues to arise in recent years has been the difficulty faced by prosecutors in common law countries who seek to rely on evidence obtained from another country. The rules of evidence in many, if not most, Commonwealth countries make it difficult for prosecutors to make the best use of foreign evidence. In particular the "best evidence" rule, together with the rule against hearsay evidence have often resulted in the rejection of evidence obtained from other countries and have thus diminished the value of mutual assistance to many countries.

2. When common law countries seek to obtain evidence from other countries they face two significant obstacles. The first is getting the other country to understand that the evidence requested must be collected in precisely the way specified and the second is that there is likely to be a further request for the witness to attend the trial in person with the result that the requested country and the witness are put to the trouble of handling two processes instead of one.

3. Other problems arise in relation to the admissibility of documentary records. There are significant variations amongst Commonwealth countries and between Commonwealth and non-Commonwealth countries in the rules of evidence relating to documentary hearsay. Some countries have continuously updated their laws to take into account (particularly in relation to business records) new methods of collecting and storing information. Others have not. Even where national evidence laws on business records reflect the "state of the art" problems can still arise.

4. Although the use of foreign obtained evidence in domestic criminal proceedings is now concerning Commonwealth countries there are well established precedents, albeit in limited areas, for accepting certain foreign materials. For example, the extradition laws of most Commonwealth countries make provision for receipt into evidence of foreign material. The Extradition Act 1993 of Antigua and Barbuda provides a good example. Part VII of that Act provides that documents authenticated in accordance with the Act shall be received in evidence without further proof of authenticity. In addition, and more substantively, it provides that a duly authenticated document which purports to set out evidence given on oath in a designated (Commonwealth) country shall be admissible as evidence of the matters stated in it.

5 Some Commonwealth countries have already addressed the problem to the extent they feel is reasonable given their basic criminal justice principles. Examples of the approaches taken in various Commonwealth countries are outlined below.

Australia

6. The Foreign Evidence Act 1994 (No. 59 of 1994) sets out the requirements for testimony obtained as a result of a request made by or on behalf of the Attorney-General to a foreign country and to any exhibit annexed to such testimony. The Act requires that the testimony must have been taken on oath or affirmation; or under such caution or admonition as would be accepted by courts in the foreign country concerned for the purposes of giving testimony in proceedings before those courts.

In addition the testimony must purport to be signed or certified by a judge, magistrate or officer in or of the foreign country to which the request was made and purport to bear an official or public seal of the country, or a Minister of State, or a Department or officer of the government of the country.

7. The testimony may be reduced to writing or be recorded on an audio or video tape.

8. Having specified the prerequisites for admissibility the legislation then, in common with other laws, provides that the foreign material is not to be adduced as evidence if it appears to the court's satisfaction at the hearing of the proceedings that the person who gave the testimony is in Australia and is able to attend the hearing. Neither may it be adduced if the evidence would not have been admissible had it been adduced from the witness at the hearing.

9. In addition to the statutory prohibitions on adducing foreign material the Act gives to the court an additional discretion by permitting the court to direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence. The court is then enjoined mandatorily to take into account certain matters in exercising its discretion. The non-exclusive list of matters requires the court to consider:

- the extent to which the foreign material provides evidence that would not otherwise be available;

- the probative value of the foreign material with respect to any issue that is likely to be determined in the proceeding;

- the extent to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them;

- whether the exclusion of the foreign material would cause undue expense or delay; and

- whether exclusion of the foreign material would unfairly prejudice any party to the proceeding.

10. The Act also gives effect in Australia to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

Canada

11. The Mutual Legal Assistance in Criminal Matters Act (c. 37 of 1988) contains, in Part II, provisions to govern the admissibility in Canada of evidence obtained abroad pursuant to a treaty. The approach is somewhat different to that adopted by Australia but again gives real opportunity for the evidence to be considered.

12. The Act provides that records or copies thereof and affidavits, certificates or other statements pertaining to the record made by a person who has custody or knowledge of the record which are sent to the Minister by a foreign state are not inadmissible in evidence by reason only that a statement contained in the record, copy, affidavit, certificate or other statement is hearsay or a statement of opinion. The determination of the probative value of a record or a copy thereof admitted in evidence is left to the trier of fact who may examine the record or copy, receive oral or affidavit evidence, including evidence as to the circumstances in which the information contained in the record or copy was written, recorded, stored or reproduced and may draw any reasonable inferences from the form or content of the record or copy.

13. Things and any affidavits, certificates or other statements pertaining to things made by a person in a foreign state as to the identity and possession of the thing from the time it was obtained until it is sent to a specified person in Canada by a foreign state in accordance with a Canadian request, are not inadmissible in evidence by reason only that the affidavit, certificate or other statement contains hearsay or a statement of opinion.

14. Affidavits, certificates or other statements are, in the absence of evidence to the contrary proof of the statements contained therein without proof of the signature or official character of the person appearing to have signed the affidavit, certificate or other statement.

15. Courts are given a discretion to refuse to admit into evidence records or copies thereof, things, affidavits, certificates or other statements if the party intending to produce the evidence has not given the other party specified notice of intention to produce, and where the thing sought to be adduced in evidence is a thing, the other party should be given opportunity to inspect the thing.

United Kingdom

16. The Criminal Justice (International Co-operation) Act 1989 deals in s. 3 with overseas evidence for use in the United Kingdom. That section lays down the procedure for seeking assistance in obtaining evidence outside the UK including specification of persons authorised to make requests and the proper channel for communication of those requests.

17. The Criminal Justice Act 1988 establishes principles to be followed by the court in determining whether or not certain evidence should be admitted. The International Co-operation Act expands upon those principles by requiring the court to have regard to whether it was possible to challenge the statement by questioning the person who made it, and, whether the local law allowed

the parties to the proceedings to be legally represented when the evidence was being taken.

18. The rules laid down in the Criminal Justice Act are similar to those later adopted by Australia and include the requirement that if the court is of the opinion that in the interests of justice a statement which is admissible nevertheless ought not to be admitted, it may direct that the statement shall not be admitted. The court must also have regard to the nature and source of documents containing statements; to the extent to which the statement appears to supply evidence which would otherwise not be readily available; to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

19. A statement which is otherwise admissible in criminal proceedings shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice. In considering whether its admission would be in the interest of justice, it shall be the duty of the court to have regard to the contents of the statement; to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and to any other circumstances that appear to the court to be relevant.

THE MODERNISATION OF EXTRADITION LAWS OF COMMONWEALTH COUNTRIES

A Paper by the Commonwealth Secretariat

INTRODUCTION

1. Law Officers of Small Commonwealth Jurisdictions at their 1995 meeting asked that the Secretariat prepare materials which would assist Commonwealth countries and jurisdictions in their efforts to ensure that their extradition laws reflected the most up-to-date practice and which would facilitate the conclusion of extradition arrangements with Commonwealth and non-Commonwealth countries. The Pacific Island Law Officers Meeting (PILOM) sought similar assistance in 1994. This paper draws on work done for PILOM.

2. While this paper does not suggest a modification of the London Scheme for the Rendition of Fugitive Offenders it does, of necessity, compare that Scheme with other international instruments. This approach is necessary if the paper is to assist member countries in their efforts to extend the scope of their bilateral extradition arrangements beyond those which exist with other countries and jurisdictions which have different legal systems and traditions.

EXTRADITION ISSUES NOT DEALT WITH IN THE LONDON SCHEME

3. There are a number of subjects of a substantive nature which are covered in the United Nations Model Extradition Treaty but not in the London Scheme. Countries may wish to consider the desirability of making these issues the subject of specific provision in national laws so as to enable them to use that law as a comprehensive basis for the consideration of extradition requests. One reason for making national legislation comprehensive is to clearly define the rights of the fugitive and those of the requesting and requested states so as to minimise uncertainty which can give rise to protracted litigation of extradition requests and potential applications for judicial review and/or *habeas corpus*. These issues are:

a. Subjects totally excluded from the London Scheme

(i) The London Scheme, although it has abolished the list approach to offences and replaced it with a dual criminality test, does not lay down *how dual criminality is to be determined* and thus legislation which follows closely the wording of the London Scheme is unlikely to have a provision paralleling Article 2(2) of the UN model which is designed to overcome decisions such as that in Gardner's Case [1968] 2 QB 399.

(ii) Provisions which deal with refusal of extradition in cases where the fugitive has been *convicted in absentia* are important and, although not mentioned in the London Scheme might well commend themselves to countries.

(iii) A provision permitting discretionary refusal of surrender in cases where both the requested and the requesting state have jurisdiction and the requested state has already taken a decision not to proceed with the case.

(iv) A provision permitting discretionary refusal of surrender in a case where both the requesting and requested state have jurisdiction and the requested state has commenced proceedings against the fugitive for the offence for which surrender is requested.

(v) A provision permitting discretionary refusal of surrender in a case where the requesting state is exercising extraterritorial jurisdiction over the offence for which surrender is sought and the requested state does not exercise extraterritorial jurisdiction in similar cases. (Such a provision may not be needed in the London Scheme because the Scheme lacks a provision which matches conduct to determine extraditability instead of matching "offences" - see the comment above on the Gardner Case provision).

(vi) A provision permitting refusal of surrender where the requested state claims sole jurisdiction over the offence for which surrender is sought. In such a case the provision should also require that where surrender is refused on this ground the requested state has an obligation to submit the case to its prosecution authorities which must consider the question of prosecution.

(vii) A provision permitting refusal of extradition where the fugitive has been or would be

liable to be prosecuted by an extraordinary or *ad hoc* court or tribunal.

(viii) A provision permitting the requested state to seek the submission of additional material in support of the request by the requesting state.

(ix) A provision limiting the time for which a person provisionally arrested may be held without the submission of the formal request and supporting documents.

(x) Any provisions on the surrender of the fugitive after the grant of a request.

(xi) Any provision requiring the requested state which refuses extradition on the ground of nationality/citizenship to submit the case to its own authorities for prosecution (or consideration of the question of prosecution).

b. Subjects covered only by inference

(i) A provision which permits refusal of surrender if prosecution of the offence of which the fugitive is accused would be statute barred in the requesting state. The "lapse of time" ground in the London Scheme may be construed as covering this but the answer to the question is far from certain.

(ii) A provision permitting refusal of surrender on humanitarian grounds. It is arguable that refusal based on Clause 10(3)(d) could cover this but the situation is not absolutely clear.

Other Features of the London Scheme

4. National legislation based on the London Scheme legislation may not adequately cover two particular areas. The first is the issue of the inability (or refusal) of certain countries to surrender their nationals. The second is issues which might arise if the requested country considers that the punishment which can be imposed by the requesting country does not meet appropriate standards such as those laid down in the International Covenant on Civil and Political Rights (ICCPR).

Nationality

5. The constitutions of some countries prohibit the extradition of nationals. Other countries prefer to reserve to themselves the right to refuse to surrender a national. Either approach characterises the extradition law and/or practice of a very significant number of countries in the world and hence account must be taken of it by countries which do, or usually do, surrender their nationals.

6. Although the London Scheme does contain an optional annex dealing with the right to refuse the surrender of nationals it offers no alternative and therefore has the potential to create safe havens. By contrast, the civil law practice of refusing to surrender nationals derives from the application of the personal theory of jurisdiction rather than the territorial theory of jurisdiction. Hence a country (such as most European countries) which refuses to surrender a national does so on the basis that it has the right to deal with the person regardless of where the alleged offence was committed. In refusing surrender *on the basis of nationality or citizenship* such a country is not providing a safe haven for the fugitive - it is merely asserting its own jurisdictional claim.

7. Multilateral conventions dealing with criminal conduct are basing the obligation to deal with offenders on what is often described as "the nationals jurisdiction". Briefly described, the "nationals jurisdiction" in multilateral conventions requires states parties to extradite or to establish such jurisdiction over alleged offenders as would allow them to prosecute if they refuse to extradite. It is therefore necessary that all countries (whatever their historical approach to jurisdictional claims may be) which refuse to extradite nationals (or retain the right to refuse under bilateral treaties or otherwise) find a means of dealing with any national whose surrender is refused.

8. The usual way in which common law countries cater for jurisdictional claims based on nationality is to agree with the country/ies concerned that where extradition is refused on this basis the accused will be dealt with in the country which claims jurisdiction. Accordingly the laws of any country which provide for refusal on the grounds of nationality must contain provisions which permit it to exercise the jurisdiction over its nationals.

9. A necessary corollary of such a provision is that the law of the requesting country must enable it to provide the requested country (which refuses extradition) with such evidence as that country requires to enable it to bring the prosecution properly and with acceptable chances of success. If one or more countries wishes to reserve to itself the right to refuse to surrender nationals the others must all be prepared, if an effective regime is to be put in place, to enact laws which enable them to provide that country (or those countries) with the evidence they need to prosecute.

10. Another way of dealing with this issue is being adopted by various European countries. It involves surrender for trial only and return to the country of nationality to serve any sentence imposed. In Europe this can be achieved where both the requesting and the requested country are states parties to a treaty on the transfer of convicted offenders.

Human Rights Issues

11. If there is concern in any country over the potential treatment of surrendered persons in the requesting country these need to be addressed legislatively. The issues which arise in this context are generally set out in the ICCPR, in the Second Optional Protocol to the ICCPR (dealing with the death penalty) and in instruments such as the Convention Against Torture and Other Cruel and Inhuman Punishment.

12. It is consistent with the spirit (and, indeed, in some cases the requirements) of these instruments that countries refuse extradition where they are not satisfied that the treatment of the surrendered person in the requesting country will comply with the standards set out in these instruments. It is not, however, conducive to good international relations that surrender be refused lightly on human rights grounds. One way of overcoming potentially divisive issues in this area is for countries to agree bilaterally or on a wider basis that extradition will not be refused on "human rights" grounds where the requesting country is a state party to the ICCPR. In death penalty cases it is common practice for a requested country to refuse to extradite for an offence carrying the death penalty unless the requesting country guarantees that the death penalty will not be imposed or, if imposed, will not be carried out.

13. Where a requesting country cannot give a required "death penalty undertaking" it appears that developing international practice is for extradition to be refused. Such refusal could be accompanied by an assertion of jurisdiction by the requested country (if so desired) or could mean that the fugitive evades justice. There is no common international practice.

14. It has been suggested to us that where the requesting country is a state party to the ICCPR no question as to the adequacy of its treatment of offenders should be raised. A state party to the ICCPR is already required, at international law, to comply with globally accepted standards. To support this concept the national laws would need to provide that extradition shall not be refused on "ICCPR" grounds where the requesting country is a state party to that Covenant.

15. The London Scheme does not deal thoroughly with this issue - the only relevant ground of refusal being contained in the death penalty annex and in Clause 10(3)(c) which is non-specific and therefore uncertain.

16. Where a requesting country is not a state party to the ICCPR and the requested country is concerned that the standard of treatment likely to be accorded a surrendered person would not meet ICCPR standards there are various alternatives which might commend themselves:

(a) extradition can be refused and the fugitive can evade justice. Clearly this option is not conducive to good relations between member countries whose views on the adequacy of their regimes for treating (or housing) prisoners may differ and whose abilities to provide "state of the art" prison facilities may differ;

(b) extradition can be granted for the purpose of the trial only and the person, if convicted, could be returned to the requested country to serve sentence in that country. The laws of both the requesting and the requested country must permit such an arrangement. Specifically, the laws of the requesting country must permit a person convicted in that country to be transferred to another country to serve his/her sentence. The laws of the requested country must allow it to receive a prisoner convicted in another country into custody and ensure that the foreign sentence forms a lawful basis for custody in its penal institutions. The necessary basis for transferring a convicted person can be founded on a comprehensive transfer of prisoner arrangement or in specialist provisions which confine the facility to cases where extradition was granted for the purpose of trial only;

(c) provision could be made to transfer the proceedings to the requested country. Transfer of proceedings is not a concept well known to common law countries and the means whereby it can be effectively achieved are somewhat complicated. Although the practice has not generally found favour in international fora which include common law countries, such a mechanism has been adopted by member countries of the Economic Community of West African States

(ECOWAS) which includes both common and civil law countries. It is, however, fair to say that the ECOWAS arrangement is very new and there is no working experience upon which members can draw for analysis.

BROAD OVERVIEW OF NATIONAL LAWS IN FORCE IN COMMONWEALTH COUNTRIES

17. A significant number of Commonwealth countries have extradition legislation which reflects the pre-1983 London Scheme. Those countries which have not amended their laws to reflect the changes since 1983 to the Scheme can only extradite for the offences listed in the old Schedule of offences. Even where countries have agreed in principle that evidentiary provisions should be modified existing laws embody the traditional evidentiary standard in that they require the submission of evidence which is admissible in the requested country and which would provide sufficient basis to put the person on trial had the offence been committed in the requested country. Provisions permitting simplified extradition where the fugitive consents to surrender are relatively rare. One of the most significant omissions from national legislation is provision which facilitates transit through the country where a fugitive has been surrendered by one country to another and needs to be transported through a country which is not otherwise involved in the case.

18. Very few Commonwealth countries would find their extradition legislation conducive to the conclusion of modern bilateral treaties with non-Commonwealth countries. The reasons for this vary but it is fair to say that the maintenance of the list of offences for which extradition can be granted together with the evidentiary requirements, the lack of transit provisions and the maintenance of very general provisions such as those which allow the requested country to refuse to extradite on grounds that to return the fugitive would be "too severe a punishment" are inconsistent with modern extradition practice.

19. A comparison between the extradition laws of most Commonwealth countries and jurisdictions and the provisions of the United Nations Model Treaty show even greater divergence than does a comparison of laws with the provisions of the London Scheme. The following areas are those where the most significant divergence occurs and hence the areas which would provide Commonwealth countries and jurisdictions with the greatest difficulty in negotiating bilateral extradition relations with the significant number of countries in the world which have accepted the provisions of the UN model as a guide to modern global practice.

(i) *Extraditable Offences*: The majority of Commonwealth countries only grant extradition for offences listed in the Schedule rather than adopting the no-list dual criminality approach. This means that extradition laws require continual updating as forms of criminality develop - a cumbersome task the need for which usually only becomes apparent when a country finds it is unable to respond to a specific request for surrender. All other things being equal, there is little, if any, justification for not surrendering a person to face trial or serve a sentence for conduct which would constitute an offence against the laws of both the requesting and requested countries.

(ii) *Determination of Dual Criminality*: The 1968 decision in *R. v. Governor of Brixton Prison, ex parte Gardner* probably would apply, at least persuasively, in many Commonwealth countries. This decision has the effect that dual criminality is not established unless the elements of the offences as created under the laws of both the requesting and requested countries match exactly. It may be desirable that legislative action be taken to ensure that courts cannot reach the same conclusion.

(iii) *Fiscal Offences*: Once the list approach to determining extraditable offences is adopted it becomes necessary to deal expressly with the question of fiscal offences. Traditionally one state was under no obligation to assist another in the enforcement of its fiscal laws. As fraud on the revenue and other economic crimes become more widespread, countries have a real interest in ensuring that they can bring to justice these criminals. Hence there has been a global trend to modify the traditional rule by providing specifically that fiscal offences are extraditable. The deficiencies here are the same as those arising from the non-implementation of paragraph 2(3) of the London Scheme.

(iv) *Accessory Extradition*: Because extradition can only be granted for serious offences (generally those carrying a maximum penalty of not less than one or two years imprisonment) fugitives who are charged in the requesting country with both offences which carry the required penalty to be extraditable and with lesser offences will find

on their return that they cannot be dealt with for the lesser offences and therefore cannot get the possible benefit of having concurrent sentences imposed. To overcome this problem it is desirable to include provision in domestic laws which allows, with the consent of the fugitive, other offences to be taken into account or dealt with during (or concurrently with) the proceedings for the offence/s for which extradition was granted.

(v) *Grounds of Refusal*: A number of grounds for refusing extradition are not included in the laws of Commonwealth countries because extradition can only be granted for "list offences". When the list is abolished it is highly desirable that the grounds of refusal be reviewed.

(a) **Limitation of the Political Offence Exception** - This issue is the same as arises under the London Scheme (paragraph 10(1)(b) and Annex 1). Many laws have not been revised to reflect the international practice of refusing to treat certain serious "international" crimes as never being offences of a political nature. It is clear fugitives accused of genocide, offences against internationally protected persons, and other crimes described in the major multilateral conventions which deal with serious offences should not be able to escape extradition by relying on the political offence exception. This is an area in which revision of laws could be contemplated.

(b) **Military Offences** - Where no list of offences is contained in the extradition law it becomes necessary to specifically exclude offences created solely under military law from the definition of extraditable offences.

(c) **Double Jeopardy** - It is becoming increasingly the practice that countries extend the double jeopardy provision to provide that a person who has been granted a pardon in the requesting country should not be surrendered. Although Commonwealth country laws do not do this some countries may wish to consider whether such a provision should be included in revised laws. In some cases full faith and credit is also given to pardons issued in third countries but this is less usual in light of isolated cases where it has been found that countries sometimes sell pardons, particularly to their citizens, with the express purpose of providing them with a means of defeating extradition procedures.

(d) **Lapse of Time** - There are cases where prosecutions might be statute barred - either in the requesting or requested country - and in such cases the Commonwealth country laws generally do not expressly permit refusal of extradition.

(e) **ICCPR and Torture Convention Exceptions** - As more countries become parties to the International Covenant on Civil and Political Rights (and the protocols to that Covenant) there is an increasing tendency to accept that it is acceptable to refuse surrender to a country which does not prohibit cruel, inhuman or degrading treatment or punishment or which does not provide the minimum guarantees set out in the ICCPR. Commonwealth country laws generally reflect only the old grounds relating to refusal in cases where it would be unjust, oppressive or too severe a punishment to surrender the person. The modern reliance on internationally acceptable norms is far more certain and less likely to cause difficulty in bilateral relations because the requesting country can clearly identify the grounds on which extradition is being refused.

(f) **Conviction in Absentia** - Because common law countries do not provide for conviction *in absentia* the London Scheme, and hence the laws based on it, does not deal with refusal on this ground. Laws capable of supporting extradition arrangements with a wider range of countries should, however, permit refusal in cases where the person has been convicted *in absentia* unless the fugitive has a legal right to have the case re-opened upon surrender and a new trial conducted.

(g) **Nationality** - Although Annex 2(2) to the London Scheme contemplates refusal to surrender based on the ground that the fugitive is a national or resident of the requested country, most Commonwealth country laws do not mirror this provision. If it is thought that such a provision is desirable in updated laws then there also needs to be provision which obliges the country refusing on this ground to take action to prosecute the person itself or at least to refer the case to the competent authority and require that authority to determine whether or not to prosecute.

Without the second requirement, countries which refuse to surrender nationals simply provide a safe haven for their own criminals.

(h) **Requested State Competence over the Offence** - The UN Model permits discretionary refusal of surrender when the requested state also has jurisdiction over the offence which is the subject of the request. Refusal is permitted where the requested state has (before the request is received) decided not to prosecute. In cases where this decision was reached because of a lack of evidence there is clearly no real ground for refusal but where the decision was reached, say because of the mental state of the accused, this is a ground of refusal which may commend itself to Commonwealth countries.

Refusal is also permitted where the requested state is proceeding against the fugitive for the offence for which extradition is requested. At the end of such proceedings the fugitive will have available the "prior conviction or acquittal" objection to extradition.

(i) **Death Penalty** - Many Commonwealth countries already have provision in their laws which permit refusal of surrender in cases where the offence is punishable by death provided that the offence in not punishable by death in the requested country. As there is a divergence of practice relating to the death penalty amongst Commonwealth countries there is no absolute certainty as to how this provision will operate on a case by case basis.

(j) **Extraterritoriality** - Common law countries did not traditionally exercise extraterritorial criminal jurisdiction. As these countries deal increasingly with countries which have traditionally exercised extraterritorial jurisdiction over their nationals and as the multilateral conventions impose increasingly obligations to exert jurisdiction over extraterritorial offences there is a need for the subject to be addressed. Countries may wish to consider whether they should provide for refusal in cases where the jurisdiction claimed by the requesting country differs from the jurisdiction they would exercise in a similar case. Similar considerations apply in cases where the requested state has a concurrent jurisdiction over the offence but refusal on this ground should only be permitted where the requested country submits the case to its competent authority for consideration of prosecution.

(k) **Ad Hoc Tribunals** - Countries may wish to include in their laws provision permitting them to refuse extradition in cases where the person surrendered would not be dealt with by the ordinary courts of the requesting country.

(vi) *Required Documents:* The UN Model treaty proposes two options. The first requires the submission of documentary proof of identity, the text of, or a statement of, the law creating the offence, a warrant for the arrest of the person sought and a statement of acts and/or omissions alleged to constitute the offence.

The second option proposed in the UN model is suggested for countries which require a judicial assessment of the sufficiency of the evidence. For those countries it is recognised that bilateral relations may require the submission, in addition to the documents listed in the preceding paragraph, of "sufficient proof in a form acceptable under the law of the requested state, establishing, according to the evidentiary standards of that state, that the person is a party to the offence." This option leaves it open to countries which require something more than a statement of acts and/or omissions to determine what that additional something may be. It could, for example, be submission of evidence (admissible in the requested country) sufficient to warrant trial of the accused or to establish a *prima facie* case against the accused. It could well be something less - such as the United States requirement of "reasonable suspicion" which can be established by hearsay evidence but requires more than a mere statement of acts and/or omissions. It could, alternatively, be something like the modified evidentiary requirement reflected in Annex 3 to the London Scheme.

In other words, the UN model recognises that it is for each country to determine what its documentary requirements are and to reflect them in its extradition arrangements. While impliedly advocating a lowering of the standard of evidence required and hence a strengthening of the rule of non-inquiry the UN model acknowledges that some countries may be either unwilling or unable to follow

this trend and will need to require "sufficient proof "in a form acceptable under (their) law/s".

This issue has been the subject of extensive consideration by Law Ministers and the views of member countries vary. Subject to the specific national position on the questions national laws could be amended with a view to countries ultimately entering into extradition relations with other countries based on the UN model while at the same time embodying the evidentiary standard thought most appropriate by each sovereign government. That might be the lower standard reflected in Article 5.2 or it might be some standard which is contemplated within the wide ranging words of footnote 14 to that article.

(vii) *Simplified Extradition Procedure*: With few exceptions extradition laws do not facilitate what is generally described as "consent surrender" or "simplified extradition".

(viii) *Certification and Authentication*: Few, if any, Commonwealth country laws permit countries to enter into extradition relations which abolish any need for certification or authentication of documents. This said, there is merit in giving consideration to simplifying the certification and authentication procedures and in ensuring that documents which comply with an appropriate standard are admissible once they meet that standard of certification or authentication.

(ix) *Additional Information*: The laws of most countries do not specifically provide for the "suspension" of extradition proceedings to permit the requested country to seek additional material from the requesting country.

(x) *Provisional Arrest*: The laws of all Commonwealth countries provide for provisional arrest. It is a question for individual judgment whether those laws are as clear as they could be and whether they sufficiently set out objective grounds for both arrest and release of the detained person.

(xi) *Postponed or Conditional Surrender*: Most countries with laws enacted since the 1960s are capable of including in bilateral relationships provisions relating to postponed or conditional surrender. Those still relying on Imperial statutes cannot.

(xii) *Surrender of Property*: The UN model contemplates that property which will be handed over to the requesting state with the fugitive includes all "property found in the requested state that has been acquired as a result of the offence or that may be required as evidence". The laws of most Commonwealth countries do not go this far - they permit the handing over of property "found in the possession of an offender at the time of his arrest". The latter is capable of narrow construction and could well exclude, for example, property (including negotiable instruments) stored in a bank or, in fact, anywhere other than on the person of the offender.

(xiii) *Transit*: This issue arises in relation to the UN model as it does under the London Scheme. The laws of many countries are generally totally deficient in this regard - they do not provide adequate (and usually do not provide at all) for the proper custody of a person surrendered by one country to another who must transit a Commonwealth country en route to the country of destination. It is an area where urgent action needs to be taken, particularly in light of some regional air schedules and routes where transit assistance could be required for days at a time while waiting for an ongoing flight.

20. A copy of the United Nations Model Treaty on Extradition is attached to this paper.

February 1996

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A

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A/RES/45/116
3 April 1991

Forty-fifth session
Agenda item 100

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Third Committee (A/45/756)]

45/116. Model Treaty on Extradition

The General Assembly,

Bearing in mind the Milan Plan of Action, 1/ adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved by the General Assembly in its resolution 40/32 of 29 November 1985,

Bearing in mind also the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, 2/ principle 37 of which stipulates that the United Nations should prepare model instruments suitable for use as international and regional conventions and as guides for national implementing legislation,

Recalling resolution 1 of the Seventh Congress, 3/ on organized crime, in which Member States were urged, inter alia, to increase their activity at the international level in order to combat organized crime, including, as appropriate, entering into bilateral treaties on extradition and mutual legal assistance,

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1/ Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. A.

2/ Ibid., sect. B.

3/ Ibid., sect. E.

Recalling also resolution 23 of the Seventh Congress, 3/ on criminal acts of a terrorist character, in which all States were called upon to take steps to strengthen co-operation, inter alia, in the area of extradition,

Calling attention to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 4/

Acknowledging the valuable contributions of Governments, non-governmental organizations and individual experts, in particular the Government of Australia and the International Association of Penal Law,

Gravely concerned by the escalation of crime, both national and transnational,

Convinced that the establishment of bilateral and multilateral arrangements for extradition will greatly contribute to the development of more effective international co-operation for the control of crime,

Conscious of the need to respect human dignity and recalling the rights conferred upon every person involved in criminal proceedings, as embodied in the Universal Declaration of Human Rights 5/ and the International Covenant on Civil and Political Rights, 6/

Conscious that in many cases existing bilateral extradition arrangements are outdated and should be replaced by modern arrangements which take into account recent developments in international criminal law,

Recognizing the importance of a model treaty on extradition as an effective way of dealing with the complex aspects and serious consequences of crime, especially in its new forms and dimensions,

1. Adopts the Model Treaty on Extradition contained in the annex to the present resolution as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice;

2. Invites Member States, if they have not yet established treaty relations with other States in the area of extradition, or if they wish to revise existing treaty relations, to take into account, whenever doing so, the Model Treaty on Extradition;

3. Urges all States to strengthen further international co-operation in criminal justice;

4/ E/CONF.82/15 and Corr.2.

5/ Resolution 217 A (III).

6/ See resolution 2200 A (XXI), annex.

/...

4. Requests the Secretary-General to bring the present resolution, with the Model Treaty, to the attention of Member States;

5. Urges Member States to inform the Secretary-General periodically of efforts undertaken to establish extradition arrangements;

6. Requests the Committee on Crime Prevention and Control to review periodically the progress attained in this field;

7. Also requests the Committee on Crime Prevention and Control, where requested, to provide guidance and assistance to Member States in the development of legislation that would enable giving effect to the obligations in such treaties as are to be negotiated on the basis of the Model Treaty on Extradition;

8. Invites Member States, on request, to make available to the Secretary-General the provisions of their extradition legislation so that these may be made available to those Member States desiring to enact or further develop legislation in this field.

68th plenary meeting
14 December 1990

ANNEX

Model Treaty on Extradition

The _____ and the _____

Desirous of making more effective the co-operation of the two countries in the control of crime by concluding a treaty on extradition,

Have agreed as follows:

ARTICLE 1

Obligation to extradite

Each Party agrees to extradite to the other, upon request and subject to the provisions of the present Treaty, any person who is wanted in the requesting State for prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence. 7/

7/ Reference to the imposition of a sentence may not be necessary for all countries.

/...

ARTICLE 2

Extraditable offences

1. For the purposes of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty. Where the request for extradition relates to a person who is wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition shall be granted only if a period of at least [four/six] months of such sentence remains to be served.

2. In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether:

(a) The laws of the Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology;

(b) Under the laws of the Parties the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the requesting State shall be taken into account.

3. Where extradition of a person is sought for an offence against a law relating to taxation, customs duties, exchange control or other revenue matters, extradition may not be refused on the ground that the law of the requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty or exchange regulation of the same kind as the law of the requesting State. 8/

4. If the request for extradition includes several separate offences each of which is punishable under the laws of both Parties, but some of which do not fulfil the other conditions set out in paragraph 1 of the present article, the requested Party may grant extradition for the latter offences provided that the person is to be extradited for at least one extraditable offence.

ARTICLE 3 -

Mandatory grounds for refusal

Extradition shall not be granted in any of the following circumstances:

8/ Some countries may wish to omit this paragraph or provide an optional ground for refusal under article 4.

/...

(a) If the offence for which extradition is requested is regarded by the requested State as an offence of a political nature; 9/

(b) If the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons;

(c) If the offence for which extradition is requested is an offence under military law, which is not also an offence under ordinary criminal law;

(d) If there has been a final judgement rendered against the person in the requested State in respect of the offence for which the person's extradition is requested;

(e) If the person whose extradition is requested has, under the law of either Party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty; 10/

(f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14; 6/

(g) If the judgement of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence. 11/

9/ Some countries may wish to add the following text: "Reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, or any other offence that the Parties have agreed is not an offence of a political character for the purposes of extradition."

10/ Some countries may wish to make this an optional ground for refusal under article 4.

11/ Some countries may wish to add to article 3 the following ground for refusal: "If there is insufficient proof, according to the evidentiary standards of the requested State, that the person whose extradition is requested is a party to the offence". (See also footnote 14.)

/...

ARTICLE 4

Optional grounds for refusal

Extradition may be refused in any of the following circumstances:

(a) If the person whose extradition is requested is a national of the requested State. Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person in respect of the offence for which extradition had been requested;

(b) If the competent authorities of the requested State have decided either not to institute or to terminate proceedings against the person for the offence in respect of which extradition is requested;

(c) If a prosecution in respect of the offence for which extradition is requested is pending in the requested State against the person whose extradition is requested;

(d) If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out; 12/

(e) If the offence for which extradition is requested has been committed outside the territory of either Party and the law of the requested State does not provide for jurisdiction over such an offence committed outside its territory in comparable circumstances;

(f) If the offence for which extradition is requested is regarded under the law of the requested State as having been committed in whole or in part within that State. 13/ Where extradition is refused on this ground, the requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested;

(g) If the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal;

12/ Some countries may wish to apply the same restriction to the imposition of a life, or indeterminate, sentence..

13/ Some countries may wish to make specific reference to a vessel under its flag or an aircraft registered under its laws at the time of the commission of the offence.

/...

(b) If the requested State, while also taking into account the nature of the offence and the interests of the requesting State, considers that, in the circumstances of the case, the extradition of that person would be incompatible with humanitarian considerations in view of age, health or other personal circumstances of that person.

ARTICLE 5

Channels of communication and required documents

1. A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the Parties.

2. A request for extradition shall be accompanied by the following:

(a) In all cases,

(i) As accurate a description as possible of the person sought, together with any other information that may help to establish that person's identity, nationality and location;

(ii) The text of the relevant provision of the law creating the offence or, where necessary, a statement of the law relevant to the offence and a statement of the penalty that can be imposed for the offence;

(b) If the person is accused of an offence, by a warrant issued by a court or other competent judicial authority for the arrest of the person or a certified copy of that warrant, a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the alleged offence, including an indication of the time and place of its commission; 14/

(c) If the person has been convicted of an offence, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by the original or certified copy of the judgement or any other document setting out the conviction and the sentence imposed, the fact that the sentence is enforceable, and the extent to which the sentence remains to be served;

14/ Countries that require a judicial assessment of the sufficiency of evidence may wish to add the following clause: "and sufficient proof in a form acceptable under the law of the requested State, establishing, according to the evidentiary standards of that State, that the person is a party to the offence". (See also footnote 11.)

(d) If the person has been convicted of an offence in his or her absence, in addition to the documents set out in paragraph 2 (c) of the present article, by a statement as to the legal means available to the person to prepare his or her defence or to have the case retried in his or her presence;

(e) If the person has been convicted of an offence but no sentence has been imposed, by a statement of the offence for which extradition is requested and a description of the acts or omissions constituting the offence and by a document setting out the conviction and a statement affirming that there is an intention to impose a sentence.

3. The documents submitted in support of a request for extradition shall be accompanied by a translation into the language of the requested State or in another language acceptable to that State.

ARTICLE 6

Simplified extradition procedure

The requested State, if not precluded by its law, may grant extradition after receipt of a request for provisional arrest, provided that the person sought explicitly consents before a competent authority.

ARTICLE 7

Certification and authentication

Except as provided by the present Treaty, a request for extradition and the documents in support thereof, as well as documents or other material supplied in response to such a request, shall not require certification or authentication. 15/

ARTICLE 8

Additional information

If the requested State considers that the information provided in support of a request for extradition is not sufficient, it may request that additional information be furnished within such reasonable time as it specifies.

15/ The laws of some countries require authentication before documents transmitted from other countries can be admitted in their courts and, therefore, would require a clause setting out the authentication required.

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ARTICLE 9

Provisional arrest

1. In case of urgency the requesting State may apply for the provisional arrest of the person sought pending the presentation of the request for extradition. The application shall be transmitted by means of the facilities of the International Criminal Police Organization, by post or telegraph or by any other means affording a record in writing.

2. The application shall contain a description of the person sought, a statement that extradition is to be requested, a statement of the existence of one of the documents mentioned in paragraph 2 of article 5 of the present Treaty, authorizing the apprehension of the person, a statement of the punishment that can be or has been imposed for the offence, including the time left to be served and a concise statement of the facts of the case, and a statement of the location, where known, of the person.

3. The requested State shall decide on the application in accordance with its law and communicate its decision to the requesting State without delay.

4. The person arrested upon such an application shall be set at liberty upon the expiration of [40] days from the date of arrest if a request for extradition, supported by the relevant documents specified in paragraph 2 of article 5 of the present Treaty, has not been received. The present paragraph does not preclude the possibility of conditional release of the person prior to the expiration of the [40] days.

5. The release of the person pursuant to paragraph 4 of the present article shall not prevent rearrest and institution of proceedings with a view to extraditing the person sought if the request and supporting documents are subsequently received.

ARTICLE 10

Decision on the request

1. The requested State shall deal with the request for extradition pursuant to procedures provided by its own law, and shall promptly communicate its decision to the requesting State.

2. Reasons shall be given for any complete or partial refusal of the request.

ARTICLE 11

Surrender of the person

1. Upon being informed that extradition has been granted, the Parties shall, without undue delay, arrange for the surrender of the person sought and the

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requested State shall inform the requesting State of the length of time for which the person sought was detained with a view to surrender.

2. The person shall be removed from the territory of the requested State within such reasonable period as the requested State specifies and, if the person is not removed within that period, the requested State may release the person and may refuse to extradite that person for the same offence.

3. If circumstances beyond its control prevent a Party from surrendering or removing the person to be extradited, it shall notify the other Party. The two Parties shall mutually decide upon a new date of surrender, and the provisions of paragraph 2 of the present article shall apply.

ARTICLE 12

Postponed or conditional surrender

1. The requested State may, after making its decision on the request for extradition, postpone the surrender of a person sought, in order to proceed against that person, or, if that person has already been convicted, in order to enforce a sentence imposed for an offence other than that for which extradition is sought. In such a case the requested State shall advise the requesting State accordingly.

2. The requested State may, instead of postponing surrender, temporarily surrender the person sought to the requesting State in accordance with conditions to be determined between the Parties.

ARTICLE 13

Surrender of property

1. To the extent permitted under the law of the requested State and subject to the rights of third parties, which shall be duly respected, all property found in the requested State that has been acquired as a result of the offence or that may be required as evidence shall, if the requesting State so requests, be surrendered if extradition is granted.

2. The said property may, if the requesting State so requests, be surrendered to the requesting State even if the extradition agreed to cannot be carried out.

3. When the said property is liable to seizure or confiscation in the requested State, it may retain it or temporarily hand it over.

4. Where the law of the requested State or the protection of the rights of third parties so require, any property so surrendered shall be returned to the requested State free of charge after the completion of the proceedings, if that State so requests.

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ARTICLE 14

Rule of speciality

1. A person extradited under the present Treaty shall not be proceeded against, sentenced, detained, re-extradited to a third State, or subjected to any other restriction of personal liberty in the territory of the requesting State for any offence committed before surrender other than:

(a) An offence for which extradition was granted;

(b) Any other offence in respect of which the requested State consents. 16/ Consent shall be given if the offence for which it is requested is itself subject to extradition in accordance with the present Treaty. 17/

2. A request for the consent of the requested State under the present article shall be accompanied by the documents mentioned in paragraph 2 of article 5 of the present Treaty and a legal record of any statement made by the extradited person with respect to the offence.

3. Paragraph 1 of the present article shall not apply if the person has had an opportunity to leave the requesting State and has not done so within [30/45] days of final discharge in respect of the offence for which that person was extradited or if the person has voluntarily returned to the territory of the requesting State after leaving it.

ARTICLE 15

Transit

1. Where a person is to be extradited to a Party from a third State through the territory of the other Party, the Party to which the person is to be extradited shall request the other Party to permit the transit of that person through its territory. This does not apply where air transport is used and no landing in the territory of the other Party is scheduled.

2. Upon receipt of such a request, which shall contain relevant information, the requested State shall deal with this request pursuant to procedures provided by its

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16/ Some countries may wish to add, as a third case, explicit consent of the person.

17/ Some countries may not wish to assume that obligation and may wish to include other grounds in determining whether or not to grant consent.

/...

own law. The requested State shall grant the request expeditiously unless its essential interests would be prejudiced thereby. 18/

3. The State of transit shall ensure that legal provisions exist that would enable detaining the person in custody during transit.

4. In the event of an unscheduled landing, the Party to be requested to permit transit may, at the request of the escorting officer, hold the person in custody for [48] hours, pending receipt of the transit request to be made in accordance with paragraph 1 of the present article.

ARTICLE 16

Concurrent requests

If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited.

ARTICLE 17

Costs

1. The requested State shall meet the cost of any proceedings in its jurisdiction arising out of a request for extradition.

2. The requested State shall also bear the costs incurred in its territory in connection with the seizure and handing over of property, or the arrest and detention of the person whose extradition is sought. 19/

3. The requesting State shall bear the costs incurred in conveying the person from the territory of the requested State, including transit costs.

18/ Some countries may wish to agree on other grounds for refusal, which may also warrant refusal for extradition, such as those related to the nature of the offence (e.g. political, fiscal, military) or to the status of the person (e.g. their own nationals).

19/ Some countries may wish to consider reimbursement of costs incurred as a result of withdrawal of a request for extradition or provisional arrest.

/...

ARTICLE 18

Final provisions

1. The present Treaty is subject to [ratification, acceptance or approval]. The instruments of [ratification, acceptance or approval] shall be exchanged as soon as possible.

2. The present Treaty shall enter into force on the thirtieth day after the day on which the instruments of [ratification, acceptance or approval] are exchanged.

3. The present Treaty shall apply to requests made after its entry into force, even if the relevant acts or omissions occurred prior to that date.

4. Either Contracting Party may denounce the present Treaty by giving notice in writing to the other Party. Such denunciation shall take effect six months following the date on which such notice is received by the other Party.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Treaty.

_____ _____

DONE at _____ on _____ in the _____
and _____ languages, [both/all] texts being equally authentic.

INTERNATIONAL CO-OPERATION TO COMBAT CRIME IN THE 21st CENTURY: THE ROLE OF THE COMMONWEALTH IN DETERMINING A BALANCE BETWEEN INDIVIDUAL RIGHTS AND GLOBAL INTERESTS

A Paper by the Commonwealth Secretariat

INTRODUCTION

1. The search for the appropriate balance between peoples' desire for individual freedom and their need for social cohesion, responsibility and the minimum order which enables freedom to be enjoyed is not new. However, since the end of the relatively static era of the Cold War, there has been a heightened demand for political and economic freedom for individual actors, both human and corporate, that has coincided with a re-ordering of state power, and the combination has given a fresh urgency to the search for that balance which is being undertaken in a much more complex, contradictory and unstable environment. The unrestrained assertion of individual and corporate interests which is often associated with modern technology, and an open-ended morality has exposed people to previously unimagined forms of environmental and ecological dangers, to terrorism, to the potential, or actual, massive economic and social instability associated with new forms on a magnified scale of anti-social behaviour, such as money laundering or drug trafficking, or more simply, to the perils of abuses of the free market.

2. At the same time the potential of state power to impose either particularised repression or overarching authority on a grand scale has multiplied exponentially. Often this has been exaggerated by the revival of nationalist, ethnic, sectarian and chauvinistic zeal. Combined with modern technology and weaponry, and all acting under the licence which still attaches to sovereignty, it is a potent threat to individual liberty.

3. Such state power, even in so-called "failed States", has frequently been exaggerated by the increasingly unrestrained competition for diminishing resources and the desperation of a world distorted by bizarre inequalities no longer mitigated by a sufficient sense of common humanity. The particular difficulty posed by these two tendencies is that they have burgeoned contemporaneously. But they do not exhibit themselves identically either temporarily or geographically. Consequently a co-ordinated strategy to find a proper balance between them has not been sufficiently considered.

4. The last decade has been a period of development and growth of measures designed to meet the needs of societies to combat serious crime. National, bilateral and multilateral efforts have sought to ensure that criminals cannot use national boundaries, differences in legal systems and varying economic policies to enhance the success of criminal enterprises and diminish the likelihood of evading justice.

5. During this period the world has also seen increased concern for the protection of individuals rights and liberties with the result that there is now an unprecedented range of review mechanisms which allow those accused and those convicted of crimes to challenge the extent to which law makers and law enforcers may use modern methods of detecting and punishing crime.

6. The parallel development of these two streams appears to have produced a tension which has resulted in ad hoc revision of both institutional and individual rights, power and duties. The tension, and the structural changes introduced to alleviate it appear to have created two "forces". The first force is a concern to protect society as a whole from the undesirable and corrosive effects of criminal activity; and the second is a concern to maintain the traditional values underpinning criminal justice systems and to protect the individual from the might of the state and its overwhelming power. Not infrequently the two forces are found in one persona - for example - in a Minister of Justice or an Attorney-General who has responsibility for ensuring the protection of both interests in one society. The dilemma facing such a person is self-evident.

7. While each of these "forces" is a legitimate and fundamental value of good governance, the conflict could be seen as diminishing the credibility of governments. Any diminution of credibility probably results from a perceived failure, to a greater or lesser degree, to respond effectively to real problems - those attributable to crime and those arising from a real or perceived diminution of

individual protection from unwarranted interference by the state.

8. The conflict should be resolved if society is to protect and further develop both legitimate interests. But realistic prospects of resolving the conflict are unlikely to be found so long as governments, and in particular law officers, are forced by circumstance to react quickly, often in high profile situations, to both the increased sophistication in the activities of criminal and the growing public expression of concern by those who see individual rights being threatened.

CURRENT ISSUES

9. These issues manifest themselves clearly in purely national criminal cases where challenges to criminal investigation and prosecution methods based on protections enshrined in constitutions, bills of rights and similar instruments are familiar. From around the Commonwealth examples can be found. The Constitutional Court of South Africa, in *Zuma v. the State*[1] dealt with the constitutionality of a reverse onus of proof provision. A similar issue was dealt with by the Supreme Court of Gibraltar in *R. v. Reina and Peralta*[2]. The question of the extent to which a restraint order could require the giving of information which could incriminate a defendant was the subject of a judgment by the Queen's Bench Division in *In re C (Restraint Orders: Identification)*[3] while the Court of Appeal for Ontario in *R. v. S*[4] considered whether the principles of fundamental justice were violated by a Crown subpoena of a co-accused to give evidence in a separate trial of the accused. In each of these 1995 cases the decision favoured the citizen over the state. The issue of confiscation orders which could have, in part, retrospective effect was considered by the European Court of Human Rights in *Welch v. United Kingdom*[5]. In Western Samoa the Court of Appeal determined that a provision which stated that a scientific report on narcotic drugs was conclusive proof of the truth of its contents and that there was no need to call the person who made the report was unconstitutional (*Police v. Stehlin*)[6].

10. While recognising that the major impact of challenges to new statutory provisions facilitating the investigation or prosecution of crime or the recovery of proceeds of crime falls in domestic criminal cases, the Commonwealth Secretariat is conscious that there is an equally prevalent trend in cases involving extradition, mutual assistance in criminal matters and transfer of prisoners. It is this development of jurisprudence in the fields international co-operation which may be of particular interest to an international group of law makers with a well established history of tackling and solving legal problems common to many (or most) of the members of the group.

11. In recent years courts have dealt with a number of extradition cases which, in one way or another, have challenged some of the long accepted practices applied in these cases. Ministers who take the final decision to surrender are being required, in some cases, to take into account matters not dealt with in extradition treaties. Fine lines are being drawn in cases where the fugitive finds himself or herself in the requesting state otherwise than completely voluntarily. The phrase "abuse of process" appears regularly in reports of extradition cases.

12. The Queen's Bench Division considered the question whether alleged illegality and breach of sovereignty in the collection of evidence tendered at an extradition hearing meant that the making of an application for extradition was an abuse of process (*R. v. Governor of Pentonville Prison: ex parte Chinoy*)[7]. Various cases on the question of delay in making extradition requests have changed what practitioners believed was the case under extradition treaties - that is that delay was not a ground for refusing surrender unless the treaty expressly or impliedly so provided. The Federal Court of Australia in *Forest v. St Leger Kelly (Special Magistrate) and the Attorney-General of the Commonwealth of Australia*[8] held that the court did not have power to stay an extradition application because of delay by the country seeking extradition but stated obiter that the Attorney-General may take delay into account in determining whether to surrender. The UK cases of *R. v. Secretary of State for the Home Department ex parte Sinclair*[9] and *R. v. Secretary of State for the Home Department ex parte Patel*[10] resulted in similar conclusions by the courts. These decisions do not however ensure that a fugitive will defeat extradition. In the United States case of *Martin v. Warden, Atlanta Penitentiary*[11] the court decided that there was no constitutional right to a speedy extradition.

13. Illegal rendition cases have featured strongly in recent jurisprudence. Starting with the 1991 South African decision in *State v. Ebrahimi*[12] the principle that a court has no jurisdiction to try a person abducted from another state by agents of the state where jurisdiction is sought to be exercised

was laid down. It was applied by the House of Lords decision in *R. v. Horseferry Road Magistrates Court ex parte Bennett*[13]. Interestingly the principle does not apply in the requested state so that a person taken by force on the high seas to a place from capture so as to defeat extradition (*R. v. the Stipendiary Magistrate ex parte Newall*[14] - Supreme Court of Gibraltar). Neither does the principle apply in cases where the accused is tricked into entering the jurisdiction from which extradition is sought for the court has no inherent supervisory power over the extradition process (*In re Schmidt*[15]).

14. "Death penalty cases" have added to extradition jurisprudence in recent years. The first prominent decision was that of the European Court of Human Rights in *Soering v. United Kingdom*[16] where it was decided that a state party to the European Human Rights Convention has a duty not to extradite a person to a jurisdiction where there are substantial grounds for believing that s/he would face a real risk of being subjected to inhuman treatment within the meaning of Article 3 of the Convention. The United Nations Human Rights Committee in *Ng, Charles Chitat v. Canada*[17] reached the conclusion that Canada ought to have sought assurances from the requesting state on the imposition of the death penalty and on issues relating to methods of execution before taking a decision to extradite.

15. The jurisprudence in mutual assistance cases is developing slowly. The Queen's Bench Division in *R. v. Secretary of State for the Home Department ex parte Propend Finance Pty Ltd and Others*[18] concluded, in effect, that the Secretary of State must, in deciding to grant a request for the production of documents also determine the means by which the assistance is to be granted and must not delegate such decision to the police. There are, however, recent decisions on the use of special investigative powers by regulatory and prosecution authorities which could be increasingly relevant in mutual assistance cases or in criminal proceedings relying on evidence obtained under such provisions. In *Saunders v. United Kingdom*[19] the European Commission of Human Rights found that statements obtained using compulsory powers under the Companies Act had resulted in a violation of the applicant's right to a fair trial. Decisions in cases on world-wide Mareva injunctions which are sometimes used in fraud and proceeds of crime cases are also relevant to the development of international assistance practice and procedure.

16. Law Ministers and their officials in Central Authorities and prosecution agencies will undoubtedly be aware of other cases in which the decision to grant or refuse co-operation to another country has been affected by concern over matters not contemplated when extradition or mutual assistance arrangements were being concluded or when the relevant Commonwealth Schemes were being developed.

17. In addition to the changes being required by wide-ranging decisions on issues arising under bills or charters of rights and constitutions, changing national perceptions of what governments ought to do may be well ahead of international developments. For example, the Torture Convention, for all states parties, operates as an amendment to its earlier bilateral and multilateral extradition arrangements so as to require refusal of surrender if the person sought could be subjected to any form of punishment contemplated in the Convention. While this is a welcome advance for states parties it is an advance which may not go far enough for other countries. Either way, the Torture Convention provides an example of yet another potentially fertile ground upon which a fugitive could challenge surrender.

A ROLE FOR THE COMMONWEALTH?

18. The Commonwealth could play an important role in developing and promulgating a vision for the 21st Century aimed at enhancing the role of international co-operation. Such a vision would maintain (and hopefully strengthen) fundamental values, including the rule of law and the rule of international law, both reflected in the Harare Declaration, while protecting society from the corrosive and divisive effects of serious and organised crime.

19. As the largest intergovernmental body to address legal issues and develop common solutions, the Commonwealth has pioneered multilateral strategies for international co-operation to combat crime. It has also set standards for national laws developed for the same purpose. This has been done in the context of shared political and legal values and, in particular, in a way which has always reflected members' commitments to the rule of law.

20. The Commonwealth has special expertise in areas relevant to this issue. Its contribution to the entrenchment of democratic values, independent judiciaries and constitutional protections for individual rights is long standing. It has collective

experience in problem solving in the legal field at national level. Added to that, Commonwealth strategies in the field of extradition and mutual assistance in criminal matters were ground breaking initiatives. The ideas and experience flowing from these schemes have strongly influenced the development of instruments such as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the model United Nations extradition and mutual assistance in criminal matters treaties.

21. Over the past 30 years the Commonwealth has made every effort to ensure that its collective capacity to deal with the international aspects of crime has been kept up to date. To do this it has reacted to threats to the maintenance of law and order as and when they have arisen or appeared on the horizon as likely threats. The changes which have been made to the London Scheme on the Rendition of Fugitive Offenders and the Harare Scheme on Mutual Assistance in Criminal Matters have invariably had immediate and significant positive impact on the problems sought to be addressed. Invariably that success has been followed by a period in which new problems arise. These problems have various causes. In some cases criminals invent new ways of conducting their criminal enterprises. In other cases defence lawyers devise new, and often successful, arguments to defeat attempts to bring their clients to justice.

22. The courts which attempt to resolve the conflicts can only do so on a case by case basis and then generally only do so when the contentious issues are raised in argument before them. The judges are faced with cases in which they must decide whether an established principle of justice best satisfies the needs of a thoroughly modern society where it could be argued that technology and mobility have rendered such a principle one of limited rather than universal application. The answers given by the courts show little consistency with the result that uncertainty grows in the community.

23. Ad hoc revision of the criminal law and international co-operation to enforce it can never be avoided. It is necessary to meet short term needs and solve immediate problems. It should not, however, be regarded as the only method of review of the internationalised criminal justice systems of nations. Along side such day-to-day problem solving there needs to be high level multilateral consideration of optimum future directions for national contributions to the global solution of the wider problem. This consideration should include review of the relationship between individual rights and the national/international interest in combating crime. It should work to balance the constitutional protections afforded to citizens with the need to enhance national and global security. In so doing it may need to seriously question the existing order and the premises underlying it.

A POSSIBLE STRATEGY

24. The Commonwealth has the capacity to look at the issues which have arisen in the context of experience in international co-operation. To achieve the maximum possible recognition of such work, it may be desirable for the Secretary-General personally to appoint a high level group to consider the issues and formulate a policy, consistent with the Harare Declaration, for maximum Commonwealth contribution to the rule of law, the rule of international law and the protection of personal freedoms. Launching a Commonwealth policy for criminal justice co-operation in the 21st Century, on the eve of the new Century, would give the Commonwealth, its member governments, their Law Ministers and judiciaries (together with the wider international community) a basis for ongoing work to maintain both the relevance and integrity of Commonwealth contribution to the global order.

25. Ideally the members of such a high-level group should be former Attorneys-General or other high ranking law officers of Commonwealth countries who have experience in the consensus building role of the Commonwealth - both as participants at Law Ministers Meetings and in other Commonwealth bodies or groups. A regionally representative group of approximately eight such eminent persons could be invited by the Secretary-General to report by 1999 which would allow Law Ministers and CHOGM to consider the report on the question of enhancing international efforts to combat crime in a manner consistent with the protection of both fundamental freedoms and liberties and the maintenance of democracy and the rule of law.

26. Any high-level group would need support and advice from practitioners in the area. Such support could be provided by convening a limited number of small groups of experts who have significant experience in relevant areas. The experts, working both individually and as a group or groups, could compile reports which would form the basis of consideration of a 21st Century policy by the high-level group of eminent Commonwealth lawyers.

27. Commonwealth experts would desirably have the opportunity to exchange experience and views with a limited number of experts from outside the Commonwealth. Optimally, representatives from the United Nations Crime Prevention and Criminal Justice Branch, the United Nations Inter-regional Crime and Justice Research Institute, the Council of Europe and the Organisation of American States would contribute to deliberations of expert groups. Involving a small but representative group of experts from outside the Commonwealth would ensure three things. First, that the Commonwealth policy will contribute to the global effort in this field by taking account of relevant developments outside its membership. Second, that experience in other countries can be taken into account and finally, to entrench the Commonwealth's role as an innovative and valuable contributor to global policy making.

28. Law Ministers could consider asking the Secretary-General to invite eminent persons to join a high-level group and to have the Secretariat convene the small expert group meetings to undertake the preparatory work for the high-level group. If Ministers were so minded they would need to recognise that such an exercise may not be able to be undertaken unless the groups were largely self-funded - that is funded by the governments of participating countries. The Secretariat anticipates that the costs of such an exercise would not be significant - amounting perhaps to two meetings each over a three year period for each expert group and for the high-level group.

Endnotes

1. Constitutional Court, South Africa, unreported, 5 April 1995
2. Supreme Court, Gibraltar, unreported, 7 March 1995
3. Queen's Bench Division, UK, The Times 21 April 1995
4. Court of Appeal for Ontario, Canada, 12 O.R. 774
5. European Court of Human Rights, (1995) 20 EHRR 247
6. Court of Appeal, Western Samoa, (1980-1993) Western Samoa Law Reports 568
7. Queen's Bench Division, [1992] 1 All ER 317.
8. Federal Court of Australia, 6 February 1992.
9. [1992] Imm. A.R. 293
10. Queen's Bench Division, The Times, February 1994.
11. F. 2d 2270 (11th Circuit 1993) USA
12. Supreme Court (Appellate Division), South Africa, 16 February 1991: 31 ILM 888 (1992)
13. House of Lords, 24 June 1993.
14. Supreme Court, Gibraltar, 7 October 1993.
15. House of Lords, U.K., [1994] 3 WLR 228; [1994] 2 All ER 65.
16. European Court of Human Rights, Case No. 1/1989/161/217 of 7 July 1989: The Times, 8 July 1989.

17. United Nations Human Rights Committee, 5 November 1993 (Communication No. 469/1991)

18. Queen's Bench Division, 17 March 1994.

19. European Commission of Human Rights, 1994 (The Independent: 30 September 1994)

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March 1996

TERMS OF REFERENCE FOR A HIGH LEVEL GROUP TO CONSIDER THE BALANCE BETWEEN INDIVIDUAL RIGHTS AND GLOBAL INTERESTS IN INTERNATIONAL CO-OPERATION TO COMBAT CRIME

Commonwealth Law Ministers recognised that they were faced with the ever increasing frequency and complexity of transnational crime and were concerned that existing arrangements for mutual assistance in the administration of justice may not be sufficient, in their present form, to fully satisfy the needs of member countries as we enter the 21st Century.

They expressed their belief that the Commonwealth has an important role to play in developing and promulgating a vision for the twenty-first Century encompassing an enhancement of the role of international co-operation. Such a vision would maintain and strengthen fundamental values, including the rule of law and the rule of international law, both reflected in the Harare Declaration, while protecting society from the corrosive and divisive effects of serious and organised crime. It would seek to ensure that an appropriate balance was maintained between the needs of nations, individually and collectively to secure the safety of citizens and their protection from the effects of criminal activity and the fundamental rights of the individual.

To address these issues they resolved to adopt terms of reference for a group of eminent Commonwealth persons which they request the Secretary-General of the Commonwealth to appoint, following appropriate consultations with member countries.

The Group, should be assisted in the preparation of materials by acknowledged experts from member countries and other relevant intergovernmental bodies. It would review the adequacy and effectiveness of arrangements for international co-operation in the administration of justice to meet the existing and prospective volume and sophistication of international criminal activity. In so doing it would:

(a) consider the emerging issues facing Commonwealth governments in seeking to balance the need for effective law enforcement with the human rights norms cherished by the Commonwealth;

(b) review developments and experiences in the law and practice of international legal assistance with particular reference to the decade past. In the course of such a review the Group could consider whether opportunities had been taken to use existing arrangements to maximum benefit;

(c) review the impact of recent jurisprudence on international legal co-operation and assess the effect of decisions of courts on the ability of countries to respond effectively to requests for assistance;

(d) consider the actual and potential impact of developments in the spheres of privacy, data protection and freedom of information on the efficacy of Commonwealth arrangements; and

(e) address the challenges to Commonwealth co-operation posed by technological and political and socio-economic structural change.

As part of its report the Group should produce for consideration by Law Ministers and Heads of Government as appropriate:

(a) recommendations on a possible Commonwealth statement of principles on all forms of international co-operation to combat crime taking into account the commitments of the Commonwealth to the rule of law, the rule of international law and the protection and promotion of human rights;

(b) recommendations on a possible Commonwealth role in the development of global norms in the field of international co-operation to combat crime by working towards acceptance of the principles by the wider global community, for example, in relevant United Nations fora.

(c) recommendations on any desirable modification of Commonwealth practice and of the Commonwealth schemes which will enhance international co-operation.

(d) recommendations as to fresh Commonwealth initiatives for co-operation in response to new and anticipated patterns of criminal activity;

In undertaking its work the group would be expected to examine material which would include

existing Commonwealth law and practice on co-operation to combat crime together with those Commonwealth declarations and international instruments setting out relevant human rights norms.

The group would submit an interim report to the next meeting of Senior Officials and should complete its work by the end of 1998.

Mutual Assistance between Business Regulatory Bodies

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

Report prepared by the Commonwealth Secretariat

1. At their 1993 meeting Commonwealth Law Ministers required Senior Officials at their next meeting to consider the issue of Mutual Assistance between Business Regulatory Agencies in order further to develop their Statement on this subject in the light of experience and practice. Paragraph 28 of the Communiqué issued by Ministers after that meeting states:

Mutual Assistance between Business Regulatory Agencies

> 28. Ministers recalled the decision of their Christchurch Meeting of 1990, taken in view of the growing internationalisation of financial markets, to extend mutual assistance in the area of business regulations. They reviewed legislative developments in a number of member countries, the emergence of a network of memoranda of understanding between business regulatory authorities, and the work of the International Organisation of Securities Commissions on mutual assistance. Many Ministers articulated general principles and considerations to guide Commonwealth governments in assessing how best, in their own circumstances, they might develop relevant administrative procedures and legislative provisions. It was recognised that a number of delegations would require to conduct further consultations with relevant regulatory agencies on their return to their capitals. In view of the urgency of the situation and the importance of the concerns expressed, it was agreed that the delegations concerned should notify the Secretary-General of any reservations and proposed amendments to the Statement they wished to enter, by 30 June 1994. All reservations and proposed amendments received should be placed before the next Senior Officials Meeting and the matter kept on the Agenda of both meetings in order further to develop the Statement in the light of experience and practice. The Statement is attached.

2. Two countries, in accordance with the request of Law Ministers, notified the Secretary-General of reservations and proposed amendments to the statement issued by Law Ministers. At their 1995 Meeting Senior Officials considered the concerns expressed by these member countries and resolved to propose to Ministers that their 1993 Statement be amended to take account of these concerns.

3. Senior Officials submit the attached report which contains a proposed revision of the 1993 Statement for consideration by Ministers.

February 1996

MEETING OF SENIOR OFFICIALS OF COMMONWEALTH LAW MINISTRIES MALTA 29 MAY - 1 JUNE 1995

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

Report of the Meeting

The meeting noted that there is a Commonwealth Scheme for Mutual Assistance in Criminal Matters and that the Statement by Law Ministers was not intended to deal with matters falling within the scope of that Scheme but was designed to address co-operation between business regulatory agencies in respect of administrative and civil matters.

The meeting agreed that the Statement was a statement of principles and guidelines for co-operation and did not constitute a Scheme.

Senior Officials, having reconsidered the Statement issued by Law Ministers in Mauritius and having taken account of proposals to amend that statement, propose the following draft statement to Ministers for consideration:

> "In pursuance of the decision taken at their 1993 Meeting in Mauritius, Ministers reviewed the Statement on Mutual Assistance Between Business Regulatory Agencies, at their meeting in Kuala Lumpur from to April 1996. They noted that the continued increase in international activity in the securities, futures and investment markets brought with it a corresponding need for an enhanced level of international co-operation in this specialised area. Given the traditional availability to Business Regulatory Agencies of administrative and civil sanctions in addition to those of the criminal law, this need could not be adequately satisfied by exclusive reliance on the Scheme relating to Mutual Assistance in Criminal Matters or other established mechanisms for the provision of mutual assistance in traditional criminal matters.
>
> Ministers reiterated the view expressed in the Communiqué which concluded their April 1990 Meeting at Christchurch, New Zealand and the general concern expressed at their Meeting in Mauritius that there was a need for the extension of mutual assistance in the area of business regulation. They reaffirmed their view that this was best achieved by provisions, which would be complementary to and compatible with those giving effect to the Harare Scheme, to enable a regulatory agency to respond to requests for assistance from a counterpart agency in another Commonwealth country and to use for that purpose appropriate powers available to it in a purely domestic context.
>
> Ministers reconsidered the Statement on Mutual Assistance between Business Regulatory Agencies which they had adopted at their Meeting in Mauritius in November 1993. While agreeing that preparation of a Commonwealth Scheme at this stage remained premature, Ministers agreed that those Commonwealth countries contemplating the development of administrative structures and the enactment of legislation in this area should, subject to the requirements of their Constitutions and the general principles of their domestic legal systems, be guided by the following general principles, guidelines and considerations:
>
> 1. That systems devised to respond to requests for assistance by counterpart regulatory authorities for the purpose of the exercise of their regulatory functions should be simple, quick and flexible and be capable of use with the minimum of formality.
>
> 2. Assistance would be provided subject to compliance by the requesting authority with appropriate conditions concerning the use, confidentiality and return of documents and information.
>
> 3. That the decision of whether or not to grant assistance in any case would be discretionary. In the exercise of this discretion the requested party could consider, among other matters, the seriousness of the alleged violation of the regulatory law, regulation or requirement; whether the assistance is obtainable by more appropriate means and, in particular, via existing channels for the provision of mutual assistance in criminal matters; issues of international law, comity and reciprocity; and the extent to which the resource costs involved would fall to be met by the requested party. Assistance may be given even though the circumstances which gave rise to the request for assistance do not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on

grounds of essential public interest.

4. That in providing for the granting of assistance for the purpose of facilitating the performance of the functions of a requesting authority as provided under the laws, regulations and requirements of the requesting country, the law of the requested country should permit (subject to appropriate civil liberties and other safeguards) a regulatory authority in that country to use appropriate powers available to it in a domestic context.

   These could include inter alia:

   (a) gaining access to, or supplying, information;

   (b) obtaining information or documents from any person or entity subject to its jurisdiction; and

   (c) exercising appropriate powers of investigation or inspection.

   To facilitate the exercise of the appropriate powers, the requesting authority should provide all necessary information required by the requested authority.

5. That the law of the requested country should make it possible in appropriate cases to invoke sanctions or take other enforcement proceedings in cases in which a person or entity withheld information, documents or other assistance which the regulatory authority was entitled to obtain in the context of responding to a request for assistance.

6. Countries should consider the removal of legal impediments to the spontaneous provision (subject to appropriate safeguards) of information by a regulatory authority to a counterpart authority in another Commonwealth country where that information gives rise to a reasonable suspicion of a breach of a legal provision, regulation or requirement of that party. The decision whether or not to provide such information in any particular case would be at the sole discretion of the authority in possession of it.

Ministers were confident that the introduction by relevant jurisdictions of mechanisms of co-operation in relation to the securities, futures and investment markets which conformed to the above general principles and considerations would provide a sound basis from which to combat fraud and other abuses, thus ensuring a more orderly international market place."

GLOBAL TRENDS IN THE AREA OF MUTUAL ASSISTANCE IN BUSINESS REGULATION: A GUIDE TO THE PREPARATION OF NATIONAL LAWS TO FACILITATE THE PROVISION OF ASSISTANCE

A Paper by the Commonwealth Secretariat

INTRODUCTION

1. At their 1993 Meeting in Mauritius, Ministers issued a Statement of Principles on Mutual Assistance Between Business Regulatory Agencies and asked their Senior Officials to keep the Statement under review. Senior Officials considered the Statement at their 1995 meeting and have proposed amendments for consideration by Ministers at this Meeting.

2. To assist countries wishing to enact legislation which will enable them to give assistance to business regulatory agencies in other Commonwealth (and, indeed non-Commonwealth) countries, the Secretariat has prepared the following notes which are designed to give effect to the Statement in the form being recommended by Senior Officials for adoption by Ministers. These notes will, of course, need revision if Ministers amend the draft Statement.

3. These notes have been prepared on the assumption that laws which facilitate co-operation between business regulatory authorities will complement laws relating to the provision of mutual assistance in criminal matters and that the type of action contemplated by the regulator will determine which channel is chosen. The Secretariat is conscious that some countries do not draw a distinction and have chosen to permit, in business regulation laws, the provision of information for the purposes of criminal investigations and proceedings in the requesting country where such proceedings are, or may be, brought by a regulatory authority. The reason for this practice is clear - often a regulator requesting information from a foreign counterpart does not know, at the time the request is made, the final form of action which may be taken against the person or entity being investigated. If information sought under business regulation statutes may only be used for civil or administrative purposes a regulator may be forced to make an identical request under mutual assistance in criminal matters laws if and when s/he decides to resort to criminal sanctions against a person. Other countries choose to separate the channels for equally good and proper reasons and in so doing may provide a mechanism for a regulatory authority to simply pass a request to the central authority for action under its criminal co-operation law.

4. Ministers first acknowledged that increased international activity in the securities, futures and investment markets had resulted in a corresponding need for a high level of international co-operation between business regulatory agencies if national agencies were to administer national regulatory laws effectively. They acknowledged that the administrative and civil sanctions which are a feature of most business regulation laws meant that the Scheme relating to Mutual Assistance in Criminal Matters did not adequately meet the needs of regulators and needed supplementation. They equally acknowledged that the development of a Commonwealth Scheme would, at this stage, be premature and accordingly they determined that the development of a Statement of Principles would be the appropriate way of proceeding pending further investigation of the question whether a scheme would be appropriate.

5. Since the enunciation of the Statement of Principles in Mauritius regulators have reiterated their growing interdependence when seeking to regulate national market places. Increasingly they acknowledge that the global nature of today's securities markets makes enforcement difficult as there are many evidentiary, jurisdictional and detection problems which are encountered.

6. Meeting in special session at the 1994 Oxford Conference on Mutual Legal Assistance, business regulators drew a clear distinction between their needs and those of authorities administering criminal laws. They pointed to the importance of the economic interests which were at stake in administering business regulatory laws and noted the different form in which the information they sought was required. For example, in seeking to take administrative action, they required information which justified, on reasonable grounds, the making of a decision. They did not, in many cases, require that the information was provided in a form which was usable in a court. A full report of the issues raised by business regulators at the Oxford

Conference is contained in the report of that Conference, additional copies of which will be available to delegations in Kuala Lumpur.

LEGISLATION TO GIVE EFFECT TO THE STATEMENT OF PRINCIPLES

7. The first principle is that *systems devised to respond to requests for assistance by counterpart regulatory authorities for the purpose of the exercise of their regulatory functions should be simple, quick and flexible and be capable of use with the minimum of formality.*

8. Legislation to give effect to this principle could adopt a number of approaches. For example, each piece of legislation which established and created powers and functions for a regulator, could include provisions which permit the regulator to co-operate with counterparts in other countries. The powers given in aid of this function would include powers to communicate, or make arrangements for communicating, information obtained by the regulator in the performance of his or her functions and powers.

9. There may be circumstances where the request raises issues which suggest that it should be dealt with in the first instance by an authority having overall responsibility for the subject of business regulation - perhaps a government department. It would be open then for legislation to require a regulator who receives a request to consult with the relevant department (or Minister) before making a decision to grant assistance. Requests falling within this class could include those:

(a) asking that the regulator in the requested country undertake an investigation on behalf of the requesting Authority; and

(b) asking that the overseas regulatory Authority be permitted to undertake an investigation in the requested country.

The Secretariat is aware of one national law designed to permit regulators to render assistance to overseas counterparts which requires the regulator to make a preliminary assessment of the request and then, unless s/he decides to refuse the request, to refer it, together with recommendations, to the relevant Minister for final decision.

10. The extent to which national laws require a regulator to consult or otherwise seek permission to render assistance is a matter for national consideration. Whatever the outcome of that consideration it would be desirable for the legislation (or instruments or guidelines made thereunder) to specify any channels through which requests should go before being granted. In the spirit of the principle, such channels should be kept to a minimum so as to permit the speedy responses sought by regulators who, for example, may need urgent information to take a decision on a takeover, on the question whether to delist a company, or whether to suspend trading in a particular share.

11. To minimise formality, legislation which generally required the approval of a person or authority other than the regulator, could draw a distinction between confidential and public information and not require the latter to be the subject of any special consideration.

12. The second principle *contemplates the provision of assistance subject to undertakings being given by the requesting Authority or country relating to the use, maintenance of confidentiality and return of any documents provided.*

13. Legislation to give effect to this principle would permit (or require) the person or Authority granting the assistance to seek undertakings and grant assistance once a satisfactory response is received from the requesting country.

14. If the legislation sets out the usual contents of a request, it could include in such a provision a requirement that, in relation to all or specified types of requests, the following will be included:

(a) details of the use to which the requested information will be put;

(b) an undertaking that, without the consent of the requested Authority or country, the information or documents provided in response will not be used for any purpose other than that specified in the request;

(c) an undertaking that, if requested by the requested country, the information or documents will be returned upon conclusion of the case for which they are provided; and

(d) details of any other person, authority, department (or otherwise) in the requesting country which may have legally enforceable access to information in the custody of a regulatory Authority. For example, if the laws of the requesting country provide that revenue

or law enforcement authorities have a right of access to Authority documents which right cannot be defeated by an undertaking as to use or confidentiality, a requested country may consider that such information should be included in any request.

15. The third principle *establishes the discretionary nature of the decision to grant assistance.*

16. Legislation to give effect to this principle could list the matters to which the person or Authority given power to grant assistance must, or may, take into account in reaching such a decision. The majority of countries would wish to ensure that the granting of assistance did not prejudice any essential public interest. Legislation could leave the determination of what is an essential public interest for consideration on a case by case basis or it could list some examples in an inclusive (rather than exclusive) definition of the term. One country has included in its law a reference to "blocking statutes" to ensure that the law facilitating business regulatory co-operation does not override specific legislation relating to the provision of evidence to overseas authorities. The maintenance of the laws of the requested country is clearly an essential public interest. (It is of interest that business regulators at the Oxford Conference cited "blocking statutes" as one of the major problems facing them.)

17. Issues listed in the Statement which could be listed as issues decision-makers must or may take into account in considering whether to grant a request are:

(a) the seriousness of the alleged violation of the regulatory law, regulation or requirement;

(b) whether the assistance sought should or could be sought under provisions relating to mutual assistance in criminal matters;

(c) whether comity would require the granting of assistance;

(d) whether the requested country or Authority can (and would) reciprocate; and

(e) the cost to the requested country of providing the assistance.

18. In addition to the matters listed in the principles, countries may wish to consider whether other grounds should be added. Some countries may wish to enshrine in law the rule that assistance will not be provided if action could be taken on the basis of race, religion, nationality or political opinions of the person in respect of whom the requesting Authority proposes to exercise its powers.

19. An important element of the third principle is that the fact that the circumstances giving rise to the request do not, or would not, constitute a violation of laws, regulations or requirements in the requested country should not, of itself, preclude the giving of assistance. Enshrining this principle in law would make it clear that a matching of regulatory laws was not a prerequisite for the granting of assistance.

20. The fourth principle *provides that the law of a requested country should permit (subject to appropriate civil liberties and other safeguards) a regulatory authority to use appropriate powers available to it in a domestic context.*

21. A provision giving effect to this principle could state simply that the power of a regulatory Authority may be exercised on behalf of a foreign regulatory Authority. A more limited provision would require that the requesting foreign regulatory Authority must be a counterpart of, or perform functions similar to the functions of the requested Authority. Countries which wished to list precisely the functions of a regulatory Authority which could be exercised on behalf of a foreign regulator could specifically list powers such as the power to:

(a) gain access to information;

(b) obtain information or documents from any person or entity subject to its jurisdiction (whether compulsorily or otherwise);

(c) exercise powers of investigation; and

(d) exercise powers of inspection.

22. The fifth principle states that *the law of the requested country should make it possible (in appropriate cases) to invoke sanctions or take other enforcement proceedings in cases in which a person or entity withholds information, documents or other assistance which the regulatory authority is entitled to obtain.*

23. Countries which give regulatory authorities powers to obtain information usually prescribe penalties for non-compliance with a lawful request for such information. Legislation to implement this

principle would provide that where information is sought on behalf of a foreign regulator, failure to provide such information (or failure to provide it honestly) will attract the same penalty as would apply if the failure occurred in a case within the jurisdiction of the requested regulator.

24. The sixth and final principle states that *countries should consider the removal of legal obstacles to the spontaneous provision (subject to appropriate safeguards) of information by a regulatory authority to a counterpart authority in another Commonwealth country where the information gives rise to a reasonable suspicion of a breach of a legal provision, regulation or requirement of that other country.*

25. Given the internationalisation of markets, it is highly likely that the investigation of an alleged breach of a law, regulation or requirement in one country will reveal evidence (or give rise to a suspicion) that breaches of the laws, regulations or requirements of other countries have occurred or may occur. In the collective interests of Commonwealth countries the sharing of such information may result in enabling early preventative (or damage limitation) action to be taken in another country.

26. Legislation to give effect to this principle could make a distinction between confidential and other information. A law could provide that information which is not confidential or sensitive could be passed freely. Confidential or sensitive information may need to be the subject of special provisions. It is self evident that information held by regulators can be commercially sensitive and ought to be the subject of laws which control its distribution. A significant majority of countries will already have laws which define for domestic purposes, classes of information which may be described as restricted information and establish the classes of persons to whom specific classes of restricted information can be passed. Such laws could, in order to facilitate spontaneous provision of information between regulators, include foreign regulators amongst the class of persons to whom restricted information can be passed. Generally known as "gateways", such provisions facilitate international co-operation.

27. An alternative approach would be to legislatively provide specifically a power to pass information, without request, to a foreign regulator. In such cases a law could specifically provide that information could only be provided without request where the regulator had reason to suspect that a class of laws, regulations or requirements had been or was about to be breached in another country. If it was considered necessary to limit the countries to which information could be provided spontaneously, legislation could provide that such information could only be provided to countries with whom arrangements for co-operation had been made (for example, by way of a memorandum of understanding) or, alternatively to countries which could provide reciprocity. An alternative approach would be to authorise regulators to pass information to specified (or generically described) counterpart authorities.

OTHER PROVISIONS WHICH COULD BE INCLUDED IN NATIONAL LAWS

28. Countries which have more than one business regulatory authority may decide to enact a specific law to deal with the subject of international co-operation rather than make provision in the enabling law of each authority. The choice is one for each jurisdiction. A general law, if enacted, could be made applicable by regulation, to specific regulatory authorities thereby facilitating its extension as and when appropriate circumstances, such as the creation of a new authority, arise.

29. It may be desirable to define the term "regulatory authority" and in this context countries may wish to include those which exercise functions in the spheres of banking supervision, the marketing and supply of financial services, insider trading and market manipulation, insurance and company affairs.

30. Countries which choose to legislatively prescribe the contents of requests for assistance may wish to follow the precedent in the model law designed to give effect to the Harare Scheme and provide that a request which does not comply exactly with the statutory requirements will not, for that reason alone, be refused. A list of contents of a request could include any or all of the following - some of which have been discussed in more detail above:

(a) details of the authority making the request, including a description of the authority's regulatory functions and the statutory basis for them;

(b) details of the purpose of the request and a summary of the information which gives rise to it;

(c) personal details of the persons named in the request (full names, places and dates of birth, known addresses, nationality, etc);

(d) a description of the conduct constituting the alleged or suspected breach of the regulatory law, regulation or rule;

(e) extracts of the relevant laws covering the provision, regulation or rule alleged to have been or suspected of being breached;

(f) information on any relevant dates or cause for special urgency;

(g) if interviews are proposed to gather evidence, details of any privileges which a witness or suspect may be entitled to claim, if such interviews are to be admissible in the requesting state;

(h) where evidence is requested to be taken from a witness or suspect, details of whether the evidence is to be taken on oath or affirmation;

(i) a description of the evidence sought, if appropriate, and a list of any specific questions to be asked;

(j) information on whether it is desired that any persons from the requesting country or authority should be present during the taking of evidence, and if so, whether the request is for such persons to be permitted to participate in the questioning (if appropriate);

(k) an undertaking to keep confidential, to the extent permitted by law, the information arising from the request, unless this requirement is waived by mutual agreement;

(l) particulars of other parties, where this is apparent, who may obtain the information for a purpose other than securing compliance with the relevant law; and

(m) an undertaking to return any documentation provided.

31. It may be desirable for any law designed to facilitate co-operation between business regulatory authorities to specifically preserve existing channels through which assistance can be provided. It would be undesirable if anything in such a law operated to lessen co-operation which already exists between countries which are members of IOSCO or between stock exchanges. A saving clause such as is included in the Harare Scheme and laws implementing it may commend itself to some governments.

32. Although not included in the Statement, regulators at the Oxford Conference identified a need to obtain information about bank accounts and sought the creation of facilities which would permit the urgent freezing of foreign accounts on their behalf. Where such information and facilities are needed in support of possible criminal proceedings it would seem inappropriate that business regulatory channels be used but it is possible that such information may be needed for the purpose of civil proceedings or to prevent loss, or further loss, to shareholders. Mareva injunctions could, perhaps, be used to secure the freezing of bank accounts but the question of giving access to information concerning such accounts could be provided for in legislation covering this subject. Countries may consider that there would be merit in specifically listing information concerning bank accounts in provisions designed to give effect to the fourth principle.

33. Countries may consider it desirable to provide a right of legal representation to persons required to give evidence in response to a foreign request for assistance. Legal issues such as the existence or otherwise of a privilege against self-incrimination may need to be addressed in national laws. If the privilege against self-incrimination is abrogated by the law, countries may need to consider whether statutes should provide for use or use-derivative indemnities. The question of how to deal with a witness who claims legal professional privilege may also need to be dealt with in the context of powers to compulsorily acquire information on behalf of a foreign regulator.

March 1996

THE COMMONWEALTH DRAFT MODEL LAW FOR THE PROHIBITION OF MONEY LAUNDERING

A Paper prepared by the Commonwealth Secretariat

BACKGROUND

1. Commonwealth Heads of Government at their 1993 Meeting expressed concern about the effects of money laundering, expressed their support for implementation of the 40 Recommendations of the Financial Action Task Force (FATF) and asked Law and Finance Ministers to further Commonwealth efforts to combat the laundering of the proceeds of **all serious crime,** thus going further than the precise scope of the FATF Recommendations. FATF is, however, reviewing the recommendations and is considering widening them to suggest the coverage of all serious crime.

2. Commonwealth Law Ministers at their 1993 Meeting expressed their desire that the issue of money laundering be addressed as a matter of urgency and their resolve, individually and collectively, to put in place comprehensive provisions criminalising money laundering in respect of the proceeds of all serious crimes, facilitating the disclosure by financial institutions of information giving rise to suspicion of money laundering activities, enabling confiscation of the proceeds of crime, making money laundering extraditable, and promoting international co-operation in the investigation and prosecution of money laundering and in confiscation proceedings.

COMMONWEALTH SECRETARIAT ACTION

3. Information available to the Commonwealth Secretariat suggested that while many Commonwealth countries had made significant progress in putting into place laws and regulatory regimes compatible with the FATF recommendations there were a number of countries whose capacity to address this issue was limited or whose laws relating to money laundering were narrower than those supported by Heads of Government in that they dealt only with laundering the proceeds of drug trafficking.

4. The Secretariat is aware that other model laws have been prepared, for example those produced by the United Nations Drug Control Programme and the Organisation of American States. Those laws were designed primarily for civil law countries and, in the case of the United Nations model sought to implement the money laundering obligations imposed by the Vienna (drug trafficking) Convention. The United Nations model, for example, fails to deal with freezing and confiscating proceeds of money laundering, or with extradition and mutual assistance issues which are the subject of the FATF Recommendations. It was our view that there was no suitable model for common law countries needing assistance. The Secretariat is, of course, aware that some member countries do not require assistance in drafting legislation to combat money laundering and implement the forty Recommendations but at the same time it is recognised that other member countries would appreciate assistance to bring their laws up to date.

5. To meet the needs of countries seeking to take the action required by Heads of Government and Law Ministers a model law has been produced which addresses relevant Recommendations of the FATF - as endorsed by Heads of Government - in a way which will permit member countries to administer the law in accordance with their established procedures.

CONSIDERATION OF THE DRAFT MODEL LAW

6. The draft was submitted to Senior Officials of Law Ministries at their 1995 meeting and to Senior Officials of Finance Ministries at their special meeting convened to deal with the question of money laundering. In light of the comments made at both of those meetings the original draft was revised to reflect as many as possible of the views of member countries. The revised draft was further considered at a money laundering workshop for senior law and finance officials held in Vanuatu in July 1995. The Secretariat is conscious that the resulting draft does not address every concerns expressed but attempts have been made to reflect as many as possible of the suggested changes.

7. The proposed Commonwealth model law is drafted in such a way as to enable countries who choose to use it to either:

(a) enact the law as a whole thereby placing all provisions relating to money laundering in one document (together with such subordinate instruments as may be required); or

(b) take each part of the model and incorporate it into another relevant law, for example the criminal code, the banking legislation, mutual assistance in criminal matters and/or extradition legislation.

If option (a) is adopted countries will find that there is some duplication which could be avoided by placing the duplicated provisions in a general part. The duplication results from an attempt to produce one document which can be used as either a whole law or a collection of provisions for insertion into individual laws.

8. At their 1995 meeting Heads of Government expressed the conviction that a common legislative approach to the problem of money laundering would facilitate international co-operation and invited member states to draw benefit from the Draft Model Law for the Prohibition of Money Laundering developed by the Secretariat.

9. Ministers may also wish to take note of the report on money laundering issued by Commonwealth Finance Ministers following their meeting in October 1995. In that report Finance Ministers recognise the value of close co-operation between Finance and Law Ministers and identified a need to consider appropriate ways of co-operating to deal with the commission of fiscal offences which generate substantial money laundering activity. In the absence of any established forum at which Commonwealth Law and Finance Ministers can meet to discuss the problems they share in working to combat money laundering, Ministers may wish to consider whether it would be desirable for them to recommend the creation, at national level, of multidisciplinary groups to consider policy and practical action in this area. They may also wish to advise the Secretariat or Commonwealth Finance Ministers of any future action they would see as helpful to the development of a combined approach to this issue.

10. Five documents accompany this paper:

(a) the model law labelled Annex A;

(b) an explanatory memorandum which details its intended operation labelled Annex B;

(c) a note on the relationship between the model law and the Forty Recommendations labelled Annex C;

(d) a note which details the amendments suggested and the action taken on those suggestions and which is labelled Annex D; and

(e) a copy of the report of Commonwealth Finance Ministers on the subject of combating money laundering which is labelled Annex E.

March 1996

Money Laundering

SELF EVALUATION OF PROGRESS IN IMPLEMENTING MEASURES IN THE LEGAL SECTOR TO COMBAT MONEY LAUNDERING

A Compilation by the Commonwealth Secretariat of National Responses to the 1995/6 Survey

1. At their 1993 Meeting Law Ministers agreed to participate in a process of self-evaluation of progress towards implementing those of the 40 Recommendations of the Financial Action Task Force (FATF) which relate to the legal sector.

2. They asked their Senior Officials, with the assistance of the Commonwealth Secretariat, to undertake this task and report to their next Meeting.

3. A number of Commonwealth countries are members of the FATF or of the Caribbean Financial Action Task Force (CFATF). Both of these organisations participate in annual self-evaluation exercises using the same (or very similar) questionnaires. To ensure that no member country was required to complete more than one questionnaire, the Secretariat approached both of these organisations with a view to gaining access to the responses provided by Commonwealth members and, at the same time, gave relevant members the option of completing the Commonwealth questionnaire or of authorising the release to the Secretariat of the information provided to the FATF or to the CFATF.

4. The information received by the Commonwealth Secretariat by 6 March 1996 is aggregated in the attached compilation of results which also includes data on the source of the information and on conditions attaching to particular responses.

March 1996

TRANSBORDER INSOLVENCY

INTERNATIONAL CO-OPERATION ON CROSS-BORDER INSOLVENCY ISSUES - AN IMPORTANT LEGISLATIVE INITIATIVE OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

A Paper prepared for the Commonwealth Secretariat by Mr Simeon A. Sahaydachny, Senior Legal Officer, Secretary of UNCITRAL

SUMMARY OF PROJECT

1. The United Nations Commission on International Trade Law (UNCITRAL) has embarked on a project designed to facilitate international co-operation and co-ordination in dealing with cases of cross-border insolvency. The project will offer to states a legislative framework, most likely in the form of model national legislative provisions, for judicial co-operation, court access for representatives of foreign insolvency proceedings, and recognition of foreign insolvency proceedings. Like other model laws and conventions prepared by UNCITRAL, the model provisions will be designed for use in all types of legal systems and by states at various levels of economic development.

2. This work of UNCITRAL is not aimed at achieving a substantive unification of insolvency laws. It has the limited but useful objective of providing a legislative basis and procedures for dealing with cases of cross-border insolvency. This modest objective is desirable since cases of cross-border insolvency are increasing and many jurisdictions remain without the legislative framework to enable co-ordination and co-operation among jurisdictions that would help to preserve asset value and rescue financially troubled but viable businesses. Such a situation impacts negatively not only on creditors and the predictability of investment in states seeking to attract investment, but also on other interested parties, in particular employees of businesses in financial difficulty.

PREPARATORY WORK UNDERTAKEN THUS FAR

3. UNCITRAL has established an intergovernmental Working Group on Insolvency Law, which is preparing a draft legal text for adoption by the Commission. The next session of the Working Group is taking place at United Nations Headquarters in New York from 1 to 12 April 1996. At that session, the Working Group is to consider a first draft of a set of model legislative provisions (copy attached, United Nations document A/CN.9/WG.V/WP.44).

4. Membership in the Commission and its Working Groups consists of 36 states elected by the General Assembly for six-year terms on the basis of a geographical distribution formula. However, participation in the sessions of the Commission and its Working Groups is open to all states, who receive invitations to participate through their Permanent Mission to the United Nations.

5. In addition to the primary role of governments in the UNCITRAL process, interested international organisations participate, including those representing practitioners and others with an interest in projects undertaken by UNCITRAL. Valuable input is being received from the International Association of Insolvency Practitioners (INSOL) and Committee J (Insolvency) of the Section on Business Law of the International Bar Association (IBA). Such input, including that received at the multinational UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22-23 March 1996), has helped focus UNCITRAL's work on a project that is both feasible and desirable.

6. Some main aspects of the emerging model legislative provisions are summarized below. It may be noted that the description below is based on deliberations at the Working Group level, which are still in progress, and should therefore be regarded as tentative.

A "MENU OF OPTIONS" FOR STATES

7. It is likely that the model legislative provisions will to one degree or another present states with a "menu of options". This would be in recognition of the fact that states differ in their traditional policy approaches regarding insolvency and procedural frameworks, as well as in the degree and manner in which they would extend co-operation to other states or particular groups of states. It is envisaged that there would be a core set of provisions recommended for adoption by all states. Though this core module might be relatively modest in what it would achieve, it

would nevertheless represent significant international progress in view of the prevailing fragmentation and divergence of law at the national level for dealing with cross-border insolvency. Such a core module could include, for example:

- authorizing judges both to extend and to solicit co-operation;

- the right of foreign insolvency representatives to direct access, in a limited appearance, to the competent court or authority for obtaining recognition and ancillary relief, thereby avoiding time consuming or less predictable avenues (e.g., letters rogatory and other types of diplomatic or consular communications incapable of providing the speedy response needed to protect assets against dissipation or concealment; exequatur proceedings and notions of comity);

- simplified procedures for foreign representatives to evidence the opening of foreign proceedings and appointment (by presentation of certified copy of decision or order opening proceedings, thereby avoiding time-consuming legalization requirements);

- applicability of recognition rules to proceedings treated as insolvency proceedings in the jurisdiction of origin, i.e. proceedings opened under insolvency laws or other laws relating to insolvency proceedings (e.g., company laws), provided they are under the overall supervision of a court or other competent state authority (thereby encompassing both liquidation and reorganization proceedings (including debtor-in-possession), as well as voluntarily initiated proceedings, and regardless of whether the debtor is a natural or legal person (though an option may provide for exclusion of insolvencies of non-traders);

- authorization for locally-appointed administrators to act as foreign representatives of proceedings originating in the enacting state, a legislative gap that has proven to be a problem in some jurisdictions;

- staying of local individual creditor enforcement actions upon recognition of a foreign proceeding, with possible options for exclusion from such a stay of enforcement of secured claims, rights in rem, and reservation of title arrangements;

- the right of foreign representatives to intervene in collective proceedings in the enacting state;

- access and national treatment for foreign creditors.

OTHER POSSIBLE ISSUES

8. In addition to the above issues in a core set of provisions, a number of other aspects of co-operation and co-ordination in cross-border insolvencies may be addressed in the UNCITRAL model legislative provisions, to one extent in the form of options for states. One area concerns the rules for determining whether any given foreign proceeding should be recognized. An approach in this regard may be based on a rebuttable presumption that the foreign proceeding is based on a substantial jurisdictional link to the debtor. Another approach would involve the recognizing court in a case-by-case examination of the jurisdictional competence of the foreign court on the basis of one or more possible connecting factors.

9. On the question of the "effects" of recognition, a two-tier approach is emerging, involving a "minimum" list of automatic effects (e.g., the stay of individual creditor enforcement actions, with possible exemptions, referred to above and authorization of information gathering by the foreign representative). In addition, the court would be authorized to grant additional forms of relief, taking into account the powers of the foreign representative under the law of his appointment, local law and public policy.

10. It remains also to determine what recommendation would be made to states that would wish to include in their legislation rules on the effects of recognition of a foreign proceeding on the jurisdiction to open local insolvency proceedings. An additional possible module would present model rules for establishing a hierarchy between concurrent proceedings.

PROSPECTS FOR COMPLETION OF WORK

11. It is expected that following several additional Working Group sessions, the draft model legislative provisions will be presented to the Commission for final revision and adoption at its annual session in 1997. Judging by other UNCITRAL legal texts, it can be expected that

the model legislative provisions would be used by states from various legal systems to "upgrade" their insolvency laws to deal in a speedy and efficient way with the increasing stream of cross-border insolvencies. Examples of adoption and use of UNCITRAL legal texts across legal systems include in particular the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

12. In addition to the model provisions on cross-border insolvency, the Commission is likely to issue a guide to enactment of the provisions for use by parliaments and executive branches of government. Such a guide has been particularly useful in the enactment of legislation based on the UNCITRAL Model Law on Procurement, and would be an adjunct to the technical assistance and consultation services provided by the UNCITRAL Secretariat in the preparation of legislation in the commercial law area.

13. For further information please contact:

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March 1996

CROSS-BORDER INSOLVENCY: A NEED FOR COMMONWEALTH ACTION?

A Paper prepared by the Commonwealth Secretariat

INTRODUCTION

Background

1. Insolvency law has been described as the foundation of commercial law. Certainly, a great number of business decisions are made and transactions structured with reference to what will happen if one or more of the parties enters an insolvency procedure. The insolvency law regime will often exert a decisive influence on the whole range of decisions relevant to the extension of credit, and in particular bank lending. Further, the legal regime in a particular state may be a key factor influencing foreign investment.

2. For these reasons, it would be unwise to ignore the deficiencies in the current legal framework in dealing with the problems created by cross-border insolvencies. Problems arise because of the dissimilarity in insolvency regimes throughout the world and the fact that harmonisation of these regimes would be a wholly unrealistic goal. Cross border problems are becoming more common as the number and complexity of transnational insolvencies rise and this trend is likely to continue due to the rapid and ongoing globalisation of economic activity which is currently taking place. The question therefore arises as to whether any action is required to address these problems. In seeking to answer this question it is necessary to establish the size of the problem.

Purposes and outline of paper

3. The purposes of this paper are therefore to ask Ministers:

- whether they have encountered significant problems in this area (and if so what they are and in how many cases they have arisen); and

- if problems have arisen, whether and how combined Commonwealth action might assist them to address those problems more effectively - in respect of cross-border insolvencies arising both between Commonwealth states and between Commonwealth and non-Commonwealth states.

4. To assist Ministers in their deliberations, this paper:

(a) outlines some of the key problems presented by cross-border insolvencies (paragraphs 7 - 10);

(b) assesses briefly the extent to which mechanisms available within the current legal framework enable cooperation in cross border insolvency cases (paragraphs 11 - 27)[1];

(c) notes current international initiatives in this area (paragraphs 28 - 29); and

(d) suggests a number of options for Commonwealth action (paragraph 30).

THE PROBLEMS PRESENTED BY CROSS-BORDER INSOLVENCIES: OVERVIEW

Terminology

5. Cross-border insolvency is a highly technical area, and it is necessary to define certain key terms at the outset.

6. A "cross border insolvency" case arises when an insolvency proceeding is commenced in State A in respect of a debtor who also holds assets and/or does business (and thus is likely to have

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1 Much of the discussion in this paper of the current legal framework and the problems presented by cross-border insolvency draws on the analysis and research of the International Association of Insolvency Practitioners and the United Nations Commission on International Trade Law, in particular *Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies: Expert Committee's Report on Cross-Border Insolvency and Recognition* (Reporters Evan Flaschen and Ron Harmer; draft 1 March 1995), and UNCITRAL *Cross-Border Insolvency: Possible Issues Relating to Judicial Cooperation and Access and Recognition in Cases of Cross-Border Insolvency* (A/CN.9/WG.V/WP.42, 26/9/95). Any errors remain, of course, those of the Commonwealth Secretariat.

creditors) in one or more other jurisdictions (States B, C etc). The insolvency proceeding commenced in State A will be referred to from now on as the "foreign insolvency proceeding" (FIP), and the person in charge of that proceeding the "foreign insolvency administrator" (FIA). The "other jurisdictions" in which recognition of the FIP is likely to be requested will be referred to collectively as "State B". Proceedings initiated in State B by the FIA will be referred to as "ancillary proceedings", and proceedings initiated in State B by local creditors as "secondary insolvency proceedings". "Local creditors" refers to those creditors who would be required to commence proceedings against the debtor in State B in order to recover their claim. In effect this means that these claims are likely to arise in respect to assets or business activities of the debtor situated in State B.

Overview of problems

7. By way of background, Appendix I outlines the steps which must typically be taken in the course of administering an insolvency proceeding, according to the law and practice of a variety of jurisdictions. Appendix I also indicates the points at which court involvement might be required, though this draws upon a narrower selection of insolvency regimes based upon the United Kingdom model.

8. These are the same steps which must be taken in a cross-border insolvency, and court assistance is also likely to be required in respect of certain activities in State B. The fact that the insolvency proceeding must be administered in more than one jurisdiction can give rise to some very complex practical and conflict of laws problems. These include the following:

- Separate and non-cooperative insolvency proceedings might be commenced in respect of the same debtor in more than one jurisdiction, with creditors and insolvency administrators competing for the assets. This may result in duplicated effort, increased cost, and a lower return to creditors as the opportunity is lost to realise the maximum value of the enterprise. Indeed, the best option might be to preserve the enterprise (along with its workforce and markets) as a going concern, and increasingly national laws are being changed to facilitate this approach in appropriate cases. However, the degree of required coordination and control may be very difficult to achieve in a cross-border insolvency for the reasons just mentioned.

- It can be quite unclear whether the FIP and/or the FIA will be recognised by State B, by what process and with what effects. States differ on these points due, among other things, to differences in insolvency laws, in the degree of discretion afforded to courts, and in the degree to which foreign law will be applied.

9. In terms of the effects of recognition, the following questions are among those likely to arise:

- will the FIA have power to manage and/or realise the debtor's assets held in State B?

- will the FIA be able to pursue voidable transaction and debtor liability claims, and if so according to the law of which forum?

- will the rights of local creditors be affected? In particular:

  - will local creditors be entitled to open separate insolvency proceedings?

  - what priority will their claims have in relation to the claims of creditors in the FIP?

  - will the security interests of local creditors be "trumped" by claims made in the FIP?

10. These and other issues are discussed further detail in Appendix II, which focuses in more detail on some of the problems and questions which an attempt to facilitate greater cross-border cooperation would have to address.

CURRENT LEGAL FRAMEWORK

Territoriality

11. According to this approach, recognition of foreign proceedings is refused, and domestic law is applied to the complete exclusion of cooperation and coordination in relation to a FIP.

Extraterritorial legislation

12. The insolvency laws of many countries purport to command control of, and confer rights in respect of, business activities, assets and creditors located outside of the jurisdiction. However, the effective operation of laws of this type depends wholly on the extent to which the foreign jurisdiction is able and willing to recognise and give effect to the FIP.

Comity

13. In the absence of any enabling legislation, access and recognition in common law jurisdictions depends on application of the doctrine of comity. This doctrine, exercised by a court pursuant to its inherent jurisdiction, guides courts in their consideration of whether to recognise the judicial, legislative and administrative acts of courts and other bodies in other countries. In exercising this jurisdiction, a court is likely to have regard to international duty and conscience, and to the rights of its own citizens and other persons under the protection of its laws (*Hilton v Guyot* 159 U.S. 113, 163-64 (1895)).

14. The doctrine of comity permits a court considerable flexibility, but this comes at the expense of predictability and certainty.

Exequatur

15. In civil jurisdictions, the doctrine of comity is in general not exercised. Instead, a FIA must petition the local court to recognise the FIP by issuing an "exequatur", ie an enabling order. The grounds on which this order can be granted are, typically, stated clearly in statute. Even then, it may still be necessary to have a local administrator appointed to realise local assets. However in most cases, if the local courts have jurisdiction over a debtor and there are grounds for commencing a local insolvency proceeding, principles of strict territoriality will apply.

16. The exequatur procedure provides certainty, but suffers some severe limitations. A key one is that exequatur statutes typically focus on the enforcement of foreign "judgements", a term which does not easily fit a collective FIP. This limitation is elaborated upon under the following heading, as an exequatur statute is a species of reciprocity of judgements legislation.

Reciprocity of Judgments Legislation

17. Legislation providing for the recognition of foreign judgements - commonly drafted pursuant to bilateral or multilateral treaty obligations - can assist the enforcement of money judgements, or of mandatory or injunctive orders. This may be of use in a FIP where the FIA seeks enforcement in State B of a judgement obtained in State A which has established the quantified liability of a particular person to the debtor's estate.

18. However, legislation of this type is likely to be of less use in relation to the general recognition and administration of an insolvency proceeding. A key reason for this is that an insolvency proceeding may not depend for its existence and effect on a judgment or order at all (and many do not); and if it does, the judgment or order is likely to be no more than a declaration of status and will not by itself command that something must be done or not done.

19. While it is not unknown for reciprocity of judgments legislation to enable recognition of a FIP as the functional equivalent of a judgement, legislation of this kind cannot realistically deal with the range of problems presented by cross-border insolvencies.

Conventions and Treaty Arrangements

20. Multilateral or regional conventions and treaties could in theory work very well to provide for access, recognition and judicial cooperation. Their main limitations are that they are difficult to conclude between countries with diverse insolvency law regimes and general commercial law, and of course do not address problems arising between a member and non-member country. Conventions and treaties which have attempted to address issues arising in this area include the Convention on Private International Law 1928 (the "Bustamante Code"), the two Treaties on Commercial International Law 1889 and 1940 (the "Montivideo Treaties"), the Nordic Bankruptcy Convention 1933, and the European Convention on Certain International Aspects of Bankruptcy 1990 (the "Istanbul Convention", not in force).

21. The European Community Convention on Insolvency Proceedings, which was opened for signature in November 1995 and is yet to come into force, is of particular interest because it comprises a significant attempt by countries with quite divergent legal systems to agree on a minimum level of cooperation. Also of interest is the Model International Insolvency Cooperation Act, recently drafted by the International Bar Association.

Unilateral Recognition/Assistance

22. A few nations have enacted legislation to provide for unilateral assistance and/or recognition in respect of a FIP ("unilateral" in the sense that reciprocity is not stated explicitly to be a prerequisite, though see paragraph 26 below). In some cases access (in a narrow procedural sense) is automatic or obtained through an administrative procedure, but these provisions invariably require court involvement to obtain substantive assistance and enforcement. However, they differ on essentials

such as the discretion if any allowed to the court; the grounds for making an order; the effect of an order; and the procedures to be followed in seeking an order.

23. It has been suggested that this general approach offers the greatest hope for improved cooperation in this area because:

- it seeks primarily a high degree of predictable recognition, assistance and cooperation rather than a uniform "international" insolvency law (which is perceived as unrealistic)

- the legislation is usually short and simple

- the procedure can be cheap and efficient and can achieve a high level of certainty

- the necessary legislation is equally possible as an addition to or expansion of the statutory regime in civil and common law systems

- it seems to operate well in practice

- there is no need for there to be a foreign "judgment" in the narrow sense noted at paragraphs 17 - 18.

24. Appendix III reproduces extracts of legislation from three countries which provide for unilateral assistance or recognition, namely sections 580-581 of the Corporations Law and section 29 of the Bankruptcy Act (Australia (Commonwealth)); section 426 of the Insolvency Act 1986 (UK); and clauses 101 and 304-306 of the Bankruptcy Code (United States). Other examples are section 156 of the Bankruptcy Law (Revised) (Cayman Islands), and section 135 of the Insolvency Act 1967 (New Zealand).

25. Several of these provisions enable assistance to the courts of "prescribed countries", for example those listed as follows:

- Section 581(2)(a) of the Corporations Law and section 29(5)(b) of the Bankruptcy Act (Australia): the Bailiwick of Jersey, Canada, the Independent State of Papua New Guinea, Malaysia, New Zealand, the Republic of Singapore, Switzerland, the United Kingdom, the United States of America.

- Section 426 of the Insolvency Act 1986 (UK): Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, the Republic of Ireland, Malaysia, Montserrat, New Zealand, St Helena, South Africa, Turks and Caicos Islands, Tuvalu, Virgin Islands.

26. It should be noted that while the description of these provisions as "unilateral" is technically correct, it is the administrative practice in, for example, the United Kingdom, to add countries to the prescribed list on the basis that their insolvency regime is broadly compatible with that of the prescribing country, and that reciprocal provisions are either in place or will be introduced.

Ad Hoc Protocols

27. A recent and successful development has been the development of the "ad hoc protocol". Under this approach, the courts of two states having primary jurisdiction over an insolvency (by reason of substantial business activities having been conducted in each jurisdiction) are requested to approve an ad hoc protocol, agreed to by the parties, which regulates various aspects of the administration of the cross-border insolvency. Limitations of this approach are that it must by its nature be individually tailored to the particular circumstances, and that its utility depends on the legal capacity and judicial willingness of each court system involved.

INTERNATIONAL INITIATIVES

28. The European Community Convention on Insolvency Proceedings, which was opened for signature by member states on 25 November 1995, comprises a primary source of inspiration in terms of possible approaches to cross-border insolvency problems. However, only members of the European Community can become parties to the Convention and it is therefore of limited practical use to the majority of Commonwealth States.

29. Of more immediate interest is the ongoing United Nations Commission on International Trade Law (UNCITRAL) project to develop a draft model legislative framework designed to facilitate improved international cooperation and coordination in dealing with cases of cross-border insolvency. The International Association of Insolvency Practitioners (INSOL) and the International Bar Association are both contributing substantially to this undertaking. The UNCITRAL Secretariat has contributed a paper ("International Cooperation on Cross-Border Insolvency Issues", LMM(96)26) which describes the project in detail. Attached to that paper is the latest draft of the proposed model legislation which has been prepared for consideration by an intergovernmental working group in New York in April 1996. The UNCITRAL Secretariat has

indicated that a Commonwealth Secretariat input to this process would be welcome, to the extent that this would add to the already substantial contribution of Commonwealth states: Australia, Botswana, Cameroon, India, Kenya, Singapore, the United Kingdom and the United Republic of Tanzania are all members of the working group. Nigeria is also a member of the working group, although its membership in the Commonwealth is currently suspended. The working group totals 36 states, and participation is open to and solicited from all member states of the United Nations.

OPTIONS FOR COMMONWEALTH ACTION

30. Options for Commonwealth action include the following:

(a) As a preliminary measure, a working group could be set up to ascertain the nature and extent of problems experienced by Commonwealth states in relation to cross-border insolvencies, and to assess the efficacy of national laws in addressing these problems. The information gathered in this exercise could be used in the process of developing an independent Commonwealth initiative, and/or fed into the work being undertaken by UNCITRAL. If the latter - as is recommended under option (c) - states would need to act promptly as the UNCITRAL project is well under way.

(b) Measures could be taken to improve the efficacy of existing Commonwealth recognition legislation, short of amendment. In particular, Commonwealth States could be advised of the criteria for being added to the list of "prescribed countries" for the purposes of assistance and recognition in those States which have the enabling legislation. However, as the existence of reciprocal provisions in the State seeking to be added to the prescribed list is likely to be one of these criteria, this may simply point to the necessity of option (c).

(c) Existing recognition provisions could be improved by amendment, and provisions introduced where they do not already exist (which appears to be the case in the majority of Commonwealth States), on the basis of an agreed model law.

This model law could be developed by way of an independent Commonwealth initiative. Alternatively the UNCITRAL draft provisions could be used as the preferred model for national legislation. An independent Commonwealth initiative probably makes little sense because it would:

- require considerable resources
- be likely to duplicate work done by UNCITRAL
- develop solutions which may only promote cooperation in respect of cross-border insolvencies between Commonwealth States. In contrast the UNCITRAL project, which has drawn on considerable international expertise and broad representation base of , addresses problems arising between jurisdictions with quite different legal systems and has an active membership which represents that diversity

It is therefore suggested that the most sensible course is for active Commonwealth participation in the UNCITRAL process, to the extent that this will add to the contribution already made by Commonwealth states. Those Commonwealth states which are not members of the working group may wish to have their views co-ordinated and expressed through representation by the Secretariat, following or in conjunction with the intra-Commonwealth projects suggested under options (a) and (b), above.

(d) States may wish to consider whether the specific topic of cross-border insolvency raises a wider issue: whether there is a need for Commonwealth assistance in revising and updating insolvency laws in general. This may be justified by the economic importance of insolvency law, noted above at paragraph 1.

March 1996

OVERVIEW OF INSOLVENCY PROCEEDINGS

A variety of tasks must typically be performed in the course of an insolvency proceeding. What these will actually be and who performs them will depend primarily on the nature of the particular proceeding - different types are noted in Appendix II. The following lists the types of tasks which commonly arise, selected from a variety of insolvency proceedings:

- initiation of the insolvency proceeding. This might be achieved by means of court order on application, or by operation of law following certain actions which, at least initially, do not require court involvement (though the court may have jurisdiction)
- identification and location of locate the debtor's assets
- calling in and liquidation of the assets
- reversal of voidable transactions which occurred prior to the insolvency proceeding
- defending claims against the debtor's estate and challenges to the administration of the insolvency
- reporting to the relevant authority certain criminal or tortious activities of the debtor, of the debtor's agents, and/or of those dealing with the debtor, or to initiate proceedings in respect of the same
- identification of creditors and the extent, validity and priority of their claims, and the making of distributions accordingly
- compromising with creditors or negotiating schemes of arrangement, perhaps in the course of restructuring and rescuing a business
- bringing the insolvency proceeding to an orderly conclusion.

The administrator is likely to posses a range of powers sufficient to perform most of the tasks listed above. Most of these powers can be exercised without court sanction. However, court involvement might be necessary to:

- determine that a transaction is voidable and that assets should be restored to the debtor's estate
- enable the administrator to proceed against certain persons in respect of civil or (more rarely) criminal liability
- determine ownership or possession of assets where this is disputed
- permit an administrator to deal with certain types of property, for example property subject to security (under those regimes which do not permit property subject to a security to be realised by the security holder independent of an insolvency proceeding)
- determine the administrator's remuneration
- enforce the administrator's powers in the absence of compliance
- formally end the insolvency proceeding and/or discharge the administrator's liability

IMPROVING COOPERATION IN CROSS-BORDER INSOLVENCIES: ISSUES TO BE ADDRESSED

A model law or convention (and thus national legislation prepared in accordance with it) which seeks to promote cooperation in cross-border insolvency would need to address the following issues, among others.

Recognition

The following section considers the issues relevant to:

- the recognition of the existence and/or legitimacy of a person (in most cases the FIA) or thing (the FIP itself or the foreign court which has jurisdiction over it); and

- the consequences which flow from recognition

(i) *Connecting factors*

What connecting factor must exist between the debtor and the requested State to justify recognition? Possibilities include domicile, habitual residence, place of registered office, principal place of business, centre of the debtor's main interests, location of assets. The "prescribed list" approach (see paragraph 25 of the main paper) goes some way to overcoming this problem, though connecting factors may continue to be relevant if the court is required to exercise its discretion in deciding whether, and to what extent, to assist requests from prescribed countries.

(ii) *Definition of "debtor"*

There are differing criteria under national laws concerning the status of persons who may be subject to insolvency proceedings. In some countries, a debtor could be a natural person, a corporation, a partnership, or some other form of business or not-for-profit enterprise. However, the insolvency laws of other countries are more restrictive, not applying for example to natural persons or to non-traders. Should a country be required to recognise insolvency proceedings which apply to categories of persons who cannot be the subject of insolvency proceedings under its own laws? If yes, what law would apply to the property of that person if there was no comparable insolvency law to apply?

(iii) *What forms of insolvency proceeding should be recognised?*

It is fundamental that recognition must only follow from the fact that insolvency proceedings have been lawfully commenced and conducted in the jurisdiction of State A. However, what forms of insolvency proceedings should be recognised? Any definition of "insolvency proceeding" formulated for the purposes of a model law or convention would have to take account of the following issues:

(a) Must the debtor be insolvent or approaching insolvency? This is not a prerequisite to the commencement of some rehabilitation proceedings, nor, of course, to commencement of a solvent liquidation. It has been suggested that the latter is an inappropriate subject of recognition, as problems concerned with the payment of debts to creditors rarely arise.

(b) Insolvency proceedings brought about by a formal court or judicial process; by executive action pursuant to statute; or by formal debtor-initiated action pursuant to statute and subject to court intervention, may in principle be considered uncontentious candidates for recognition.

However:

- some jurisdictions limit recognition to an FIP which qualifies as an insolvency proceeding according to the law of the forum.

- informal insolvency proceedings based purely on private contract and lacking statutory sanction or judicial supervision are unlikely to give a local court the comfort it needs to recognise a foreign proceeding. A receivership represents a more ambiguous case. It involves the enforcement of a contractual right for the benefit of one or a small number of creditors only, yet is commonly regulated to at least some extent by statute.

(iv) *Who should be recognised?*

It has been suggested that, if the principal purpose of obtaining recognition is to ensure that the FIA seeking recognition gains control of the business affairs and/or the assets of the debtor in State B, then that FIA must as a prerequisite to recognition possess those same powers in State A. Furthermore, these powers should derive from judicial order or statute.

Further issues are:

- should recognition be granted to those not coming within the category of "independent administrators" (such as are appointed under most insolvency procedures)? An example would be a "debtor in possession" who continues to manage the business, subject to court supervision.

- should a state which licenses insolvency practitioners be required to recognise a FIA from a regime which does not have a licensing regime, or at least not according to equivalent criteria?

(v) *What should be the effects of recognition?*

Mere recognition of the FIA and/or of the FIP itself, may not suffice without further measures. For example, there is likely to be an urgent need to prohibit creditors, automatically upon recognition or by court order, from disposing of the assets located in the state in which recognition has been sought and obtained. Further orders may be needed in relation, for example, to the disposal of assets.

There are several aspects to the general issue of the effects of recognition, including the following.

Powers of the court

It has been suggested that, as a general principle, the result of recognition should be that such cooperation, aid and assistance should be given as is not inconsistent with the law of the country in which recognition is sought. In particular, it would be necessary for a court in State B to have the following powers:

- to make a formal declaration of recognition

- to make interim or holding orders to preserve the status quo and to protect the business interests and assets of the debtor

- to grant varied types of relief and to join and summon parties as necessary

Effect on the debtor and creditors

Should the debtor be disinvested as a result of recognition? If so, in whom should the local assets vest? What rights should creditors with a claim to those local assets possess? This latter question is sufficiently important and complex to merit its own section below ((vi) "Rights of local creditors").

Powers of the FIA

What powers should the FIA have - all of those needed to perform the tasks listed in Appendix I? Should they be shared with (or conferred solely upon) the court of State B and/or a local administrator appointed in State B?

Sources of those powers might include one, both or all of the following:

- the law of State A;

- the law of State B in respect of the equivalent insolvency proceeding;

- orders of the court in State A or State B.

Mechanism for determining the effects of recognition

There are a number of alternative mechanisms for determining the effects of recognition:

- provision of an exhaustive list of all the consequences of recognition

- the effects of the FIP are imported in their entirety into the recognising State (subject perhaps to enumerated exceptions)

- the insolvency effects of the FIP are converted into the equivalent effects under the insolvency laws of State B

- the choice of law is left to the recognising court (perhaps in regard to the rules of private international law)

- the court is given the discretion to decide the effects (in accordance perhaps with prescribed guidelines)

(vi) *Rights of local creditors and secondary insolvency proceedings*

It is probably uncontentious to suggest that local creditors should at the very least be permitted standing in the ancillary FIP. However, what should their rights in this proceeding be? Should they even be permitted to open a secondary insolvency proceeding, and if so, in what circumstances and (again) with what rights? More specifically:

- Should local creditors be notified of, and given the right to oppose, an application for recognition? The answer may depend on whether the fact of recognition and consequences of recognition (for example an

automatic stay on creditors' rights) are determined at the same time. Appropriate rules would need to ensure that any permitted creditor challenge was dealt with expeditiously.

Following or pending recognition, should there be a complete stay on creditors' rights to proceed against the debtors' assets (immediately or at a later date); should their rights in this regard be left untouched; or should the rights of some creditors (eg those holding a security interest) to proceed be left untouched while others are barred from taking action? (This can be treated as a different issue from the ranking of local creditors' claims in an eventual distribution (discussed below), though in reality this may be determined by their right to bring separate proceedings and the relation of those separate proceedings to the FIP).

Should the fact of the FIP remove the need to prove insolvency as a prerequisite to the opening of a secondary insolvency proceeding? Should permission to open a secondary insolvency proceeding be limited to, for example, those cases where the debtor has an establishment in State B (not just assets)?

Should the opening of a secondary insolvency proceeding block entirely the recognition of a FIP, or freeze the FIP if it has already been recognised?

Which forum's law will govern the ranking of claims? Where will local creditors come in the "pecking order"? More specifically:

will local creditors have "first cut" at the proceeds of local assets or will these assets be added to the FIP pool for the benefit of all creditors?

will claims which are preferential under the law of State B, for example employee and revenue claims, be given priority?

can security interests over local assets which have been created in respect of business activity in State B be enforced in priority to security interests over local assets which have been created in respect business activities in another jurisdiction?

Should the answer to these various questions differ depending on whether these rights are pursued:

- in an ancillary or secondary insolvency proceeding?

- by creditors based in State B? (This was not made a component of the definition of "local creditor" in paragraph 6 of the main paper).

(vii) *Should recognition be mandatory (ie automatic on certain criteria being met) or discretionary?*

It has been argued that, once the elements contained in a definition of "insolvency proceeding" have been satisfied, recognition should follow with a minimum of discretion allowed to the decision maker (usually a judge). This would enhance predictability and certainty. The price would be inflexibility and possible resistance from a judiciary accustomed to the considerable discretion which is a feature of the common law tradition - a discretion which, typically, is exercised responsibly.

The approach in each jurisdiction is likely to depend on the compatibility of the respective insolvency laws of the countries involved. This is reflected in the unilateral recognition legislation of Australia (Corporations Law section 580) which requires mandatory recognition of an insolvency proceeding if it has originated in a prescribed country. Generally speaking, the insolvency law regimes of these "prescribed countries" are based on similar principles. For these countries, recognition is highly predictable. For non-prescribed countries, in contrast, the Australian legislation requires a discretionary approach and provides no guidelines for the exercise of this discretion. This appears to render the outcome much less predictable.

As a general point, the mandatory approach recognition may be preferable where the act of recognition is distinct from acts giving effect to recognition, for example the granting of enforcement orders or otherwise providing assistance with respect to the FIP.

Access

What procedures should be employed to obtain recognition? There are three principal methods:

(i) through formal diplomatic channels. This is seldom fast enough and is not considered further here.

(ii) through the judicial process. This requires a request to be made to the court of State B, in some states via a letter of request or similar instrument issued by a court of

State A. This latter requirement provides a useful filter and a measure of reassurance to the court of State B that the proceedings are properly founded and that the request is necessary. The judicial process is considered by some to offer greater protection, speed, efficiency and certainty. Direct contact of this type between courts would typically require an agreement between the States involved.

(iii) through the statutory reciprocity approach. This comprises filing a prescribed form with a relevant administrative agency, or filing a judgment or order with the relevant court. Recognition follows and may be used to base proceedings, though some judicial or quasi-judicial process will be needed for assistance. Existing legislation which provides for this approach (including exequatur statutes) could be improved by adding, where necessary, provisions which recognise the distinct nature of collective insolvency proceedings.

Judicial cooperation

(i) *Ad hoc protocol*

The International Bar Association is currently developing a model for ad hoc protocols of the kind noted at paragraph 27 of the main paper, in the form of a "Cross-Border Insolvency Concordat". The purpose of the Concordat is to suggest rules that the parties or courts could adopt to deal with issues such as designation of the administrative forum, application of that forum's priority rules, rules for cases in which there is more than one administrative forum, and designation of applicable rules for avoidance of transfers of assets which took place in the period preceding the insolvency.

(ii) *Judicial communication*

Communications between judges may be very helpful for the purpose of enabling them to obtain accurate information and to coordinate their actions, proceedings and orders. However, communications of this kind can be problematic in legal systems not accustomed to such initiatives, and may raise concerns in relation to procedural safeguards for the parties. It may help to give parties:

- notice of a forthcoming communication;
- the right to be present during the communication;
- a record of the communication;
- the right to agree to communication through a third party intermediary.

(iii) *Co-operation between administrators*

Cooperation would be enhanced if administrators appointed in a FIP and in a secondary insolvency proceeding had a duty to communicate any information which may be relevant to the other proceeding (subject to necessary limits imposed by eg confidentiality requirements and by the duties of the administrator).

RECOGNITION/ASSISTANCE PROVISIONS: SELECTED STATUTES

AUSTRALIA

DIVISION 9[1] - CO-OPERATION BETWEEN AUSTRALIAN AND FOREIGN COURTS IN EXTERNAL ADMINISTRATION MATTERS

Interpretation

580 In this Division:

"external administration matter" means a matter relating to:
- (a) winding up, under this Chapter, a company or a Part 5.7 body;
- (b) winding up, outside Australia, a body corporate or a Part 5.7 body; or
- (c) the insolvency of a body corporate or of a Part 5.7 body;

"prescribed country" means:
- (a) a country prescribed for the purposes of this definition; or
- (b) a colony, overseas territory or protectorate of a country so prescribed.

Courts to act in aid of each other

581 (1) **[Courts having jurisdiction under local Corporations Law]** All courts having jurisdiction in matters arising under the Corporations Law of this jurisdiction, the Judges of those courts and the officers of, or under the control of, those courts must severally act in aid of, and to be auxiliary to,
- (a) each other; and
- (b) all courts having jurisdiction in matters arising under corresponding laws, the Judges of those courts and the officers of, or under the control of, those courts; in all external administration matters.

581 (2) **[Where excluded Territories and prescribed and other countries]** In all external administration matters, the Court:
- (a) shall act in aid of, and be auxiliary to, the courts of the excluded Territories, and of prescribed countries, that have jurisdiction in external administration matters; and
- (b) may act in aid of, and be auxiliary to, the courts of other countries that have jurisdiction in external administration matters.

581 (3) **[Powers upon court's request for aid]** Where a letter of request from a court of an excluded Territory, or of a country other than Australia, requesting aid in an external administration matter is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

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[1]Corporations Law

581 (4) [Power to request a court's aid] The Court may request a court of an excluded Territory, or of a country other than Australia, that has jurisdiction in external administration matters to act in aid of, and be auxiliary to, it in an external administration matter.

SECTION 29[2] COURTS TO ACT IN AID OF EACH OTHER

29(1) [All Courts with jurisdiction] All Courts having jurisdiction under this Act, the Judges of those Courts and the officers of or under the control of those Courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy.

29(2) [Aid to external Territories, other countries] In all matters of bankruptcy, the Court

(a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and
(b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

29(3) [Request for aid] Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

29(4) [Court may request aid] The Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in bankruptcy to act in aid of and be auxiliary to it in any matter of bankruptcy.

29(5) ["Prescribed Country"] In this section, "prescribed country" means -
(a) the United Kingdom, Canada and New Zealand;
(b) a country prescribed for the purposes of this subsection; and
(c) a colony, overseas territory or protectorate of a country specified in paragraph (a) or of a country so prescribed.

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[2]Bankruptcy Act

UNITED KINGDOM

426.[1] Co-operation between courts exercising jurisdiction in relation to insolvency

(1) An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part.

(2) However, without prejudice to the following provisions of this section, nothing in subsection (1) requires a court in any part of the United Kingdom to enforce, in relation to property situated in that part, any order made by a court in any other part of the United Kingdom.

(3) The Secretary of State, with the concurrence in relation to property situated in England and Wales of the Lord Chancellor, may by order make provision for securing that a trustee or assignee under the insolvency law of any part of the United Kingdom has, with such modifications as may be specified in the order, the same rights in relation to any property situated in another part of the United Kingdom as he would have in the corresponding circumstances if he were a trustee or assignee under the insolvency law of that other part.

(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.

(6) Where a person who is a trustee or assignee under the insolvency law of any part of the United Kingdom claims property situated in any other part of the United Kingdom (whether by virtue of an order under subsection (3) or otherwise), the submission of that claim to the court exercising jurisdiction in relation to insolvency law in that other part shall be treated in the same manner as a request made by a court for the purpose of subsection (4).

(7) Section 38 of the Criminal Law Act 1977 (execution of warrant of arrest throughout the United Kingdom) applies to a warrant which, in exercise of any jurisdiction in relation to insolvency law, is issued in any part of the United Kingdom for the arrest of a person as it applies to a warrant issued in that part of the United Kingdom for the arrest of a person charged with an offence.

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[1]Insolvency Act 1986

(8) Without prejudice to any power to make rules of court, any power to make provision by subordinate legislation for the purpose of giving effect in relation to companies or individuals to the insolvency law of any part of the United Kingdom includes power to make provision for the purpose of giving effect in that part to any provision made by or under the preceding provisions of this section.

(9) An order under subsection (3) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

(10) In this section "insolvency law" means –

(a) in relation to England and Wales, provision made by or under this Act or sections 6 to 10, 12, 15, 19(c) and 20 (with Schedule 1) of the Company Directors Disqualification Act 1986 and extending to England and Wales.

(b) in relation to Scotland, provision extending to Scotland and made by or under this Act, sections 6 to 10, 12, 15, 19(c) and 20 (with Schedule 1) of the Company Directors Disqualification Act 1986, Part XVIII of the Companies Act or the Bankruptcy (Scotland) Act 1985;

(c) in relation to Northern Ireland, provision made by or under the Insolvency (Northern Ireland) Order 1989 or Pt. II of the Companies (Northern Ireland) Order 1989;

(d) in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to provisions falling within any of the foregoing paragraphs;

and references in this subsection to any enactment include, in relation to any time before the coming into force of that enactment the corresponding enactment in force at that time.

(11) In this section "relevant country or territory" means –

(a) any of the Channel Islands or the Isle of Man, or

(b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument.

(12) In the application of this section to Northern Ireland –

(a) for any reference to the Secretary of State there is substituted a reference to the Department of Economic Development in Northern Ireland;

(b) in subsection (3) for the words "another part of the United Kingdom" and the words "that other part" there is substituted the words "Northern Ireland";

(c) for subsection (9) there is substituted the following subsection –

"(9) An order made under subsection (3) by the Department of Economic Development in Northern Ireland shall be a statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 and shall be subject to negative resolution within the meaning of section 41(6) of the Interpretation Act (Northern Ireland) 1954".

UNITED STATES

§ 101.[1] Definitions

(23) "foreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

(24) "foreign representative" means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding.

§ 304. Cases ancillary to foreign proceedings

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may -

(1) enjoin the commencement or continuation of -

(A) any action against -

(i) a debtor with respect to property involved in such foreign proceeding;

or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with -

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[1]United States Bankruptcy Code (title 11 of the United States Code)

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity;-and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if -

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2) (A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

§ 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303, 304, or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303, 304, or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

INTELLECTUAL PROPERTY RIGHTS
THE LEGAL IMPLICATIONS OF THE AGREEMENT ON TRADE AND INTELLECTUAL PROPERTY RIGHTS ARISING FROM THE CONCLUSION OF THE URUGUAY ROUND

LEGAL ISSUES ARISING FROM THE URUGUAY ROUND AGREEMENTS

A Paper by the Commonwealth Secretariat

I. INTRODUCTION

PURPOSE AND SCOPE OF THE PAPER

1. The purpose of this paper is to inquire whether Commonwealth states need any assistance, and if so what kind of assistance, in addressing the legal issues presented by the collection of multilateral and plurilateral agreements which comprises the results of the Uruguay Round (UR).

2. This need is likely to vary from state to state. For some, it seems clear that no assistance at all is needed. However, there is a perception that for many others, the UR Agreements - which fill several hundred pages of carefully drafted text and cover a diverse range of highly technical subject matter - may present considerable legal problems. This paper tests that perception.

3. To assist Ministers in their deliberations, two objectives are pursued here. The first is to identify the types of legal issues and problems which the Agreements, taken as a whole, appear to present. These are outlined in paragraph 5 below and returned to in more detail in Part IV of the paper. The second objective - necessarily modest in light of the subject matter - is to alert Ministers to the scope and nature of these agreements by outlining, in a highly selective manner, *some of* the key obligations imposed by *some of* the agreements. This is addressed in Parts II and III. (It is important to emphasise that states wishing to assess with precision their legal rights and obligations under the Agreements covered should not rely on these outlines).

THE URUGUAY ROUND AGREEMENTS: OVERVIEW

4. The UR Agreements are a collection of multilateral conventions concluded between states. They are the fruit of seven years of negotiations which have transformed the international trading system and the framework of public international law which underlies it. A new body, the World Trade Organisation (WTO), has replaced the regime which had lasted since 1948 under the aegis of the General Agreement on Tariffs and Trade (the GATT, which had come to refer both to the Agreement concluded in 1947 and to the informally-constituted body which administered it). Further, the UR Agreements expand the regulation of international trade far beyond trade in goods. Thus, obligations and rights of various kinds are now created for states in respect of certain trade-related aspects of intellectual property rights, services and investment.

THE LEGAL ISSUES: INTRODUCTORY NOTE

5. The UR Agreements comprise therefore a revolution in the legal framework regulating international trade which legal advisers in the public and private sectors cannot afford to ignore. The implications for Law Ministers are very significant because the agreements:

- are the source of numerous binding commitments in international law, compliance with which will require a wide range of actions at the national level;
- are likely in many cases to require revision and redrafting of national laws as one aspect of that compliance;
- are of a length and complexity which will require, on occasion, specialist legal advice in the interpretation of a state's exact rights and obligations. These skills will also be an essential component of:
- effective representation in the ongoing negotiation of trade issues
- the proactive use of the trade opportunities which the Agreements present; and
- provide for a greatly improved dispute resolution procedure. States which are unable to exploit these improvements effectively, both as a sword and as a shield, will suffer a severe disadvantage in access to justice.

6. These points are elaborated upon in Part IV, after Ministers have had the chance to consider the outline of key agreements which is provided in Parts II and III.

TO WHOM SHOULD THIS PAPER BE ADDRESSED?

7. A response is also sought to a very important practical question: is this an area which comes within the ambit of the Office of the

Attorney-General/Ministry of Justice in each State? If not, to whom should this inquiry be directed?

STRUCTURE OF THE PAPER

8. The remainder of the paper will:

- In Part II, outline the content of the Marrakesh Agreement Establishing the World Trade Organisation (more commonly referred to as the WTO Agreement). This will summarise the WTO's structure and functions and help to provide an overview of the UR Agreements as a whole.

- In Part III, list the UR Agreements and provide a brief introduction to the background and content of a selection of these agreements. A more detailed analysis of each agreement in this selection is contained in Appendices IV-IX.

- In Part IV, discuss in more depth the legal issues presented by the UR agreements, touched on in paragraph 5 above.

- In Part V, note some of the evolving trade issues which will continue to be on the negotiating agenda, in particular issues concerning trade and the environment.

- In Part VI, suggest tentatively some of the ways in which legal assistance could be provided to member states.

II. MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANISATION

OVERVIEW

9. Article II of the Marrakesh Agreement Establishing the World Trade Organisation (the WTO Agreement) states that the WTO "shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the [four] Annexes to this Agreement."

10. The agreements and associated legal instruments ("the agreements") located under these four Annexes, listed (minus most of the associated legal instruments) at paragraph 26 below, run to several hundred pages. Article II deems the first three Annexes, which comprise the multilateral agreements, to be integral parts of the WTO Agreement and states that these agreements are to bind all members. Thus it is not possible to accede to the WTO Agreement and then to pick and choose between the multilateral agreements - they are a unity. However this is not the case regarding the plurilateral trade agreements, listed under the fourth Annex, which will only be part of the WTO Agreement and create rights or obligations for those members who accept them.

11. The entire bundle of agreements is sometimes referred to, incorrectly, as "the GATT 1994". However, this conceals their scope and diversity. In fact, as can be seen from paragraph 26, the GATT 1994 (comprising the GATT 1947 as elaborated upon by several understandings and agreements reached in the Uruguay Round) is only one of many agreements. For the purposes of this paper, the collection of agreements will continue to be referred to as "the UR Agreements".[1]

FUNCTIONS AND STRUCTURE OF THE WTO

Functions

12. Article III of the WTO Agreement defines five functions for the WTO:

- to facilitate the implementation, administration and operation of the Multilateral Trade Agreements and the Plurilateral Trade Agreements;

- to provide a forum for negotiations among Members concerning their multilateral trade relations;

- to administer the Dispute Settlement Understanding (the DSU);

- to administer the Trade Policy Review Mechanism;

- to co-operate, as appropriate, with the International Monetary Fund (IMF) and with the World Bank and its affiliated agencies.

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1. These agreements are collated in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts*, GATT Secretariat, Geneva, 1994; viii + 558pp. Publications produced by the GATT or its successor the WTO can be obtained from: World Trade Organisation, Publications Services, Centre William Rappard, Rue de Lausanne 154, CH-1211 Geneva, SWITZERLAND, Fax: (022) 739 54 58, Tel: (022) 739 52 08.

The last three of these functions are elaborated upon in paragraphs 13-18.

Dispute settlement understanding

13. The Understanding on Rules and Procedures Governing the Settlement of Disputes (or the DSU as it is more conveniently known), contained in Annex 2 to the WTO Agreement, builds on and fundamentally improves dispute resolution procedures contained in the GATT 1947. Appendix I outlines the scope and procedures of the DSU.[2]

14. The strengthening of the dispute resolution procedures is probably good news for countries which lack the "muscle" to bring pressure to bear in other ways. However, developing countries will continue to face some basic limitations. For example, it is necessary to collect extensive information to support complex legal arguments and, in the event of a favourable outcome for the complainant, authorised retaliatory measures are unlikely in some cases to do the complainant much good.[3]

Trade Policy Review Mechanism

15. The Trade Policy Review Mechanism (TPRM) is contained in Annex 3 to the WTO Agreement. Its objectives are to contribute to improved adherence to WTO rules through greater transparency and to examine the impact of trade practices and policies of members on the multilateral trading system.

16. To fulfil these objectives, the Trade Policy Review Body (TPRB) will carry out periodic reviews of the trade policies and practices of members and to this end a member is required to prepare a report (with technical assistance from the WTO Secretariat available to developing and least-developed countries). The Secretariat will also produce its own report. When the review is completed, both reports are to be published along with the minutes of the TPRB meeting which convenes to consider them (TPRM paragraphs C and D).

17. The TPRM emphasises that its purpose is *not* to serve as a basis to enforce legal obligations (TPRM paragraph A) and the TPRM does not explicitly require scrutiny of a member's trade practice and policy for compliance with those obligations. However, nor is the legal dimension excluded and legal skills may be of use when a state is assessing compliance with WTO rules.

Co-operation with the IMF and World Bank

18. The IMF's mandate is to provide short-term financing to countries which are confronting balance of payments problems, while the World Bank attempts to mobilise resources to alleviate poverty in, and to assist the sustainable development of, low-income countries. Trade and financial or macroeconomic policies are often linked. For example, protectionist trade measures might be tempting to alleviate balance of payment problems. Enhanced co-operation between the IMF, World Bank and the WTO is therefore important to ensure the greater consistency and compatibility of their activities.[4] It suffices here to note the overlap in functions and to suggest that a basic understanding of the legal obligations imposed and rights conferred by membership of the IMF and the World Bank may on occasion be an important component of comprehensive legal advice on trade issues.

STRUCTURE AND VOTING

19. In contrast to the GATT, which had come to refer both to the General Agreement itself and to the Secretariat which had administered it, the WTO will have legal personality and the formal structure reproduced in diagram form as Appendix II. The WTO Agreement accords privileges and immunities to the WTO, its officials and representatives of the members similar to those stipulated in the United Nations Convention on the Privileges and Immunities of the Specialised Agencies 1947 (Article VIII), which may require enabling legislation in some states.

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2 The DSU, and the various dispute resolution provisions to be found distributed throughout the agreements, are collated in *The WTO Dispute Settlement Procedures: A Collection of the Legal Texts*, WTO, Geneva 1995; xxi + 95pp.

3 Jackson, J.H., Davey, W.J., and Sykes, A.O., *Legal Problems of International Economic Relations: Cases, Materials and Text* 3ed, West Publishing Co., St Paul 1995; lvii + 1248pp; 346-348.

4 Hoekman, B. & Kostecki M., *The Political Economy of the World Trading System: From GATT to WTO* Oxford University Press, Oxford 1995; xvii + 301pp; 51-52.

20. Most decision-making in the WTO will continue to be by consensus, with recourse to voting as a fall-back measure. Each member has one vote. However, majorities ranging from two-thirds to unanimity are required for certain decisions (WTO Agreement Articles IX, X). One commentator suggests that the consensus approach may enhance the negotiating leverage of smaller countries, and that their efficacy will depend on the quality of their delegation. "Bargaining to achieve consensus lies at the heart of both multilateral trade negotiations and the functioning of the system."[5]

MEMBERSHIP AND ACCESSION

Original members

21. Article XI of the WTO Agreement states that the contracting parties to GATT 1947 as of the date of entry into force of the WTO Agreement, and the European Communities, can become "original Members" of the WTO by:

- accepting the WTO Agreement and the Multilateral Trade Agreements; and
- annexing Schedules of Commitments required under GATT 1994 and the General Agreement on Trade in Services.

Accession

22. Any state or separate customs union territory possessing full autonomy in commercial relations (and which cannot become an "original member" on the terms explained above) may accede to the WTO Agreement (and thus the multilateral trade agreements) on terms to be agreed between it and the WTO. The Ministerial Conference is given the power to approve accession by a two-thirds majority of the existing WTO members. Accession to a Plurilateral Trade agreement, in contrast, will be on the terms provided for in that Agreement (Article XII).

23. In practical terms Article XII means that countries wishing to join the WTO must negotiate their membership with existing WTO members through the accession procedure.

24. Appendix III records membership of the WTO as of 17 November 1995.

5 ibid., pp 40-41.

SPECIAL POSITION OF LEAST-DEVELOPED COUNTRIES

25. Least-developed countries recognised as such by the United Nations "will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities."(Article XI:2).

III. THE MULTILATERAL TRADE AGREEMENTS

OVERVIEW

26. The following lists the agreements found under Annexes 1-4 of the WTO Agreement (referred to in paragraphs 9 to 11 above) to give some idea of their scope and diversity:

Multilateral Trade Agreements

- General Agreement on Tariffs and Trade 1994
- Agreement on Agriculture
- Agreement on the Application of Sanitary and Phyto-Sanitary Measures
- Agreement on Textiles and Clothing
- Agreement on Technical Barriers to Trade
- Agreement on Trade-Related Investment Measures
- Agreement on Implementation of Article VI of the GATT 1994
- Agreement on Implementation of Article VII of the GATT 1994
- Agreement on Pre-shipment Inspection
- Agreement on Rules of Origin
- Agreement on Import Licensing Procedures
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards
- General Agreement on Trade in Services
- Agreement on Trade-Related Aspects of Intellectual Property Rights
- Understanding on Rules and Procedures Governing the Settling of Disputes
- Trade Policy Review Mechanism

Plurilateral Trade Agreements

- Agreement on Trade in Civil Aircraft
- Agreement on Government Procurement
- International Dairy Agreements
- International Bovine Meat Agreement

27. Omitted from these lists are a series of "understandings" reached in respect of various articles of the GATT 1994, which come within the

multilateral framework and have the same legal standing as the agreements so called. The plurilateral trade agreements are noted for completeness only and receive no further consideration in this paper.

BRIEF INTRODUCTION TO SELECTED MULTILATERAL AGREEMENTS

28. Paragraphs 30 to 40 provide a brief introduction to key agreements selected from the multilateral agreements listed above. These are the GATT 1994, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the General Agreement on Trade in Services (GATS), the Agreement on Textiles and Clothing, the Agreement on Agriculture, and the Agreement on Trade Related Investment Measures (TRIMs).

29. Fuller core information, under the headings "application" and "obligations", is given in respect of each of these agreements in Appendices IV - IX. (A little more detail is given in respect of the GATT 1994 and TRIPS). Each agreement covered below refers to the relevant Appendix which elaborates upon it. The purpose of this format is to make the paper, which covers a lot of ground, more readable.

GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (APPENDIX IV)

30. The purposes of the GATT 1994, which comprises the GATT 1947 as elaborated upon by several understandings and agreements reached in the Uruguay Round, are to liberalise world trade and to place this trade on a stable rule-based footing.[6] Key obligations include the following:

- to impose tariffs on goods no higher than those agreed to and recorded in tariff schedules;
- to treat other WTO members no less favourably than it treats any other country with respect to any regulation of imports and exports ("most-favoured-nation (MFN)" treatment);
- to treat foreign goods no worse than domestic goods once the goods have cleared customs ("national treatment"); and
- not to impose "quantitative restrictions", in other words prohibitions or restrictions on imports or exports other than duties, taxes, or other charges.

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (APPENDIX V)

31. The particular concern which has been expressed in relation to TRIPS merits a more detailed introduction than that received by other agreements in this section.

Background

32. To a large extent intellectual property rights (IPRs) - patents, trade marks, copyright, know how, plant breeders' rights etc. - have, in the industrialised countries, replaced fixed assets as the real economic value of companies. IPRs have become a *'trade* issue because trade in goods containing an IP element has increased substantially in recent years, and a number of industrialised countries have felt that inadequate protection of IP in technology importing countries has eroded their competitive advantage.[7] Developing countries, on the other hand, have been keenly aware of the increased costs which could arise from greater IP protection - not just in relation to (for example) computer software, but also to basics such as food and medicine. TRIPS greatly enhances global IP protection and appears to be a major achievement for industrialised countries, but should also be seen in the context of trade-offs and bargaining across the full range of the UR Agreements. There is also an argument that foreign companies will be happier to invest in countries which confer stronger IP protection.

Key obligations

33. TRIPS imposes three general obligations:

- minimum standards: to give effect to the level of IP protection provided for in the agreement as a minimum level - it is open to any country to provide greater protection;
- national treatment: countries must, with regard to the protection of IP, protect nationals of other countries by treating them no less favourably than they treat their own nationals; and

6 A primary reference text for the practitioner is *Analytical Index: Guide to GATT Law and Practice* GATT Secretariat, Geneva, 1994.

7 Hoekman & Kostecki, above note 4, p 146.

- most-favoured-nation treatment: with regard to the protection of IP, any advantage granted by a Member to the nationals of any other country must be accorded immediately and unconditionally to the nationals of all other Members.

Legal issues: the experience of one developing Commonwealth state

34. The principal legal task will be to review and assess existing national legislation and, if necessary, to amend intellectual property law and enforcement procedures to comply with the new standards. In this context it is worth noting the experience of one Commonwealth state, a developing country, which is in the middle of this exercise. Its intellectual property statute law has been based chiefly on United Kingdom legislation enacted around the middle of the century (the Copyright Act 1956, Trade Marks Act 1938, Patents Act 1949, Registered Designs Act 1949) but has tended not to keep pace with the UK reforms of that legislation. For example, it appears that there has been no protection granted for plant breeders' rights, seed varieties, or semi-conductor chips. As regards the common law, actions such as injurious falsehood and passing continue to be available.

35. Having acceded to the Berne Convention and the Paris Convention, this state was entitled to technical assistance from the World Intellectual Property Organisation (WIPO). The Draft Industrial Property Act prepared by WIPO envisaged a wholesale replacement of the state's law in this area. A consultant's report on this Draft, commissioned by the Secretariat, questioned the necessity for this in respect of a state which already had in place a legal regime which, though in need of improvement, was adequate and effective. It was suggested that provisions taken from a civil law system may be inappropriate and difficult to apply in the context of a legal system based in the common law tradition. States may wish to consider whether it would be useful to draft a Model Law rooted in the common law system.

36. Member states in the Caribbean region may also, in the context of possible accession to or partial membership of the North American Free Trade Agreement (NAFTA), be requested to observe and implement certain IPRs. Care should be taken. Any rights granted in excess of those required by TRIPS will have to be extended, under the MFN principle in TRIPS, to all other WTO members. Further, there is a danger of incorporating, wholesale, provisions which have been drafted from a different legal conceptual basis (in this case, United States law).

GENERAL AGREEMENT ON TRADE IN SERVICES (APPENDIX VI)

37. "Modern economies are service economies...An efficient service sector is a precondition for economic development".[8] The services sector, which includes such diverse activities as tourism, telecommunications, education and banking, accounts for over sixty percent of GDP in OECD countries and in 1993 accounted for 22.2 percent of global trade ($US930 billion).[9] The GATS provides, for the first time, a framework of multilateral rules to regulate certain international trade aspects of this sector. Key obligations include the following:

- with respect to any measure covered by the agreement, to accord MFN treatment immediately and unconditionally to services and service suppliers of any other Member;

- to specify in a schedule its "market access commitments" - i.e. the market sectors to which access will be permitted in respect of services supplied from the territory of another Member - and the terms of this access; and

- to accord national treatment to services and service suppliers of any other Members in respect to all measures affecting the supply of services.

AGREEMENT ON TEXTILES AND CLOTHING (APPENDIX VII)

38. Along with agriculture, textiles and clothing has been a major sector which in practice has fallen outside of the GATT. Instead, four successive Multifibre Arrangements (MFAs) have since 1974 regulated bilaterally agreed quantitative restrictions or unilaterally imposed restraints on the export of a growing range of fabrics and textiles. The Agreement on Textiles and Clothing will phase out MFA-IV and gradually bring trade in this area within the GATT 1994 over a ten year period (1995-2004). Key obligations include the following:

- to remove all quantitative restrictions provided for in bilateral agreements under the MFA on fixed percentages of the 1990 total volume of

8 ibid p 127.

9 idem.

imports in accordance with a graduated schedule over a ten year period; and

- to increase quotas over the same period, again in graduated fashion.

AGREEMENT ON AGRICULTURE (APPENDIX VIII)

39. Agriculture has remained one of the most heavily protected areas of trade since the inception of the GATT 1947. The application of GATT disciplines comprises a considerable achievement, though their initial effect is likely to be modest. Key obligations include the following:

- to change non-tariff border measures into tariffs;
- to reduce tariffs by an average of 36 per cent (developed countries) and 24 per cent (developing countries) over 5 years. All existing and new tariffs are bound;
- to reduce domestic production support to agriculture; and
- to reduce export subsidies by 36 per cent in value and 21 per cent in volume from a 1986-90 base period average. Export subsidies are bound, as are tariffs.

AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (APPENDIX IX)

40. One commentator describes the TRIMs Agreement as "a modest first step" towards developing an integrated framework addressing policies affecting both trade and investment in goods and services.[10] A TRIM is an attempt by a government to place conditions on a company that wishes to operate within its borders. These may be positive, including investment incentives to move to the country in question, or negative, for example a requirement that an investor use locally produced goods in its manufacturing process or a restriction on access to foreign exchange for the purchase of imports.[11] Key obligations include the following:

- not to apply any TRIM inconsistent with the national treatment and quantitative restriction obligations in the GATT 1994; and
- to eliminate all TRIMs inconsistent with the agreement within 2 years of the entry into force of the WTO Agreement (developed countries), 5 years (developing country) or 7 years (least developed countries).

IV. LEGAL ISSUES

41. The following elaborates upon the outline of legal issues provided in paragraph 5, above, by identifying a need for legal skills in respect of six separate types of activities.

(a) Legal interpretation

42. Competent application of legal skills will often be essential to a state wishing to ascertain its precise legal rights and duties under the agreements. The complexity, length and interrelationship of many of these agreements mandates the same careful, thorough and precise analysis which the lawyer applies to national legislation. Generally worded obligations are frequently honey-combed with exceptions and qualifications. Key phrases are frequently ambiguous and have been interpreted, in the case of the GATT 1994 itself, by a series of panel decisions which comprises an authoritative (though not binding) body of jurisprudence.[12] The international lawyer will also be aware of relevant sources of law existing outside of the agreements themselves, for example other international conventions (including the Vienna Convention on the Law of Treaties 1969) and customary international law.[13]

(b) Legislative drafting

43. Implementation of many of the obligations imposed by the agreements will require revision of and amendment to national legislation, as required by Article XVI:4 of the WTO Agreement. (This is one reason why a precise determination of what these obligations are is regarded as essential).

(c) Exploiting the agreements

10 Hoekman & Kostecki, above note 4, p 121.

11 Evans P & Walsh J., *The EU Guide to the New GATT*, The Economist Intelligence Unit, London 1994; v+ 136pp; 32.

12 These are usefully summarised in Pescatore, Davey and Lowenfeld *Handbook of GATT/WTO Dispute Settlement* Kluwer, 1991 (looseleaf).

13 See for example Seidl-Hohenveldern, I., *International Economic Law* 2ed., Martinus Nijhoff Publishers, Dordrecht 1992 xii + 286pp.

44. Legal advice could play a key role in exploiting fully the trading advantages and opportunities which various of the agreements offer to those states which understand them thoroughly and in detail.

(d) Dispute settlement and access to justice

45. As noted at paragraphs 13 to 14 above, the rules governing the settlement of disputes have been greatly improved and can be invoked in a range of circumstances under each of the agreements. Legal skills may be essential both to detect violations and to challenge them through a skilled use of the dispute procedures. States may also on occasion need to defend themselves against challenges of a similar nature.

(e) Participation in the WTO and trade negotiation

46. Negotiation within the WTO framework will be ongoing in respect of international trade issues yet to be resolved. Some of these issues are discussed in Part V. Legal advisers may have a role to play in the formulation of, and commentary on, new rules. An understanding of the detail, interrelationship and purpose of the agreements will be integral to competent advice on the effect and desirability of a reform (though here as elsewhere the lawyer's role overlaps with that of other advisers). Legal advice may also have a contribution to make in relation to participation in the WTO voting/consensus system, noted above at paragraphs 19 to 20.

(f) Compliance with transparency requirements

47. Many of the agreements require notification and publication by members of the national laws, regulations, and judicial and administrative decisions relevant to the subject matter of those agreements. There may be a call for legal skills in the necessary editing and compilation, and in the interpretation of the compliance requirements themselves.

V. EVOLVING ISSUES

GENERAL

48. Ongoing review and negotiation is built into most of the agreements. Further, there are many multilateral trade issues which the agreements have only begun to address or have not addressed at all, and which are likely to be the subject of future negotiation. Examples are the multilateral regulation of competition policy, anti-dumping policy, labour standards and environmental protection[14] (the last of which merits separate discussion, under the next heading).

ENVIRONMENT

Environmental conditionality for joining the WTO?

49. While the WTO Agreement preamble includes sustainable development and environmental protection among its objectives, the agreement does not explicitly impose any environmental conditionality for states wishing to join the WTO. Instead, there is an implicit recognition within the WTO Agreements that national environmental policies are matters that fall within the discretion of governments, as long as these policies are applied in a way that does not infringe these agreements. Thus, Article XX(b) of the GATT 1994 exempts from the GATT obligations those measures necessary to protect human, animal or plant life or health, so long as they are applied in a non-discriminatory way.

The relationship between the WTO Agreements and Environmental Conventions

50. The growing nexus between international trade and environmental protection has created tension between the goals and objectives of those concerned with environmental protection and those interested in preserving free trade.

51. The environmental community believes that the use of trade restrictions in environmental conventions is a necessary ingredient in protecting the environment, while free-traders see the imposition of environmental requirements in trade agreements merely as "green barriers" which are disruptive to the liberalisation of global trade.

52. Trade restrictions have long been used to promote domestic environmental interests and have appeared in recent years in international agreements. Of the 127 multilateral agreements in the area of the environment, 17 contain a variety of restrictive trade provisions.[15]

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14 Hoekman & Kostecki, above note 4, Ch 11.

15 Caldwell, D.J., "International Environmental Agreements and the GATT: An Analysis of the Potential Conflict and the Role of the GATT "Waiver" Resolution" 18 *Journal of*

53. Examples of such global environmental conventions include the Basel Convention on the Control and Transboundary Movements of Hazardous Wastes and Their Disposal 1989, The Montreal Protocol on Substances that Deplete the Ozone Layer 1987, and The Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973. These conventions specify different trade measures affecting parties and non-parties - they require parties to apply more restrictive trade provisions to non-parties than to parties. Such environmental agreements would appear to run counter to the underlying principle of non-discrimination in the WTO Agreements.

54. This raises a number of significant questions. How can states continue to implement their international obligations under multilateral environmental agreements (which contain restrictive trade measures) and at the same time comply with the WTO trade rules? This inquiry needs to be distinguished from the closely related (and more frequently discussed) issue of how the WTO will regard efforts by individual states or unilateral action to enforce domestic environmental standards against other members of the international community.[16]

55. Obviously there is a need to ensure the compatibility of the principles of free trade espoused under the WTO trade agreements with the national environmental standards adopted by states in implementation of environmental conventions. These are questions which are becoming more and more prominent and must be addressed sooner or later, whether or not states are considering membership of the WTO. In this context, it is worth noting that Ministers agreed in the course of the UR to establish a committee on Trade and Environment to consider the types of issues which have been touched on above (Decision on Trade and the Environment, Marrakesh April 1994). This committee is open to all members of the WTO.

International Law and Trade (1994) 177.

[16] The unilateral action by the United States in banning the import of Mexican tuna to the United States on the grounds that the production methods used by Mexico did not comply with the environmental standards of the United States, which lead to the famous *Tuna/Dolphin* case (*United States: Restrictions on Imports of Tuna from Mexico* 39th Supp. BISD (1993)), is a classic example.

VI. LEGAL ASSISTANCE

56. Ministers are requested to consider what kind of legal assistance they need (if any), and in what particular areas. Modes of assistance which the Secretariat could promote and co-ordinate include the following:

(a) Educational workshops

57. Regional workshops could be convened for the purpose of capacity-building in areas of specialist legal knowledge. Due to the scope of the UR Agreements, it is likely that a given workshop would need to focus on one area or on a small number of areas. Thus there may be a particular demand for a workshop outlining the precise obligations imposed by the TRIPS agreement, for the purpose of assisting legal advisers to review national IP laws. An alternative or additional approach - one which would require considerable resources - would be to prepare a draft model law for Commonwealth states in this area.

(b) Technical assistance

58. There may be a need for specialist relatively long term legal assistance to individual members. This could arise in relation to any of the six areas discussed in Part IV.

(c) Newsletter/bulletin

59. A bulletin keeping members up to date with relevant developments could be very useful. This could complement the role played by *WTO Focus,* the official newsletter produced by the WTO ten times a year.

(e) Co-ordination and liaison with international organisations

60. The Secretariat is currently developing the necessary links with the large number of international organisations working in the field and is exploring actively the possibilities of offering joint and co-ordinated assistance. For example, there is a possibility that the Secretariat could work with the African Regional Industrial Property Organisation in bringing education and assistance to the African region.

March 1996

DISPUTE SETTLEMENT UNDERSTANDING

APPLICATION

- to all the multilateral and plurilateral trade agreements (DSU Appendix, Appendix 2 lists those of the covered agreements which contain additional rules and procedures). It will no longer be possible for Members to choose between a number of alternative forums.

KEY STAGES IN A GATT/WTO DISPUTE SETTLEMENT PROCEEDING

A leading commentary summarises the following key stages and procedures[17]:

1. As a first step, *consultation* is required under Article XXIII of the GATT 1994 itself. The DSU provides rules for consultations and entitles the complaining party to request a panel if no settlement is reached within 60 days (DSU Article 4);

2. A parallel option of *good offices, conciliation and mediation* offered by the Director-General of the WTO is provided for (DSU Article 5);

3. If consultation fails, a complaining party is given the *right to have a panel established* and the Dispute Settlement Body (the DSB) is obliged to establish a panel unless there is a consensus to the contrary (which, of course, the complaining party can prevent) (DSU Article 6);

4. The WTO Director-General may then *appoint the panel members* if the parties cannot agree over their identity (DSU Article 8);

5. Standard *terms of reference* for the dispute are provided (DSU Article 7);

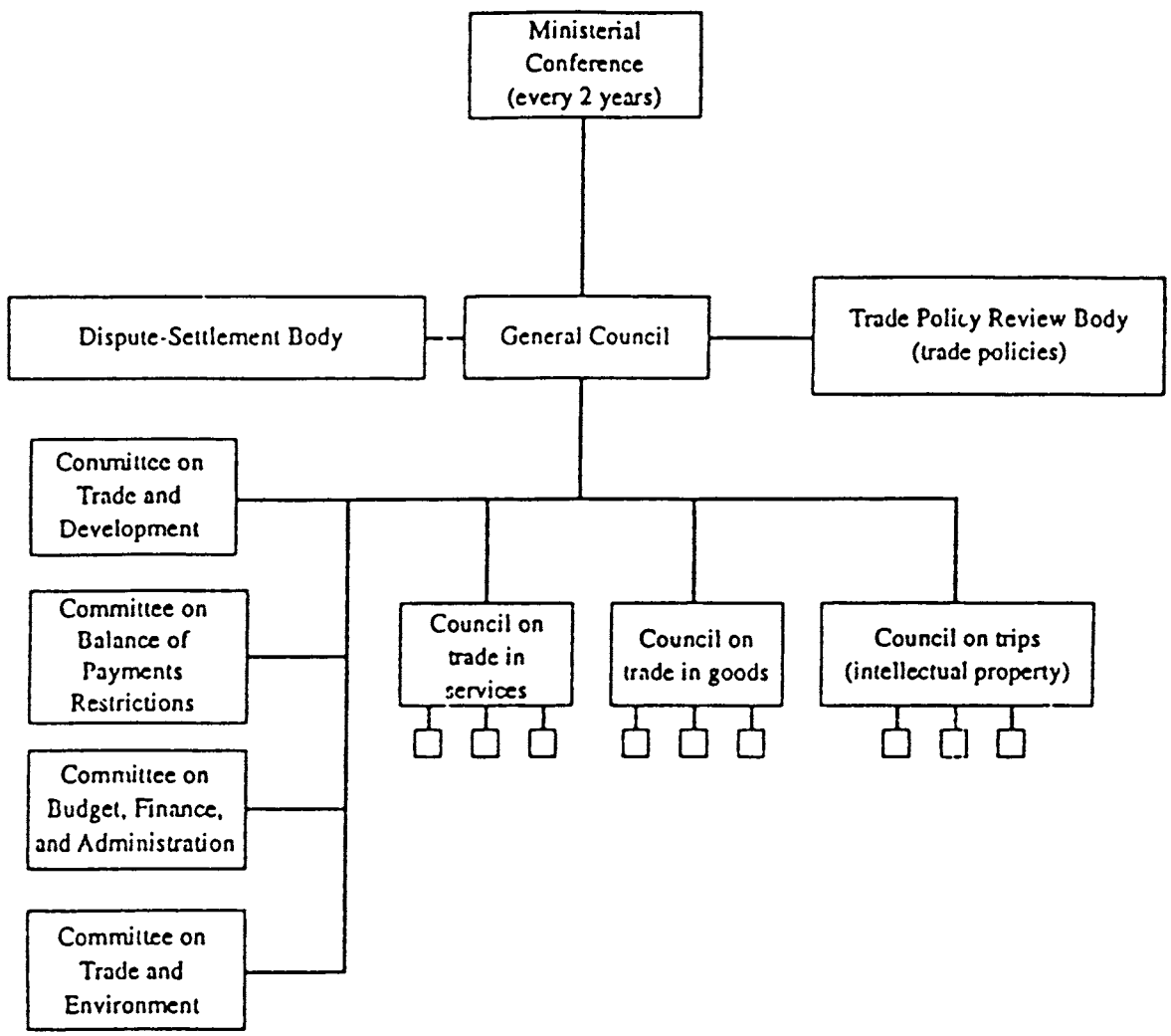
6. *Procedures for the hearing* regulate inter alia who may be heard, time limits for the various panel stages, and submission of the panel's draft report (including its legal analysis) for comment by the parties (DSU Article 15);

7. The DSB *shall adopt a panel report* unless there is a consensus not to adopt it or a party notifies its intention to appeal (DSU Article 16);

8. On notification of intention to appeal, the DSB creates a *standing Appellate Body* which is limited to considering issues of law covered in the panel report. The appellate proceedings are not to exceed 90 days and its report shall be adopted in the absence of consensus to the contrary (DSU Article 17);

9. The losing respondent must indicate what action it plans to take to implement a panel recommendation, and the DSB will monitor whether it carries out this action. While the DSU provides that withdrawal of a measure inconsistent with the party's GATT obligations is preferable, compensation and suspension of concessions remain available as remedies if the panel recommendations are not implemented. The DSB will authorise suspension automatically (absent a consensus to the contrary) if there has been no implementation or compensation (DSU Article 21).

STRUCTURE OF THE WTO



Source: WTO

MEMBERSHIP OF THE WORLD TRADE ORGANISATION

The following 112 Governments have accepted the Marrakesh Agreement Establishing the World Trade Organisation. Their membership in the World Trade Organisation is effective as of the dates indicated.

Government	Entry into Force/ Membership
Antigua and Barbuda	1 January 1995
Argentina	1 January 1995
Australia	1 January 1995
Austria	1 January 1995
Bahrain	1 January 1995
Bangladesh	1 January 1995
Barbados	1 January 1995
Belgium	1 January 1995
Belize	1 January 1995
Bolivia	13 September 1995
Botswana	31 May 1995—
Brazil	1 January 1995
Brunei Darussalam	1 January 1995
Burkina Faso	3 June 1995
Burundi	23 July 1995
Cameroon	13 December 1995
Canada	1 January 1995
Central African Republic	31 May 1995
Chile	1 January 1995
Colombia	30 April 1995
Costa Rica	1 January 1995
Côte d'Ivoire	1 January 1995
Cuba	20 April 1995
Cyprus	30 July 1995
Czech Republic	1 January 1995
Denmark	1 January 1995
Djibouti	31 May 1995
Dominica	1 January 1995
Dominican Republic	9 March 1995
Egypt	30 June 1995
El Salvador	7 May 1995
European Community	1 January 1995
Finland	1 January 1995
France	1 January 1995
Gabon	1 January 1995
Germany	1 January 1995

Government	Entry into Force/ Membership
Ghana	1 January 1995
Greece	1 January 1995
Guatemala	21 July 1995
Guinea Bissau	31 May 1995
Guinea, Rep. of	25 October 1995
Guyana	1 January 1995
Honduras	1 January 1995
Hong Kong	1 January 1995
Hungary	1 January 1995
Iceland	1 January 1995
India	1 January 1995
Indonesia	1 January 1995
Ireland	1 January 1995
Israel	21 April 1995
Italy	1 January 1995
Jamaica	9 March 1995
Japan	1 January 1995
Kenya	1 January 1995
Korea	1 January 1995
Kuwait	1 January 1995
Lesotho	31 May 1995
Liechtenstein	1 September 1995
Luxembourg	1 January 1995
Macau	1 January 1995
Madagascar	17 November 1995
Malawi	31 May 1995
Malaysia	1 January 1995
Maldives	31 May 1995
Mali	31 May 1995
Malta	1 January 1995
Mauritania	31 May 1995
Mauritius	1 January 1995
Mexico	1 January 1995
Morocco	1 January 1995
Mozambique	26 August 1995
Myanmar	1 January 1995
Namibia	1 January 1995
Netherlands - For the Kingdom in Europe and for the Netherlands Antilles	1 January 1995
New Zealand	1 January 1995
Nicaragua	3 September 1995
Nigeria	1 January 1995
Norway	1 January 1995
Pakistan	1 January 1995
Paraguay	1 January 1995
Peru	1 January 1995
Philippines	1 January 1995
Poland	1 July 1995
Portugal	1 January 1995

Government	Entry into Force/ Membership
Romania	1 January 1995
Saint Lucia	1 January 1995
Saint Vincent & the Grenadines	1 January 1995
Senegal	1 January 1995
Sierra Leone	23 July 1995
Singapore	1 January 1995
Slovak Republic	1 January 1995
Slovenia	30 July 1995
South Africa	1 January 1995
Spain	1 January 1995
Sri Lanka	1 January 1995
Suriname	1 January 1995
Swaziland	1 January 1995
Sweden	1 January 1995
Switzerland	1 July 1995
Tanzania	1 January 1995
Thailand	1 January 1995
Togo	31 May 1995
Trinidad and Tobago	1 March 1995
Tunisia	29 March 1995
Turkey	26 March 1995
Uganda	1 January 1995
United Kingdom	1 January 1995
United States	1 January 1995
Uruguay	1 January 1995
Venezuela	1 January 1995
Zambia	1 January 1995
Zimbabwe	3 March 1995

Source: WTO

GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

APPLICATION

- to trade in *goods*.

OBLIGATIONS

- to observe limits which have been agreed on the tariffs which may be imposed on imported products (Article II; a condition of WTO membership is to submit an Article II Schedule: WTO Agreement Articles XI and XIV);

- not to discriminate against the trade of other parties. This has two aspects:

  - each member must grant to every other member the most favourable treatment which it grants to any country with respect to any regulation of imports and exports (the MFN obligation in Article I). "Regulation" would include the levying of customs duties;

  - once the goods have cleared customs, each party must treat foreign goods equally to domestic goods ("national treatment" - Article III);

  - to implement prescribed valuation principles in respect of all products subject to restriction by reference to value (e.g. ad valorem customs duties) (Article VII; see also Agreement on Implementation of Article VII of the GATT 1994);

  - to accord to other parties, in respect of marks of origin marking requirements, treatment no less favourable than that accorded to like products of any third country (Article IX; see also Agreement on Rules of Origin);

  - to limit fees and expenses (other than domestic taxes and import and export duties) imposed in connection with export and import to the level of services rendered (Article VIII);

  - not to impose "quantitative restrictions", in other words prohibitions or restrictions on imports or exports other than duties, taxes, or other charges. Examples of prohibited "quantitative restrictions" would be quotas or import licenses (Article XI; the Agreement on Import Licensing Procedures is relevant in this regard). There are substantial exceptions to this rule, but in taking advantage of them a party may not apply quantitative restrictions in a discriminatory fashion (Article XIII). However, there are exceptions even to this!; and

  - to publish trade regulations and judicial and administrative decisions pertaining to specified trade related matters; to administer these regulations and decisions in a uniform, impartial and reasonable manner; to maintain or institute independent judicial, arbitrative or administrative tribunals for the purpose of the prompt review of administrative action relating to customs matters (Article X).

The foundational nature of the GATT merits consideration, in addition to the above, of some of the rights created by this agreement and of some of the many exceptions to the obligations imposed by it. (This analysis is not given in respect of other agreements discussed elsewhere. This does not mean that these agreements do not create rights and exceptions, but rather that these important aspects have been omitted for the sake of brevity).

RIGHTS

- to levy on "dumped" products - namely, those products introduced into the commerce of the importing country at less than their normal value - an anti-dumping duty not greater than the margin of dumping (Article VI);

- alternatively to levy a "countervailing duty" to offset the estimated subsidy granted on the manufacture or export of a product in the country of origin or export (Article VI). However, before it can impose a duty, a country must determine that the dumping or subsidy will cause or threaten "material injury" to an established domestic industry (the "injury test"). Dumping and subsidies are the subject of two further agreements, respectively the Agreement on Implementation of Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing

Measures. While subsidies are not prohibited per se by the GATT itself (Article XVI), the latter agreement does define certain prohibited subsidies and provides specific remedies.

EXCEPTIONS

Exceptions to various of these obligations are numerous: waivers voted under Article XXV, balance of payments exceptions allowing use of quotas (Articles XII-XV), exemption from the MFN obligation for customs unions and free trade areas (Article XXIV), general exemption when emergency action is required to protect a domestic producer (Article XIX), general exceptions (Article XX), national security (Article XXI), the renegotiation procedures for tariff concessions (Article XXVIII), and the provision which permits a prior member or a new member to "opt-out" of a GATT relationship with the other when the new member enters the GATT (Article XXXV). Various of the Understandings found in Annex 1A to the WTO Agreement are relevant to various of these exceptions.

There are also specific provisions throughout the GATT which relax certain obligations for developing countries under particular circumstances (including Article XVIII and Part IV). More generally, the preferential trading regimes devised under the General System of Preferences (GSP) - for example the Lomé Conventions - comprise crucial exceptions from the strictures of the GATT for many Commonwealth states. The legal basis of the GSP continues to be the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, assented to by the contracting parties of the GATT in 1979. There is no set expiry date to this Decision. Members do however commit themselves to "collaborate in arrangements for review of the operation of [the Decision]" (Decision, paragraph 9). The legal force of this Decision continues under the GATT 1994 (see Annex IA to the WTO Agreement, GATT 1994 paragraph 1(b)(iv)). Members, in the Decision on Measures in Favour of Least-Developed Countries (agreed on as part of the UR), reaffirm their commitment to implement fully certain provisions of the 1979 Decision concerning least-developed countries.

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

APPLICATION

- to all categories of intellectual property that are the subject of Sections 1 to 7 of Part II of the agreement (see below under the heading "Rights") (Article 1:2); and

- members must accord the protection provided for in the agreement to the "nationals" of other Members, i.e. those legal or natural persons who would be eligible for protection under the Paris Convention (1967), Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits (Article 1:3).

OBLIGATIONS

General

To comply with three general obligations:

- minimum standards: to give effect to the level of IP protection provided for in the agreement as a minimum level; it is open to any country to provide greater protection (Article 1);

- national treatment: countries must, with regard to the protection of IP, protect nationals (carefully defined in Article 1:3) of other countries by treating them no less favourably than they treat their own nationals (Article 3); and

- most-favoured-nation treatment: with regard to the protection of IP, any advantage granted by a Member to the nationals of any other country must be accorded immediately and unconditionally to the nationals of all other Members (Article 4).

Rights

Copyright

- to comply with the Berne Convention for the Protection of Literary and Artistic Works in its latest version (Paris 1971). However, parties are not obliged to protect moral rights as required by Article 6*bis* of the Berne Convention (Article 9);

- to protect computer programmes as literary works under the Berne Convention 1971 (Article 10:1);

- to protect databases by copyright (subject to certain conditions) (Article 10:2);

- to provide a rental right for the owners of rights in films, sound recordings, phonograms and computer programmes; thus going beyond what is required in the Berne Convention (Articles 11 and 14);

- to protect performers from unauthorised recordings and broadcasting of live performances (bootlegging) (Article 14);

- to provide a minimum term of 50 years for performers' rights and rights in sound recordings (Article 14); and
- to give broadcasting organisations control over the use of broadcast signals for a minimum of 20 years (Article 14).

Trade Marks and Service Marks

- to confer on registered trade mark owners exclusive rights to the use in the course of trade of similar or identical signs, where this would result in a likelihood of confusion. Well-known marks should be given additional protection.(Article 16). Protectable subject matter capable of constituting a trademark is defined in Article 15;

- to confer a term of protection on initial registration of a minimum of seven years, renewable indefinitely (Article 18); and

- to regulate the use of trade marks and their licensing and assignment in accordance with Articles 19-21;

Geographical Indications

- to accord protection to geographical indications to prevent (i) deception of the public as to place of origin and (ii) unfair competition (Article 22).

Industrial Designs

- to provide for the protection of independently created industrial designs that are new or original (as defined) (Article 25). More specifically, the owner of a protected industrial

design shall have the right for a minimum of ten years to protect designs against manufacture, sale or importation of articles bearing or embodying a copy of that design, when such acts are undertaken for commercial purposes (Articles 25-26).

Patents

- to make patents available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Plant varieties are to be patentable or protected by an effective sui generis system, or a combination (Article 27);

- to confer on the patent owner the exclusive rights to prevent third parties not having the owner's consent from making, using, offering for sale, selling or importing for these purposes a product or, where the subject matter is a process, the product obtained directly by that process (Article 28). The term of protection is 20 years (Article 33);

- to permit the following exclusions from patentability (Article 27):

  - diagnostic and therapeutic methods for the treatment of humans or animals;
  - plants and animals (other than micro-organisms); and
  - biological processes for the production of plants and animals

- to comply with detailed provisions laid down for compulsory licensing (Article 31); and

- to provide for judicial review of a decision to revoke or forfeit a patent (Article 32).

Layout Designs (Topographies) of Integrated Circuits

- to provide protection to the layout-designs (topographies) of integrated circuits, in accordance inter alia with certain provisions of the Washington Treaty on Intellectual Property in respect of Integrated Circuits (Article 35);

- to confer protection for a minimum of ten years from date of registration or first commercial exploitation (Article 38);

- to render unlawful the importing, selling, or distribution for commercial purposes of a protected layout-design, or an integrated circuit in which a protected layout-design is incorporated (Article 36);

- to permit innocent infringers to use or sell stock obtained or ordered before learning of infringement, upon payment of a suitable royalty (Article 37); and

- to permit compulsory licensing on the basis of adequate remuneration for parties (Article 37, incorporating Article 31);

Trade Secrets

- to protect trade secrets and know-how which has a commercial value against breach of confidence and other acts contrary to honest commercial practices (Article 39); and

- to protect test data concerning marketing approvals for pharmaceutical or agricultural chemicals against unfair commercial use (Article 39).

Anti-Competitive Practices in Contractual Licenses

- to consult on request with any other Member which has cause to believe that a national or domiciliary of the requested Member is violating the requesting Member's laws regulating anti-competitive aspects of contractual licensing practices or conditions pertaining to IPRs (Article 40).

ENFORCEMENT

- to provide procedures and remedies to ensure intellectual property rights are effectively enforced. These should be fair and equitable, not unnecessarily complicated or costly, and should not entail unreasonable time limits or unwarranted delays. Judicial review of administrative decisions should also be provided (Article 41);

- to confer on judicial authorities the authority to, inter alia (Articles 44-50):

  - order injunctions;
  - award damages and expenses;
  - order the disposal or destruction of infringing goods; and
  - order prompt and effective provisional measures, in particular where any delay is likely to cause irreparable harm to the right holder, or where evidence is likely to be destroyed;

- to provide for measures which can be taken at the border by customs authorities to suspend release into domestic circulation of counterfeit and pirated goods (Article 51); and

- to provide criminal procedures and penalties in cases of (at the least) wilful counterfeiting or piracy on a commercial scale. Remedies should be effective deterrents (Article 61).

DISPUTE PREVENTION AND SETTLEMENT

- to publish, or make publicly available, national laws, regulations, final judicial decisions and administrative rulings pertaining to the subject matter of the agreement, and to notify the same to the Council for TRIPS (Article 63); and

- to comply with the Dispute Settlement Understanding procedures as applied to this agreement (Article 64).

TIME SCALE FOR IMPLEMENTATION OF THE AGREEMENT

An extended transition period (five years for developing countries, ten for least developed countries) is provided to implement the agreement. Developing countries have an additional five years to extend the agreed level of patent protection to areas of technology not so protectable after the first five years (Article 65). However, developing and least developed countries:

- must accept the filing of pharmaceutical and agrochemical applications for patents from the beginning of the transitional period. The invention is protected from the date of filing, though the patent need not be granted until the end of this period (Article 70); and

- may not delay implementation of Articles 3, 4 and 5 more than one year following the date of entry into force of the Agreement Establishing the World Trade Organisation (WTO). These three provisions provide for national treatment, most favoured nation treatment and multilateral agreements on the acquisition of intellectual property concluded under the auspices of the World Intellectual Property Organisation (Article 65).

GENERAL AGREEMENT ON TRADE IN SERVICES

APPLICATION

- to measures by Members affecting "trade in services", defined in Article I as the supply of a service;
- from the territory of one Member into the territory of another Member;
- in the territory of one Member to the service consumer of any other Member (e.g. tourism);
- by a service supplier of one Member, through commercial presence in the territory of any other Member (e.g. banking); or
- by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member

OBLIGATIONS

Part II defines general obligations and disciplines, which include the following:

- with respect to any measure covered by the agreement, to accord MFN treatment immediately and unconditionally to services and service suppliers of any other Member. However, a Member may maintain a measure inconsistent with this obligation if it is listed in a specified Schedule. Measures of this kind are expected to contain a built-in termination date. Those which are to last more than 5 years are reviewable by the Council for Trade in Services (Article II, Annex on Article II Exemptions);
- to publish all measures relevant to the operation of the agreement, including international agreements to which the Member is a signatory, to report the same to the Council for Trade in Services, to respond to requests for information by other Members and to establish inquiry points for this latter purpose (Article III);
- where specific commitments are undertaken (Part III), to administer fairly measures which affect trade in services (Article VI.1);
- to provide judicial, arbitral or administrative tribunals or procedures which provide for prompt review and appropriate remedies in respect of administrative decisions affecting trade in services (Article VI.2);
- to report to the Council for Trade in Services on the taking of certain measures mandated or permitted under the agreement (e.g. under Articles VII, VIII, X);
- to ensure that a monopoly supplier of a service in its territory does not act in a manner inconsistent with the Member's obligations under Article II (MFN treatment, above) and with its specific commitments (Article XVI, below); and
- except in limited circumstances, not to restrict international payments and transfers for current transactions relating to specific commitments (Article XII).

Part III defines the following "specific commitments":

- to specify in a schedule its "market access commitments" - i.e. the market sectors to which access will be permitted through the modes of supply defined in Article I (see above), and the terms of this access. A Member has a very wide discretion to define these commitments, but must accord to services and service suppliers of any other Member treatment no less favourable than these commitments once they are placed in the Schedule (Article XVI). Article XX lists those matters which a Schedule must specify. A Member which modifies or withdraws a commitment may be liable to pay compensation to an affected Member or Members (Article XXI); and
- to accord national treatment to services and service suppliers of any other Members in respect of all measures affecting the supply of services. This is limited to the sectors inscribed in the Schedule (as compiled pursuant to Article XVI) and is subject to any conditions and qualifications contained therein (Article XVII).

Part IV commits Members to successive rounds of negotiations to achieve a progressively higher level of liberalisation. These rounds are to begin within the next four years.

These obligations must be read in the context of the numerous exceptions and qualifications found in the main body of the agreement and in the 5 sector-specific annexes (covering movement of natural persons, air transport services, financial services, maritime transport services and telecommunications). For example, the MFN, market access and national treatment obligations do not apply to regulations governing the procurement by government agencies of services purchased for governmental purposes and not with a view to commercial use (Article XIII).

AGREEMENT ON TEXTILES AND CLOTHING

APPLICATION

- to the textiles and clothing products set out in the Annex to the Agreement, which is lengthy and highly detailed. Products falling outside of the Annex will be regulated by the GATT 1994, under which bound MFN tariff rates remain substantially higher than the average for industrial products generally.[18]

OBLIGATIONS

- to notify all restrictions provided for in bilateral agreements under the MFA to the Textiles Monitoring Board and to remove them on fixed percentages of the 1990 total volume of imports in accordance with a graduated schedule: 16% when the Agreement comes into force, 17% within 3 years, and so on until all products specified in the Annex are fully integrated into the GATT 1994 (Article 2);

- to increase quotas over the same ten year period, again in graduated fashion (Article 2); and

- to establish the necessary legal provisions and administrative procedures to address circumvention of the Agreement by means of transhipment, re-routing, false declaration concerning country or place of origin, falsification of official documents (Article 5).

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[18] Trebilcock, M.J., and Howse, R. The Regulation of International Trade, Routledge, London 1995; 510pp; 325.

AGREEMENT ON AGRICULTURE

APPLICATION

- to the agricultural products listed in Annex I of the Agreement.

OBLIGATIONS

Market Access

- to tariff non-tariff border measures (NTBMs) (Article 4); and
- to reduce tariffs by an average of 36% (developed countries) and 24% (developing countries) over 5 years. All existing and new tariffs are bound.

Domestic Support

- to reduce domestic production support to agriculture (as measured by an Aggregate Measure of Support - (the AMS), defined in Article 1) by 20% by the year 2000 (relative to a 1986-88 base period) (Article 6, Annex 3); and
- to list the base-period AMS and the Final Bound Commitment Level in a Schedule. All these levels are bound (Articles 6, Annex 3).

Export Subsidies

- to reduce export subsidies by 36% in value and 21% in volume from a 1986-90 base period average. Export subsidies are bound, as are tariffs (Article 9); and
- not to use export subsidies at all except for agricultural goods subject to reduction commitments. (Article 8).

General

- to give effect to the Agreement on the Application of Sanitary and Phytosanitary Measures (Article 14).

The Agreement is quite complex and these obligations are subject to a range of exceptions and qualifications. The regime is more lenient for developing countries. For example, they need only reduce tariffs, support and export subsidies by two-thirds of the levels above, and have ten years to implement the Agreement.

AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES

APPLICATION

- to investment measures related to trade in goods (Article 1).

OBLIGATIONS

- not to apply any TRIM inconsistent with the national treatment and quantitative restriction obligations in Articles III and XI respectively of the GATT 1994 (Article 2; the Annex provides an "illustrative list" of inconsistent TRIMs). All relevant exceptions under the GATT 1994 will apply to these obligations. In particular, developing countries shall be free to deviate temporarily from the provisions of Article 2 to the extent permitted by, inter alia, Article XVIII of the GATT 1994 (Articles 3 and 4);

- to notify the Council for Trade in Goods of all TRIMs inconsistent with this Agreement within 90 days of the entry into force of the WTO Agreement, and to eliminate the same within 2 years of the same date (developed countries), 5 years (developing country) or 7 years (least developed countries). During the transition period, a Member may not increase the degree of inconsistency of any notified TRIM, but may apply it to a new investment under defined circumstances (Article 5); and

- to notify the WTO of the publications in which TRIMs may be found (Article 6).

Again, these obligations must be read carefully in the context of a range of qualifications and exceptions.

CANADA'S IMPLEMENTATION OF THE TRIPS AGREEMENT

A Paper by the Department of Justice, Canada

1. The purpose of this report is to provide a brief history of Canada's legislative implementation of the TRIPS Agreement, which is part of Canada's obligations as a member of the World Trade Organization.

URUGUAY ROUND

2. The Uruguay Round[1] established the World Trade Organization (WTO) and replaced the "old" GATT[2] as the common institutional framework for the conduct of trade relations between member states. The *Agreement on Trade-Related Aspects of Intellectual Property Rights*, or as it is more commonly known, "TRIPS", can be found in Annex 1A to the WTO Agreement and is part of a single undertaking which becomes binding upon WTO members when they join that Organization.

3. Intellectual Property Rights (IPRs) were not part of the GATT prior to the Uruguay Round. However, the major economic powers considered them to be necessary for the business certainty required for investment decisions in foreign markets. The United States was particularly concerned with the software, sound recording and pharmaceutical industries; Japan, with the semiconductor industry; and the European Community, with geographical indications for wines and spirits. Thus, effective and adequate protection and enforcement of IPRs became a major objective of the TRIPS Agreement.

4. Moreover, the TRIPS Agreement has achieved what traditional IPR conventions had been unable to do in more than a century, i.e. implementation of IPR protection on an almost global basis. For example, the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention), which was originally signed in 1886 by 10 countries, required until 1988 to reach a membership of 77 countries. By way of contrast, the TRIPS Agreement (which incorporates by reference the substantive provisions of the Berne Convention), was negotiated in eight years and counts 124 countries[3] as its members.

TRIPS AGREEMENT

5. The TRIPS Agreement is divided into seven parts: general provisions and basic principles; standards concerning the availability, scope and use of intellectual property rights; enforcement of IPRs; acquisition and maintenance of IPRs and related inter-partes procedures; dispute prevention and settlement; transitional arrangements; and institutional arrangements/final provisions. Canada was already in compliance with many of these provisions, as a result of the North American Free Trade Agreement (NAFTA). The principal changes for Canadian legislation were for geographical indications for wines and spirits (TRIPS, articles 23 and 24) and copyright, including article 18 of the Berne Convention (dealing with retrospective copyright protection) and TRIPS, article 14, (dealing with neighbouring rights).

NAFTA

6. In December, 1991, in an effort to bring closure to the GATT Uruguay Round, Arthur Dunkel, the then Director-General of the GATT, proposed a *Draft Final Act*[4], which included the TRIPS Agreement in a form which varied only slightly from the final text signed at Marrakesh. Much of the Dunkel text was included in the text of

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1 *The Final Act of the Uruguay Round and the Marrakesh Agreement Establishing the World Trade Organization* (April 12 - 15, 1994).

2 *General Agreement on Tariffs and Trade*. One of the annexes to the new Marrakesh Agreement Establishing the World Trade Organization is the *General Agreement on Tariffs and Trade, 1994*. In an organizational sense, the World Trade Organization replaces the *General Agreement on Tariffs and Trade, 1947*, but the substantive obligations of that GATT, 1947 agreement survive in the form of the GATT, 1994 agreement.

3 including the European Community

4 *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (Annex III)*, GATT Doc. MTN.TNC/W/FA (December 20, 1991). In Daniel, Al J., Jr. "Intellectual Property in the Uruguay Round: the Dunkel Draft and a Comparison of United States Intellectual Property Rights, Remedies and Border Measures." *International Law and Politics*, Vol. 25, p. 751.

the NAFTA[5] and subsequently implemented through the NAFTA implementation legislation.

7. Thus, through the NAFTA implementation bill[6], the *Copyright Act* was amended so as to extend protection to works "resulting from the selection or arrangement of data" (TRIPS, article 10(2); NAFTA, article 1705(1)(b)); a rental right was provided for computer programmes and cinematographic works (TRIPS, article 11; NAFTA, article 1705(2)(d)); and border measures were added for the importation of works which infringed copyright (TRIPS, article 51; NAFTA, article 1718). The *Patent Act* was amended to bind the Crown, and conditions were imposed upon the Crown's use of patented technologies (TRIPS, article 31; NAFTA, article 1709(10)). The *Trade-marks Act* was amended to repeal its registered user provisions and to make recognition of the use of a trademark by another person conditional only upon the control of the owner of that trademark (TRIPS, article 19(2); NAFTA, article 1708(9)). In addition, amendments were made to the *Fertilizers Act*, *Food and Drugs Act*, and *Pest Control Products Act* in order to deal with confidential information provided to government regulatory agencies (TRIPS, article 39; NAFTA, article 1711).

8. During the same period, Canada passed the *Patent Act Amendment Act, 1992*,[7] which repealed compulsory licensing provisions for pharmaceutical products, thereby ensuring that patent rights would be "enjoyable without discrimination as to ...the field of technology" (TRIPS, article 27(1); cf. NAFTA, article 1709(1)).

GEOGRAPHICAL INDICATIONS

9. Articles 23 and 24 of the TRIPS Agreement deal with geographical indications for wines and spirits and, in effect, allow the co-existence of the current European system of *appellations contrôlées*[8] and the American system of labelling regulations administered by the Bureau of Alcohol, Tobacco and Firearms (BATF) of the United States Department of Commerce[9].

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5 *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America* (17 December, 1992)

6 *An Act to implelment the North American Free Trade Agreement*, Bill C-115, assented to 23 June, 1993

7 Bill C-91 (December 10, 1992).

8 Under the French system of categorizing wine, regulations have been developed over most of the course of the 20th Century for geographical-based *appellations contrôlées*. These regulations prescribe the grape varieties, agricultural and wine-making methods, and yields which must be followed in each zone which is authorized to use an *appellation contrôlée*. (See Robinson, J. *Oxford Companion to Wine*, p. 40-42). The French system was used as a model for European Community wine legislation, (wherein the term "quality wine" is used rather than *appellation contrôlée*), which requires member states to regulate the following factors: demarcation of the areas of production; vine varieties; cultivation methods; wine-making methods; minimum natural alcoholic strength by volume; yield per hectare; analysis and assessment of organoleptic (i.e., colour, clarity, smell and taste) characteristics. (See *Council Regulation (EEC) no. 823/87 of 16 March 1987*, as amended).

9 In the United States, subsection. 205(e) of the Federal Administration Act, 27 U.S.C., provides, in general terms, that wine labels shall not contain any statement that is false, deceptive, misleading, or likely to mislead the consumer regarding the product. In addition, that subsection authorizes the Secretary of Commerce to prescribe regulations that will provide the consumer with adequate information as to the identity and quality of the product. In 1938, the Secretary enacted the wine labelling regulations (27 CFR Part 4) for the use of designations having geographic significance, i.e., designations which are associated with wine produced in a specific geographic area. These designations were divided into three categories: (a) generic (for designations for specific kinds of wine which no longer have geographic significance, e.g., Vermouth); (b) semi-generic (for designations which may only be used for wines of the origin indicated in those designations, e.g., names of foreign states, counties, and wine-growing regions and viticultural areas, such as Rheingau, Muscat de Frontignac and Piemonte). The regulations also included lists for each category and a sub-list for (d) non-generic designations which were known to American consumers and trade as the designation of a specific wine of a particular place or region (e.g., Deidesheimer, Schloss Johannisberger, Chateau Lafitte, Chateau d'Yquem, Asti Spumante and Lacryma Christi). In 1983, the BATF undertook to expand the "c" and "d" lists, but this would have meant adding another 2,113 names to the "c" list and another 618 to the "d" list.

10. In respect of Canada, Annex 313 of the NAFTA already imposed an obligation to respect four names - Bourbon Whiskey, Tennessee Whiskey, Tequila and Mezcal - as distinctive products of the United States and Mexico respectively. These and other names, including several European designations (Scotch Whiskey, Irish Whiskey, Armagnac and Cognac) were contained in Division 2, Part B, of the *Food and Drug Regulations*. However, the above regulation is limited to a relatively small number of designations. To deal with geographical indications more generally, it was felt that IPR protection could best be assured through amendments to the *Trade-marks Act*.

11. Thus, section 11.12 was added for the purpose of creating a list of protected geographical indications (LPGI), to be kept by the Registrar of Trade-marks. Proposals for additions to the LPGI will be published in the Canada Gazette. Section 11.13 provides for an objection procedure for those additions. In practice, objections will be heard by the Trade-marks Opposition Board, and the sole ground for objection will be that the proposed addition is not a geographical indication within the meaning of the Act. Sections 11.14 and 11.15 prevent the adoption or use, as a trademark, of any name on the LPGI. Section 11.16 is an exception provision which allows for the use of a protected geographical indication in comparative advertising, other than on labels or packaging. Section 11.17 is a "grandfather" provision, which allows for the continued use of previously used geographical indications (as allowed by TRIPS, article 24(4)). Section 11.18 provides an exception (as per TRIPS, article 24(6)) for indications which are "identical with a term customary in common language in Canada as the common name for the wine or spirit" and includes a statutory list of "generic" indications for wines[10] and spirits[11]. This list may be amended from time to time by the Governor in Council. Section 12 was amended to prevent the registration, as a trademark, of a protected geographical indication for wines or spirits not associated with the territory of that geographical indication.

12. In terms of domestic Canadian geographical indications, a committee of the Canadian General Standards Board has been established to define the boundaries of Canada's wine-making regions and to prescribe the oenological practices and technical and labelling requirements for wines produced in Canada.

COPYRIGHT

13. The TRIPS Agreement[12] obliges member states to comply with the substantive provisions[13] of the Berne Convention[14], other than for moral rights[15], and to give national treatment to nationals of other WTO members in accordance with the connecting factors contained in the Convention[16]. Thus, Canada amended the definition of "treaty country" in its *Copyright Act* to include, in addition to members of the Berne Convention and the Universal Copyright Convention, WTO members as well. (It also repealed its compulsory licensing provisions for book publishing, which had the effect of imposing greater obligations on Canadian authors and copyright owners than on nationals of other treaty countries).

14. Article 70 of the TRIPS Agreement, which deals with protection of existing subject matter, provides that "...copyright obligations with respect to existing works shall be solely determined under the Berne Convention (1971)...". In other words, the status of works which exist in each WTO member, as of the date of application of the TRIPS Agreement, is to be determined by applying the principle of article 18 of the Berne Convention.[17]

Hence, the lists in the regulations continue to be limited to examples of names by country.

10 Champagne, Port, Porto, Sherry, Chablis, Burgundy, Bourgogne, Rhine, Rhin, Sauterne, Sauternes, Claret, Bordeaux, Chianti, Madeira, Malaga, Marsala, Medoc, Médoc, Moselle, Mosel and Tokay.

11 Grappa, Marc, Ouzo, Sambuca, Geneva Gin, Genièvre, Hollands Gin, London Gin, Schnapps, Malt Whiskey, Eau-de-vie, Bitters, Anisette, Curacao and Curaçao.

12 TRIPS, article 9(1)

13 i.e., articles 1 through 21

14 TRIPS, article 2(2) makes clear that the Berne Convention obligation refers to the Paris Act, 1971, text of that Convention. Canada has, as of the date of this writing, signed the Convention at the Rome Act, 1928, level and has yet to sign the Paris Act, 1971.

15 article 6bis

16 TRIPS, article 1(3)

17 "(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term

This article ensures that works which had not fallen into the public domain (through effluxion of time) in a WTO member state in which copyright protection was claimed upon that state's accession to the TRIPS Agreement, would be protected. Prior to 1 January, 1996, Canada's copyright legislation was silent on this point, and it was thus uncertain whether copyright protection would be granted to foreign works retrospectively in Canada. (The United States, in adhering to the Berne Convention, enacted that its copyright legislation would not "provide copyright protection for any work that is in the public domain in the United States",[18] which was arguably a violation of article 18 of the Berne Convention, since effluxion of time was not the only way works could fall into the public domain in that country).[19] As part of TRIPS implementation, both Canada and the United States amended their legislation to extend copyright protection retrospectively. In Canada's case, subsection 5(1.01) was added, in order to provide retrospective protection for pre-existing subject matter for nationals of WTO member states, but it was limited by new subsection 5(1.02) so as not to apply to works which had fallen into the public domain in their country of origin (by reason of the expiry of their term of protection), and by section 29, which allowed the Copyright Board to fix compensation for a person who had previously entered into legal arrangements for the use of a work which, by the addition of subsection 5(1.01), infringed the rights of an author or copyright owner.[20] These compensation provisions were based on article 18(3) of the Berne Convention.[21]

15. Article 14 of TRIPS dealt with neighbouring rights,[22] the first paragraph thereof requiring protection for performers. In this connection, Canada amended its *Copyright Act* by altering the definition of "performance" so as to exclude performing artists[23] and by adding a definition of "performer's performance". Furthermore, section 14.01 was added to provide protection for performing artists against the unauthorized fixation or subsequent reproduction of their performer's performances in sound recordings and against the unauthorized broadcast of their live performer's performances. Section 28.02 was added to allow for certain exceptions to the new performer's right, such as fair dealing. Section 28.03 was added to allow the Copyright Board to fix compensation for a person who entered into legal arrangements for the use of a performer's performance which, by the addition of section 14.01, infringes the rights of a performer or owner of the performer's right. Section 43.1 was added to impose criminal sanctions against infringers of the new performer's right, and section 44.2 was added to allow for border measures against the importation of infringing copies of performer's performances. Moreover, subsection 14.01(4) of the Act provides retrospective protection for performer's performances (TRIPS, article 14(6) and 70(2)).

16. With respect to the remaining neighbouring rights provisions of TRIPS article 14, producers of sound recordings in Canada already received protection for their works, through subsection 5(3) of the *Copyright Act*, which deals with copyright in "records, perforated rolls and other contrivances by means of which sounds may be reproduced" (TRIPS, article 14(2)). As for "rebroadcasting works by wireless means and communication to the public of television broadcasts of same" (TRIPS,

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of protection."...

18 *Berne Convention Implementation Act 1988*, s. 12

19 See Ricketson, Sam. "U.S. Accession to Berne: An Outsider's Appreciation (Part 2)." *Intellectual Property Journal*, Vol. 8, December 1993, p. 87.

20 The United States passed the *Uruguay Round Agreements Act*, s. 514 of which restored copyright protection in the United States for certain foreign works which were in the public domain in the United States because of non-compliance with formalities, lack of national eligibility or lack of subject-matter in the case of sound recordings fixed before February 15, 1972. Owners of these restored copyrights have the option of registering their claims to copyright with the United States Copyright Office. Owners who intend to enforce their rights against parties already actively exploiting these works ("reliance parties") must file notice of intent to enforce with the Copyright Office or serve actual notice of that intent against the party using those works.

21 "...the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle."

22 i.e., rights of performers, producers of sound recordings and broadcasting organizations.

23 The concept of "performance" of a work already has a well-established meaning in copyright law, e.g., playing a situation comedy on a large-screen television set in a shopping mall.

article 14(3)), Canada already provided copyright owners the possibility of preventing those acts.[24]

MISCELLANEOUS MATTERS

17. In implementing TRIPS, Canada also made a number of minor, technical amendments to its IPR statutes. The definition of "country" in the *Patent Act* was amended to include WTO member states (with the effect of allowing priority claims from WTO members which are not members of the Paris Convention[25] (TRIPS, article 1(3))). A comparable amendment was also made to the *Industrial Design Act*. The *Patent Act* was also amended so as to limit the compulsory use by the Crown of semi-conductor technology to public non-commercial use (TRIPS, article 31). A similar amendment was made to the *Integrated Circuit Topography Act*, in respect of layout designs for integrated circuits (TRIPS, article 37), that Act was made binding upon the Crown, and the protection of that Act was extended to nationals of WTO member states (TRIPS, article 3(1)). The *Trade-marks Act* was amended to include WTO member states in the definition of "country of the union" (TRIPS, article 3(1)) and to allow for the expungement of a trademark after three years of non-use[26] (TRIPS, article 19).

CONCLUSION

18. Canada, as a developed country, was required to implement the TRIPS Agreement by 1 January, 1996. Article 1 of the TRIPS Agreement allows for a fair amount of flexibility in terms of how a WTO member may implement its TRIPS obligations.[27] Canada was fortunate enough to have a well-established intellectual property regime in its various IPR statutes. Moreover, it had a well-developed common law in the areas of passing off and trade secrets as well as the *Civil Code of Quebecc* provisions on trade secrecy[28] and unfair competition.[29] Canada also had the advantage of having made significant amendments to its legislation as part of its implementation of NAFTA. Thus, Canada adopted a strategy which was to make only such changes to its laws as were necessary for the reasonable and effective implementation of the TRIPS Agreement. It also treated IPRs as private rights of action, so that, as much as possible, the engine of the state would not become involved in settling essentially private disputes between parties, which was considered to be costly and unnecessary. In implementing the TRIPS Agreement, Canada was interested in similar implementation changes which were being made by its NAFTA partners, particularly the United States, to their legislation, and was sensitive to the consequences that any Canadian legislative change would have upon Canadian nationals and industries.

April 1996

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[24] *Copyright Act*, para. 3(1)(f), which gives the copyright owner the sole right "in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication".

[25] *Paris Convention for the Protection of Industrial Property.*

[26] The previous period was two years.

[27] "...Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

[28] articles 1472, 1612 and 2088

[29] art. 1457

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

REVIEW OF ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD

Memorandum by the Commonwealth Secretariat

INTRODUCTION

1. The period since the last meeting of Commonwealth Law Ministers held in Mauritius in 1993 has been a very eventful one. Senior Officials of Law Ministries met in Malta in May/June 1995 followed in September by a meeting in Namibia of the Law Officers of small Commonwealth jurisdictions both of which feed into the Law Ministers' Meeting and act as complementary channels through which legal developments and concerns in the public sector reach Ministers collectively. But in many ways the Commonwealth Heads of Government Meeting in New Zealand in November 1995 marked another watershed in the further development and advancement in the promotion of the Commonwealth's fundamental values. All these Meetings, culminating in New Zealand with more clearly defined measures for promoting and defending Commonwealth values, demonstrated the dynamic nature of the Commonwealth Association. Even by comparison with the high standards established at previous Meetings, the Senior Officials and Law Officers' Meetings were seen as part of the continuing process of improvement in the advancement of Commonwealth mutual legal co-operation.

2. Among the most momentous events of the period since the last Law Ministers' Meeting was the resumption by the Republic of South Africa of its membership of the Commonwealth Association. This was followed by its participation at the Malta meeting of Senior Officials where, with a great sense of history and achievement, the role that the Commonwealth had played in helping to resolve one of the most intractable human problems that has faced the international community this century was recalled. There, Senior Officials had the opportunity to add their welcome and to express their pleasure at the prospect of the participation of the Government and people of South Africa in all future meetings, activities and programmes.

3. It is also appropriate to record here the Secretariat's delight in the admission of two new members - Cameroon and Mozambique - to the Association thus bringing the total membership roll to 53. The Legal and Constitutional Affairs Division, for its part, has taken the earliest opportunity to initiate contact with the Ministers of Justice of the new and returning member countries and their officials. Although in the case of South Africa it would have been almost two full years since its return to the fold, Law Ministers will no doubt wish, at an appropriate stage of the proceedings, to express their own special welcome to their colleagues from the new South Africa, and to Cameroon and Mozambique on the occasion of their first participation at a Commonwealth Law Ministers' Meeting.

4. As this is his first Ministerial Meeting, it would be appropriate to take the opportunity to formally introduce Professor Reginald Austin who assumed office as Director of the Legal and Constitutional Affairs Division soon after the Mauritius Meeting. Within a relatively short time of assuming office, Professor Austin has caught the flavour of the legal Commonwealth to which he was not altogether a stranger. The Legal and Constitutional Affairs Division would like to express its gratitude for the warmth of the welcome that has been extended to him by those Ministers and their staff whom he has already had the privilege to meet.

5. It is once again a pleasure to record the presence at this Meeting not only of the Secretary General himself who, although not a lawyer, has always taken a keen interest in the work of the Division in his capacity as our former supervising Deputy Secretary General, but also of Mr Srinivasan who succeeded Sir Anthony Siaguru in office as Deputy Secretary General (Political) and now supervises, amongst others, the work of the Legal and Constitutional Affairs Division. It may be recalled that following the restructuring of the Secretariat and the introduction of a programme driven system of work, there is now more emphasis on a collegiate approach to the work of the Division in which the Deputy Secretary General (Political) plays a strategic role.

6. The period since the 1993 has, regrettably however, not been entirely without difficulties. The advances in democratisation associated with the happy return of South Africa and the admission to membership of both Cameroon and Mozambique at the New Zealand CHOGM, must be balanced against the Associations's agonising observation of events in Nigeria and its suspension from membership. One positive outcome of that unhappy event was the adoption by Commonwealth Heads of the Millbrook Commonwealth Action Programme designed to give

effect to the commitments contained in the Harare Commonwealth Declaration. The Action Programme includes measures to support processes and institutions needed for the practice of the Harare Principles, as well as measures to deal with violations of those Principles. The Harare Commonwealth Declaration and principles continue to be a focal point of Secretariat activities, particularly in the field of the promotion of good governance.

7. The Division continues to be guided in its work by a commitment to ensuring a free flow of information on legal developments throughout the Commonwealth and providing assistance, when sought, to governments and their organs so that they may benefit from the experiences of other jurisdictions. In some specialised areas such as combating and countering international crime, including money laundering; managerial reform and the management of electoral processes, the Secretariat has developed its own expertise which is deployed to assist governments in capacity building and in supporting and strengthening the democratic institutions of the state.

8. A regular feature of the Division's work is a steady flow of requests for information on a wide range of matters. Frequently, requests are for materials and precedents to assist proposed legislative reform. This review will cover the range of work arising from such requests and all the multi-faceted aspects of the Division's work including recent developments arising from new mandates and priorities set for the Division.

9. The role played by the regular meeting of Senior Officials in shaping the direction of the work of the Division continues to gain in significance. The working relationship between the Division and Senior Officials both in their individual capacities as Law Ministry officials and our primary "clients" and collectively as a forum for the exchange of professional experience and common consideration of concerns, mandated to be examined by Law Ministers, has similarly gained in significance. The Meeting held in Malta in May 1995 demonstrated how valuable and effective this forum has become in preparing the ground for Law Ministers' Meetings and in facilitating mutual legal co-operation generally. A report of that meeting has been circulated as paper **LMM(96)3**.

10. Two other parallel meetings where senior Commonwealth Law Officers traditionally discuss matters of special interest to small states and in which professional staff of the Division traditionally play an important role are the regular meetings of Law Officers of small Commonwealth jurisdictions (LOSJ) and, at the regional level, the Pacific Islands Law Officers (PILOM).

11. In September 1995, Namibia hosted the fifth pan-Commonwealth Meeting of Law Officers of small Commonwealth jurisdictions and similarly in October 1995, Vanuatu hosted the 14th Meeting of the Pacific Islands Law Officers.

12. The Division always stands ready to assist member states whenever requested to and will continue to do so.

PROVISION OF INFORMATION

Commonwealth Law Bulletin

13. Over the years and in many quarters, the *Commonwealth Law Bulletin* (the *Bulletin)* has come to be acknowledged as an instrument of practical use. To legal officers in Attorneys-General offices around the Commonwealth, to Ministries of Justice, judges, magistrates, law reform officers, legislative drafters, law teachers and legal practitioners alike, the Bulletin has symbolised a source book. It could thus be compared with the essential "up-dating" information provided to medical practitioners by drug companies or the regular refresher courses provided to professionals whose field of expertise requires constant development and is therefore an extension of the concept of continuing legal education without the need to bring its beneficiaries into traditional regular "training sessions".

14. Virtually all the material published in the Bulletin is, in a sense, training material. It is used as such for the development of Commonwealth legal institutions and the maintenance of expertise by a variety of professional people - legislative counsel; public prosecutors; judicial officers; law reformers; law teachers; Ombudsmen; Human Rights Commissioners; Electoral Officers; legal practitioners and any other lawyer, public or private who has access to it. Because it is designed to be a constantly up-dated mini-library of legal developments around the Commonwealth, it is able to provide uniquely Commonwealth material which feeds the constantly evolving common legal language, and the developing common legal values which are central to the fundamental values of the Commonwealth.

15. Unfortunately, the cumulative pressures which over the years have taken their toll on the relatively small staff of the Division have resulted in unavoidable backlog in the Division's work of facilitating the general flow of information through

the traditional medium of the *Bulletin*. It has been a matter of concern and embarrassment that this Secretariat flagship publication in the legal field has been running behind schedule for some time and has taken longer than had been thought would be the case to clear the backlog. However, recent allocation of additional human resources has ensured that determined efforts are now being made to bring the *Bulletin* back to its normal publication schedule. The expectation is that the backlog would have been cleared by the end of 1996 when all the outstanding numbers up to and including the July 1996 issue would have been published and despatched to readers. We expect the October 1996 issue, as would normally be the case, to be ready for despatch to readers sometime in January 1997. This would represent a considerable relief for the Division and, we believe, would be welcomed around the Commonwealth, especially in small jurisdictions. The Division is deeply conscious of the fact that the *Bulletin* represents a major investment in both time and expense on the part of our correspondents who toil to help us gather and share these essential materials. For all this, and for the patience of our readers, the Division is profoundly appreciative.

16. However, reduced resources continue to be a serious problem for the *Bulletin*. New priorities have a negative effect on the Commonwealth Secretariat budget. The Division has argued that the *Bulletin* is an essential developmental tool for the achievement of stable democratic government - without which sustainable economic growth is impossible in the long run. This argument has been accepted, and a portion of the costs of producing the *Bulletin* will be met for perhaps the next financial year or two by the CFTC. Butf the CFTC is seen as a source of initial, rather than permanent funding of developmental initiatives, and in the current crisis of resources, even this partial funding will be discontinued. It is unlikely to be replaced by Commonwealth Secretarial funding, and the Division and the Commonwealth legal community faces a stark choice in this.

17. The *Bulletin* serves both developing and developed Commonwealth states. If the law is one of the consensual cementing agencies of the Commonwealth, the exchange of ideas, concepts, techniques, and rationales of the law as a social instrument provided by the *Bulletin* helps to give that consensus. Its role in a Commonwealth which now includes new legal traditions may be even more critical.

18. The problem, reduced to its most basic form, is that the *Bulletin* has always been seen as a *free* service to the legal establishments of Commonwealth member states: Ministries, Judges, Magistrates, Commissioners operating legal institutioins and University Law Schools. Subscriptions are also taken out, but the *Bulletin* is not a marketed product, it is an essential service enjoyed by all legal establishments however well or poorly resosourced they are. The Division is now forced to make it clear that unless the *Bulletin* is brought nearer to self-financing status, it will not be able to continue. The message from its erstwhile sources of funding is that: those who can pay should pay for their copies of the *Bulletin*; it should be put on a commercial basis if possible, probably by establishing a joint venture between the Division and a suitable law publisher.

19. The Division is currently exploring the options. It believes that certain basic principles must be must be secured. These include:

- editorial control must remain with the Division and the prime objective of the *Bulletin* must continue to be the provision of comparative Commonwealth legal material.

- the *Bulletein* must continue to be available free or at a heavily subsidised price to those jurisdictions which cannot afford to purchase it. Some criteria will need to be worked out as to how such jurisdictions will be identified.

The indications so far suggest that provided there is a significant reduction in the free service, the *Bulletin* could be preserved and possibly enhanced through a commercial partnership. The Division has now established a basis for its production and with the continued creative support of Law Ministers and other Commonwealth legal colleagues, will pursue a realistic solution to the problem.

20. It is against this background and in response to the challenge of diminishing resources that the Division has embarked on negotiations with a firm of commercial publishers to explore the possibilities of commercial publication but these negotiations are at an early stage and it would be premature to speculate on the result.

21. Our objective and commitment, however, is to secure the continuation of publication of the Bulletin in a form in which it will continue to be accessible to jurisdictions that most need the useful service that we believe it has rendered over the last twenty years or so.

Law Reports of the Commonwealth

22. The difficulties that the Division has faced with

regard to the timely publication of the *Bulletin* notwithstanding, it has been closely associated with the editors of the Law Reports of the Commonwealth through the provision of many of the cases that are reported in it and through representation on its Editorial Committee. It may be recalled that this now established and authoritative series of law reports was launched in 1985 by a private sector publisher with the active encouragement of the Legal Division. The series was launched to fill a perceived need which the *Bulletin* is not able to satisfy fully and it continues to do so as a useful companion to the Bulletin.

Other legal information and assistance

23. Within the limits of its very limited and inevitably stretched resources, the Division also provides assistance on a regular basis on a whole range of matters as and when requested but on an ad hoc basis, particularly to small states who rely to a lesser or greater extent on the *Bulletin* for much of their legal information. Much of the assistance provided in this way will often be in the nature of information, legislative precedents or advice needed to facilitate a proposed law reform or policy review.

The Commonwealth Law Book Programme

24. Launched in 1984 by the Commonwealth Lawyers Association with the encouragement of the Legal Division, this programme having grown beyond its small beginnings has in some ways become a victim of its limited success. It is now jointly sponsored by the **Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates and Judges Association**. It has operated from inception in close collaboration with **Book Aid International**, formerly Ranfurly Library Service whose commitment to the ideals of the programme has not diminished. In spite of experiencing resource constraints, Book Aid International continues generously to provide warehousing and shipping facilities. Clearly without their involvement, the programme would probably not have come into existence in the first place, and would not have been able to continue for as long as it has.

25. It is appropriate here to also mention and to acknowledge the assistance provided by the **Commonwealth Foundation** by way of financial grants towards the running costs of the programme over a period of three years beginning from the 1996/97 financial year. One of the difficulties the programme faces is meeting its main recurrent cost for the collection of donated books and their shipment to beneficiaries in various parts of the Commonwealth.

26. In excess, now, of 100,000 volumes of law books have been supplied under the programme since its inception in 1984 from its London -based operations. This does not include the volumes supplied directly to beneficiaries from Australian, Canadian and New Zealand based agencies for which no statistics are available. The Division continues to tap its wide range of contacts among practitioners and libraries in both the public and private sector who donate books they would otherwise pulp, while Book Aid International, for its part, continues to provide warehousing as well as shipment facilities. But the programme, again essentially a free service based on the belief that information and education in a common legal tradition is conducive to good governance, is still in dire need of funds to sustain its long term viability.

Publications

27. In addition to *the Commonwealth Law Bulletin*, the Legal and Constitutional Affairs Division publishes a range of other titles as the circumstances require to meet specific needs. Since the Law Ministers' Meeting in Mauritius, the following publications have been produced:

General

- 1993 Meeting of Commonwealth Law Ministers, Mauritius: Minutes
- 1993 Meeting of Commonwealth Law Ministers, Mauritius: Memoranda, 2 Volumes
- Commonwealth Law Bulletin and Index, Quarterly, Vol. 20
- Commonwealth Legal Education Association Newsletter, Quarterly
- "The Key" (Newsletter of the Commonwealth Correctional Administrators)
- Report of Meeting of Senior Officials of Commonwealth Law Ministries, Malta, 1995

Human Rights

- Developing Human Rights Jurisprudence: Volume 6: The Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bloemfontein, South Africa, 1993

- Workshop on Administrative Law, Blantyre, Malawi, 1994, Report and Documentation

- Workshop on Administrative Law, Mahe, Seychelles, 1994, Report and Documentation

- Workshop on Administrative Law, Maseru, Lesotho, 1995, Report and Documentation

- Workshop on Administrative Law, Gaborone, Botswana, 1995, Report and Documentation

- Good Government and Administrative Law: An introductory Guide, 1996

Mutual Assistance/Administration of Justice

- Report of the Oxford Conference on Mutual Legal Assistance: December 1994

- Money Laundering Workshop Report: Papers from the Money Laundering Workshop, Port of Spain, June 1994

- Action Against Transnational Criminality, Volume III: Conference Papers, Papers from the 1993 Oxford Conference on International and White Collar Crime, April 1994

- Commonwealth Legal Assistance News (CLAN), Volumes 4 - 11

- Commonwealth Commercial Crimewatch, Volumes 3 - 10

- Mutual Assistance in Criminal Matters: Guide to National Practice and Procedure, Part 1 and 2: October 1995 (Loose leaf service)

- Combating Money Laundering: Guide to National Laws, Parts 1 and 2: November 1995 (Loose leaf service)

FUNDAMENTAL POLITICAL VALUES AND GOOD GOVERNANCE

28. The Commonwealth Harare Declaration remains a focal point by reference to which virtually all the activities of the Secretariat are now conceived, planned and evaluated. In keeping with its traditionally catalytic approach to its mandate, the Division has sought to actively promote the ideals of democracy, democratic processes, the rule of law and just and honest government. In this respect, professional staff of the Division have played a full supporting role in the election monitoring activities of the Secretariat, including South Africa, Namibia, St. Kitts & Nevis and Tanzania.

29. At a practical level in two parallel developments, the Legal and Constitutional and Legal Affairs Division has been working to sensitise the Commonwealth legal fraternity and senior managers, in both the public sector and some sections of the non-governmental sector, to developments in the field of human rights and to the imperatives and demands of good, open and accountable government.

30. On the one hand, the series of judicial colloquia launched in 1988 in conjunction with the London based International Centre for Human Rights (INTERIGHTS), to promote the domestic application of international human rights norms has been acknowledged as a valuable addition to the existing mechanisms for promoting a better understanding of human rights and as contributing to the development of human rights jurisprudence. Following the success of the colloquia so far held mainly in the Africa region, where significant constitutional changes have been taking place it is proposed to hold a follow-up colloquium in the immediate future in South Africa to focus on the constitutional implications of the domestic application of international human rights norms. This is expected to involve other judiciaries in the region which have not participated in the previous colloquia. The intention is for the series to continue as a form of continuing judicial education, subject to the availability of funds which have so far been provided to a large extent from private sources.

31. In 1992, the Division launched a programme of administrative law workshops which have complemented the judicial colloquia and the principal objective of which is to sensitise public officials to the important role played by administrative law in facilitating good government through the judicial review of administrative action. At the heart of the exercise is the need for all who exercise executive powers which affect the public in their everyday lives to be guided in their actions by the principle that government must be conducted in accordance with the law. The first of these workshops held in the Zambian capital, Lusaka, produced the *Lusaka Statement on Government under the Law* which received the endorsement of Law Ministers in Mauritius as providing a sound basis for the promotion of best practice in government. Subsequent workshops have been held in Malawi, Seychelles, Lesotho and Botswana and the participants were unanimous in expressing their shared conviction that the principles contained in the Lusaka Statement were of universal application. With the exception of Botswana, the workshops have been held in countries that have recently been in transition from a military or single-party to multi-

party democratic government. As a result of the workshops, there is increasing awareness of the need for transparency and accountability in government which are essential ingredients in promoting the development of a democratic ethic and a culture of tolerance. The range and level of participation recorded at the workshops clearly illustrate the importance governments attach to the ideals of democracy, the rule of law and good government which Commonwealth Heads of Government, in adopting the Harare Declaration in 1991 and reinforced in 1995 by the Millbrook Plan of Action, are pledged to uphold in their respective countries.

32. One of the practical outcomes of the workshops has been the publication by the Secretariat of a guidebook in response to the request by participants for a manual to be prepared and made widely available to encourage public officials to act within the law when carrying out their official duties. The manual has been published and is circulated to Law Ministers as paper **LMM(96)16.** It is also being circulated to the participants at all the workshops that have been held and generally to governments and will be used as training material at future workshops.

HUMAN RIGHTS

Human Rights Unit

33. At the Mauritius Meeting, Ministers were briefed on the Secretariat's work in the promotion of human rights. The Human Rights Unit which spearheads this work had only just then been relocated from the Political Affairs Division to the Legal and Constitutional Affairs Division where it has found a natural home due to the affinity of human rights issues with legal and constitutional matters. Although the Unit has retained functional links with the Political Affairs Division, its relocation has had the beneficial effect of linking human rights programmes more closely to the structures which, in the long run, sustain democracy and promote respect for human rights, as well as lend renewed practicality to activities in this area. The Units mandate is to promote human rights throughout the Commonwealth and it ensures that due regard is given to this in the work of other Divisions within the Secretariat. In pursuance of this, the Secretariat has, mainly through the Human Rights Unit, undertaken promotional work in the field of human rights under the following broad areas of activity:

* Human Rights Education, Training and Exchange of Information
* National Institutions building Programme
* Democracy, Human Rights and Development

Human Rights Education & Training

34. In this area, the Human Rights Unit has sought to collaborate with other relevant bodies, particularly with the United Nations, to promote awareness of human rights issues. To this end, a joint UNAFRI/COMSEC workshop for Senior Correctional Officials on the management of Prisons and Prisoners was held in Kampala, Uganda in November 1994. Another workshop, held in Malta in 1995, and organised by the Department of Multilateral Affairs of the Maltese Ministry of Foreign Affairs was sponsored by the Secretariat in conjunction with the United Nations Centre for Human Rights. The workshop, attended mainly by diplomats from Commonwealth countries, was held to commemorate the 50th anniversary of the United Nations. Similarly, a workshop for senior law enforcement officials which had both educational and capacity building objectives and which was held in Cyprus in 1995 is noted below.

35. A Commonwealth-wide survey of existing human rights teaching materials for secondary schools was conducted with a view to documenting the different approaches and concerns in member countries as well as to recommending concrete ways of strengthening human rights education through Commonwealth co-operation. The survey concluded, inter alia, that there was need for exchange of existing materials as well as scope for the production and dissemination of new teaching materials.

36. In fulfilment of its CHOGM mandate, and in response to specific needs identified by member states in the region states, the Human Rights Unit organised a well received Regional Workshop for Officials in charge of reporting under the International Human Rights Instruments in July 1995 in Zambia. Furthermore, as a way of facilitating wider dissemination of information on human rights and increasing accessibility to human rights publications, the Unit collaborated with the African Publishers Network, UNICEF and the Afro Asian Book Council to organise a one day Workshop on low cost publishing entitled "Books for Millions" at the 1995 Zimbabwe International Book Fair. The workshop helped to create a network of publishers within Commonwealth countries and also facilitated the creation of links between institutional publishers and low cost publishers in Commonwealth countries

37. The Secretariat held a major conference on Human Rights Education in September 1995, to mark the UN Decade on Human Rights Education which commenced in 1995. The main objective of the Conference was to define the framework for activities, through the identification of workable strategies in order to create an atmosphere conducive to generating momentum for activities geared to human rights education in Commonwealth countries throughout the decade. To this end, the Conference made the Oxford Declaration on Human Rights Education and established a framework and agenda for human rights education in the Commonwealth for the decade and beyond. The Conference was attended by representatives from government, educational institutions and NGOs. The Oxford Declaration and the framework and agenda are before the Meeting as annexes to paper **LMM(96)15**.

38. In the area of information exchange, the Human Rights Unit has continued to respond to individual requests for information and publications from member states on human rights issues. In addition, the Human Rights Unit has in the past published the Human Rights Update which contains, among other things, information received from member states on human rights issues but this has not been published during the last year or so as a result of inadequate staff resources. However, it is proposed to resume publication soon as a result of improvement in the staffing situation.

39. A video film on Street Children was produced, with the aid of the Unit, to raise awareness of the rights of these children and to focus attention on their plight with a view to encouraging action by both governments and international agencies to alleviate the plight of such children.

National Institution building Programme

40. In the area of institutional building, the Secretariat has facilitated the provision of technical assistance to several member countries who have sought assistance in strengthening or setting up of national institutions.

41. The Regional workshop for officials in charge of Reporting already referred to above and which was be held in 1995 Zambia was aimed, among other things, at helping to strengthen national capacities for reporting under the various international and Regional Human Rights Instruments.

42. Similarly, as part of its capacity building work, the workshops in Cyprus, Uganda and Malta all considered draft training materials which had been commissioned by the Unit several years earlier to assist member states to undertake their own specialised training for their public officials.

Development, Human Rights and Democracy

43. Heads of Government at their Cyprus Meeting had affirmed the importance of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights at Vienna in June 1993. They also stressed that democracy, development and respect for human rights and fundamental freedoms were interdependent and mutually reinforcing. The Legal and Constitutional Affairs Division has collaborated with other relevant Secretariat Divisions to seek, in conjunction with member states, ways of promoting Development, Human Rights and Democracy in an integrated manner. An initial workshop covering the Southern Africa region was hosted by Namibia in July 1994. A follow-up Commonwealth-wide workshop was hosted by Sri Lanka in June 1995. It is next planned to identify examples of Commonwealth best practices in promoting an integrated approach and to develop training programmes for capacity building based on these.

CORRECTIONAL ADMINISTRATORS AND THE TREATMENT OF PRISONERS

44. At their Harare meeting in 1992, Commonwealth Correctional Administrators had considered and agreed that, subject to the prior views and comments of the relevant authorities of member states, an illustrative draft of proposed guidelines for the treatment of prisoners commissioned by the Division be submitted to Law Ministers for their consideration and guidance. At Mauritius, after considering the revised illustrative draft incorporating the views received from states, Ministers mandated the Conference of Commonwealth Correctional Administrators, in the light of the practical realities of the economic and social situation in Commonwealth countries, to review the illustrative draft in close consultation with the UN and to report back to it at a future Meeting.

45. In the event, due to difficulties being experienced by the hosts of the meeting of Correctional Administrators which had been planned for 1995, a meeting is yet to take place and it has therefore not been possible to report any further progress on the illustrative draft of the proposed guidelines. However, efforts continue to be made to secure an alternative host for the meeting. The Division will keep the situation under review and

will report any developments through Senior Officials.

PROTECTION OF THE MATERIAL CULTURAL HERITAGE

46. At their 1995 meeting in Malta Senior Officials, consistent with their general mandate to keep under regular review all Commonwealth Schemes for Mutual Assistance in the administration of justice, considered a model draft Bill produced by the Attorney General's Department, Australia and designed to facilitate implementation of the Commonwealth Scheme for the Protection of the Material Cultural Heritage (the Mauritius Scheme). As there was insufficient time at the meeting to consider the model draft Bill fully, Senior Officials agreed to study the draft more fully on their return home and to communicate their views to the Division which was requested to prepare a revised model draft Bill in the light of the views it had received for its further consideration. Pursuant to this, the Division has produced a revised model draft Bill and this is being placed before Senior Officials for their consideration at a meeting to be held in Kuala Lumpur on 14 April before the commencement of the Ministerial Meeting.

LEGISLATIVE DRAFTING ASSISTANCE

Legislative Drafting Training

47. The CFTC funded programme for the training of legislative drafters has now been institutionalised as an integral part of the Faculty of Law of the University of the West Indies in Barbados. This suggests that adequate facilities now exist to meet current demands for the kind of training offered at the University level. However, the Division remains of the view that the need for alternative training facilities in this important skill for any governments involved in developmental activities is as, if not more, pressing now as ever, if the new demands of an ever changing democratic environment are to be met. The continued viability of the courses at the University of the West Indies is still a concern of the Division which, in close consultation with the Management and Training Services Division of the Secretariat encourages governments to nominate suitable candidates for training at the University with, wherever possible, funding provided by the Secretariat. For its part, the University has shown a continued commitment to the courses and development by the creation of a Chair of legislative drafting.

48. An average of sixteen students attend each course and a substantial number of them continue to be sponsored by the Secretariat. Some are admitted for the Advanced Diploma in Legislative Drafting but the majority proceed to the Masters Degree in law with specialisation in Legislative Drafting. Significantly, women continue to enrol in large numbers and in some years substantially outnumber the men. In the 1994/95 year, for example, women accounted for ten out of the intake of sixteen students.

49. A longstanding problem that has remained unsolved and which merits serious attention by governments is the issue of the retention of trained legislative drafters. In an evaluation carried out in 1995 of technical assistance provided to the Caribbean region by the CFTC in the area of legislative drafting, including the assistance provided to the University of the West Indies in connection with the legislative drafting courses, the evaluators drew attention to a number of shortcomings from which it was apparent some lessons could be learned. Among these are:

- the need to ensure that persons nominated for the course are genuinely interested in legislative drafting, and that they are likely to continue to work in the drafting departments of their governments.

- the need for governments to consider improving conditions of service for legislative drafters with a view to encouraging them to pursue legislative drafting as a career in preference to other posts in the legal and judicial services.

50. Similar observations have been made by the CFTC funded Director of the legislative drafting courses at the University of the West Indies. In his report on the 1994/95 Diploma and Masters Degree courses, he suggested that governments should ensure that the persons they nominate for the course are genuinely interested in a legislative drafting career and that they are assigned to legislative drafting duties on their return home. He reported instances of recent trainees writing to him to say that, since their return, they "have not drafted one legislative sentence" having been deployed in non-legislative drafting duties immediately on their return, in spite of the shortage of trained drafters in the legislative drafting department. It is therefore not surprising that often the recent trainee becomes frustrated and abandons the idea of pursuing a career in legislative drafting. He further suggests that persons nominated for the course could be required by their governments to enter into a bond to serve for a specified number of years after their training, the possibility being that by the time the officer has

completed the period of the bond the inclination to leave for private practice to which they are traditionally lost would have considerably waned. He also believes that the terms and conditions of service of legislative drafters is crucial to the question of their retention in government service.

51. We, for our part, from years of experience with the legislative drafting courses, echo these observations and, without underestimating the difficulties governments face when dealing with the review of conditions of service of their public services, would recommend to Ministers that urgent steps need to be taken to deal with the specific problem of the retention of legislative drafters.

Distance Training in Legislative Drafting

52. Ministers are also aware of the initiative taken by the Commonwealth Secretariat and the Commonwealth of Learning (COL) to develop a programme for the training of legislative drafters using distance learning techniques. Progress in bringing this project to fruition has been somewhat affected by technical problems in the completion and printing of the course modules . However, these problems have now been satisfactorily resolved and the Secretariat and COL are pleased to report that enrolment for the pilot year of the programme has been in progress since December 1995. Special funding arrangements will apply during the first year of operation of the programme as a result of which the joint sponsors decided to limit the number of the first intake of trainees to only 50. During this first year of operation, trainees would be enrolled without any charge to the nominating governments.

53. To date, 30 students have been enrolled by RIPA International in London who have been contracted as the Central Delivery Agency (CDA) for administering the programme. Training is scheduled to commence on 11 March 1996 with an initial intake of the 30 students who have selected from 13 different jurisdictions. This does not include trainees from the Caribbean and South Pacific regions. An additional 20 trainees, ten each from each of these two regions are expected to commence their training later in the year when Regional Delivery Agencies (RDAs) in the process of being established at the University of the West Indies in Barbados and at the Port Vila campus of the University of the South Pacific are expected to be in place to provide the necessary support services for co-ordinating and monitoring the work of the trainees in those two regions respectively. Details, extracted from the Course Text, Part 1 of the seven volume set of study materials, of the programme of work to be covered by each student during the year long study period and a note of how it is envisaged the programme will operate during the pilot year and in subsequent years are set out as **Appendix I** to this review.

INTERNATIONAL CRIME AND MUTUAL LEGAL CO-OPERATION

Commercial Crime Unit

54. The Unit's prime task is to assist members combat major crime by enhancing national capacity to enact and administer laws relating to mutual assistance in criminal matters, extradition, transfer of prisoners, proceeds of crime and money laundering. The Unit has concentrated, since the 1993 Meeting of Law Ministers, on providing the information and tools needed by those investigating and prosecuting crimes with an international element.

PROVISION OF INFORMATION

55. Recognising the value of sharing experience in the development and administration of laws designed to assist countries combat both domestic and international crime, the Unit has significantly increased the resources available to it to assist countries in locating and retrieving relevant material. 1995 saw the development of a data base of national laws on issues falling within the Unit's mandate. Now reflecting almost 400 pieces of legislation the data base enables the Unit to locate provisions dealing with the subjects of banking, corruption, drug trafficking, evidence, extradition, money laundering, mutual assistance in criminal matters, mutual assistance between business regulatory agencies, organised crime, proceeds of crime, securities (and related matters) and the transfer of prisoners. A second data base of multilateral and bilateral treaties and memoranda of understanding is in the process of being compiled.

56. For the assistance provided by member countries in making available copies of relevant laws the Unit wishes to record its gratitude. The co-operation we have received will enable us to respond far more quickly and efficiently to requests from members for precedent material.

57. Production of the periodic newsletter "Commonwealth Commercial Crimewatch" which details legislative and case developments relating to proceeds of crime, money laundering, criminal justice issues and evidence - including reports of cases relating to drug trafficking - remains on the Unit's work agenda.

MUTUAL LEGAL ASSISTANCE

58. At their 1993 meeting Ministers encouraged the Secretariat to promote a meeting of central authorities responsible for co-ordinating the provision of mutual legal assistance. Acting upon this advice the Commercial Crime Unit convened the Oxford Conference on Mutual Legal Assistance which was co-sponsored by the United Nations International Drug Control Programme (UNDCP) and the United Nations Inter-regional Crime and Justice Research Institute. The Conference was held in September 1994 and was attended by 146 officials representing 50 Commonwealth and non-Commonwealth countries and six international organisations. The aim of securing the attendance of representatives of all major legal systems in the world was achieved as was the important goal of strengthening professional links between central authorities. The report of, and recommendations by, the Conference are before Ministers at this meeting **[LMM(96)13]**.

59. Recognising the need of practitioners to have ready access to as many national laws relating to the provision of assistance in the investigation and prosecution of crime as possible, the Unit, in 1995, issued the first parts of a loose leaf service entitled "Mutual Assistance in Criminal Matters - Guide to National Practice and Procedure". The response to this publication has been encouraging and the Unit expects to be able to issue, at quarterly intervals, new materials to ensure the currency of the service.

60. At the request of the Pacific Islands Law Officers Meeting, the Unit undertook work which it is expected will lead to the modernisation and simplification of the extradition laws of member countries of the Pacific Forum. The exercise has been, we believe, of mutual benefit to both the Secretariat and the South Pacific region in that it has raised for consideration a number of questions relevant to the adequacy of national laws to cope with modern pressures for extradition laws which meet the needs of societies concerned to co-operate in the suppression of crime. Some of the issues arising from this review are included in paper **LMM(96)14** which is provided for the information of Ministers.

61. The production of the periodic newsletter "Commonwealth Legal Assistance News (CLAN)" which details legislative developments and cases decided by national courts on issues such as extradition, mutual assistance in criminal matters and transfer of prisoners remains a priority activity for the Unit.

MONEY LAUNDERING

62. Money laundering was first widely recognised as a threat to legal and economic systems in the middle 1980's. Since that time the UNDC, the OECD (through the Financial Action Task Force), the Council of Europe, Interpol, the Organisation of American States and the Commonwealth have been working to combat it. The Commonwealth Secretariat's first work in this area was undertaken by the Commercial Crime Unit in 1991.

63. In 1993, Heads of Government identified money laundering as a serious threat to financial systems worldwide and agreed that the Commonwealth should support enhanced international co-operation in combating this financial crime. They commended the 40 recommendations drawn up by the Financial Action Task Force (FATF) (the international body founded for this purpose in 1989) and urged steps for their early implementation. Law Ministers considered the issue at their meeting in Mauritius in 1993 and concluded that the issue had to be addressed as a matter of urgency and would require co-ordination with the work of Commonwealth Finance Ministers. They expressed their resolve, individually and collectively, to put in place comprehensive provisions to address the legal issues covered by the 40 Recommendations of the FATF and agreed to participate in a process of self-evaluation of progress towards implementation of the 40 Recommendations.

In response to the call by Ministers for urgent action, the Unit has devoted significant time and effort to this subject.

64. A particular emphasis has been work to strengthen working relationships with other relevant international organisations which have similar goals. In particular the Commercial Crime Unit has co-operated with the FATF, the UNDCP, the Caribbean Financial Action Task Force, the Council of Europe and Interpol in joint ventures. At the January 1996 meeting of the Financial Action Task Force all international organisations working on this issue agreed a format for the analysis of national laws and the ultimate production of a global compendium of materials related to combating money laundering. The material, when prepared will be added to the Secretariat's own publication entitled "Money Laundering - A guide to National Laws" which is designed to assist government legal practitioners and law enforcement agencies seeking to obtain information and assistance from other countries.

65. In 1994 and 1995 the Unit organised and conducted, with the FATF, two Money Laundering Symposia for the Asia Region (which includes nine

Commonwealth jurisdictions). These Symposia (held in Kuala Lumpur and Tokyo) have, we believe, significantly increased awareness of the subject in the region, with the 1995 Symposium resulting in the formation of a Regional Steering Group mandated to advance implementation of the 40 Recommendations throughout Asia.

66. With the invaluable assistance of the British Foreign and Commonwealth Office, the Unit conducted workshops in the Caribbean and the Pacific on the subject of money laundering. Designed to bring together representatives of both legal and financial sectors, the workshops were held in Port of Spain in May 1994 and Port Vila in July 1995.

67. Perhaps the most technical work in this area is the drafting of a model law to combat money laundering. The model was considered by both Senior Officials of Law Ministries and Senior Officials of Finance Ministries at meetings 1995. In light of comments made at those meeting the original draft was refined and revised and is before Ministers at this meeting for consideration **[LMM(96)18]**. The model law is designed as a guide to member countries which have not yet enacted laws to combat money laundering.

68. In undertaking work to help countries combat money laundering the Unit has co-operated with the Secretariat's Economic Affairs Division - the Division with responsibility for working with Commonwealth Finance Ministers. Commonwealth Finance Ministers considered the subject of money laundering at their 1994 and 1995 meetings.

DRUG TRAFFICKING

69. Commonwealth Heads of Government continue to stress the need for member countries to address the important issues of drug trafficking and drug abuse. They have urged Governments that were not a party to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances to adhere to the Convention and enact the necessary domestic legislation as soon as possible, and invited Law Ministers to give priority attention to legislative programmes which would ensure that their countries were in a position to meet the threat posed domestically and render legal assistance to other countries in respect of any drug trafficking offences.

70. The Unit has not undertaken any work related solely to drug trafficking. It is our view that all of the work undertaken by the Unit is intrinsically necessary to the enhancement of national capacity to combat drug trafficking. Various articles of the 1988 Convention require states parties to take action to facilitate international co-operation against drug trafficking, to combat the laundering of the proceeds of drug trafficking, to facilitate the confiscation of the proceeds of drug trafficking as well as to be able to extradite for the offences listed in the Convention. The work of the Unit is designed to assist member countries to achieve these goals as part of the wider effort which is necessary to defeat commercial crime generally.

Other Legal Assistance

71. There are other ways in which the Division provides assistance, particularly to small states, including dependent territories, in pursuance of the Secretariat's special mandate to assist small states to meet their special needs. Most significant of this is the technical assistance provided under CFTC auspices by way of short term or long term assignment of field experts. The identification and placement of the experts to work on specific projects, usually in developing countries, is generally done in consultation with the Legal and Constitutional Affairs Division. The nature of assistance provided in this manner is described in greater detail below.

TECHNICAL ASSISTANCE IN THE LEGAL FIELD

Economic and Legal Advisory Services Division

72. The Economic and Legal Advisory Services Division (ELAS) formerly known as the Technical Assistance Group (TAG) is the in-house consulting unit of the Commonwealth Secretariat. ELAS responds to requests from governments in areas of activity which have been identified by Commonwealth governments as developmental priorities. ELAS staff comprises specialists in economics, commercial and international law, and computer systems. In cases requiring highly specialised services ELAS augments its services with the support of external technical consultants. ELAS lawyers work closely with the Division's economists to provide an integrated advisory service covering the legal aspects of the projects undertaken by ELAS, including the review and revision of legislation, preparation of new legislation, agreements and contractual documents and dealing with legal issues relating to execution and implementation of the project activity concerned.

73. Over the period under review ELAS has continued to receive requests for its services in its traditional programme activities of terrestrial and

marine resources development and debt management. At the same time as countries are moving towards more market oriented economics, increasing requests are being received for assistance in other areas of economic management such as those relating to access to funds for private investment, development of domestic capital markets, privatisation and the promotion of the role of the private sector. ELAS has also assisted in the strengthening of democracies and assistance with elections.

74. In assisting Governments to create a conducive climate for investment, ELAS has assisted the Government of Zanzibar in developing policies and a legal and institutional framework for foreign investment, advised the Government of Guyana on trade-related intellectual property rights and assisted it in appraising the current state of its intellectual property law in the light of its obligations under the TRIPS Agreement under WTO arrangements. ELAS assisted the Government of Kiribati in reviewing a draft investment management agreement. With respect to the development of capital markets, ELAS has provided assistance to the Governments of Mauritius, Tanzania, and Uganda in establishing or strengthening their regulatory frameworks for securities trading and stock exchanges. ELAS has also advised the Governments of Ghana and Mauritius on a regulatory framework for non-bank financial institutions and the Governments of Ghana and Tanzania on collective investment schemes.

75. Assistance with privatisation has been extended to Barbados and Guyana. Requests in relation to private sector development have increased and advice has been given to Ghana, Namibia and Sierra Leone on commercial and financial law matters and to Uganda on hydropower development. ELAS is carrying out a diagnostic survey of legislation affecting private sector development in Ghana with a view to recommending measures for the removal of legal impediments to private sector development.

76. ELAS continues to provide specialist legal and economic policy advice and assistance in the establishment and maintenance of a legal and economic framework conducive to foreign investment in the various natural resources sectors, principally mining, petroleum and fishing. Over the period under review, it has undertaken numerous projects throughout the Commonwealth, as a result of which risk capital has been attracted to several countries.

77. ELAS has been particularly active in Namibia, which signed five petroleum exploration agreements negotiated in the first licensing round, with ELAS's assistance. The Government is now receiving ELAS's assistance with the second round of negotiations. ELAS also assisted Namibia with the Government's negotiation of a major diamond mining agreement. ELAS continues to assist other countries such as Grenada, India, Malta, Seychelles, Swaziland and Tonga in the petroleum sector. This assistance includes the review of model contracts and preparation of new contracts, the promotion of the hydrocarbon sector and participation in negotiations with multinational companies. In the mining sector, in addition to Namibia, Botswana, India, Lesotho, Pakistan, Sierra Leone, Solomon Islands, Sri Lanka, Uganda and Zimbabwe have received ELAS's legal, economic or policy advice in respect of a range of minerals, including gold, diamonds, platinum, nickel and heavy minerals. In the context of natural resources development, it is to be noted that ELAS's advice includes the consideration of environmental issues as they relate to petroleum and mining activities and the inclusion of suitable provisions in agreements and legislation.

78. Commonwealth states, particularly small island states, recognise the importance of maximising their maritime areas to benefit from the sovereign rights accorded to them over the resources they contain. The Government of Jamaica and the Organisation of Eastern Caribbean States (OECS), on behalf of its membership, have received assistance in respect of various stages of preparation for maritime boundary negotiations.

79. In the area of fisheries, ELAS has rendered assistance to Brunei Darussalam, where a new legislative scheme was drafted.

80. In the field of democratisation, ELAS has also been involved in the Secretariat's support to Commonwealth Observer Groups to elections and also offers technical assistance with election laws and organisation. Observer Groups to Malawi, Namibia, Tanzania and South Africa have received this support and the Government of Malawi, Mozambique, Sierra Leone, South Africa, Tanzania and Zambia have received assistance with preparations for multi-party elections.

The General Technical Assistance Services Division

81. The principal vehicle through which such assistance is provided to governments is the General Technical Assistance Services Division (GTASD) which, together with other Secretariat Divisions administers funds provided by the CFTC. Requests for assistance are made to the Deputy Secretary General (Development Co-operation) through the requesting government's local point of contact

(usually the Finance or Planning Ministry). The point of contact accords relative priorities to the various requests channelled through it, and because of the usually heavy demand on the scarce resources of the CFTC, those accorded higher priority rankings have a greater chance of receiving a favourable consideration.

82. The technical assistance provided by the GTASD is not intended, of course, to go on indefinitely and a long-term expert is generally only provided for two years in the first instance. In some cases, extensions have been sought successfully where these have been accorded very high priority and where a key work programme remains to be completed. However, the CFTC cannot provide a particular service indefinitely and encouragement and support are given for a local counterpart to be trained to take over from the expert.

83. Reference has already been made to the assistance provided by the CFTC in the training of legislative drafters. Here, it is appropriate to make special mention of the contribution made over the years by the CFTC to the development of many Commonwealth countries by providing trained and experienced legislative drafters to fill important posts in their legislative drafting establishments. This assistance has always been much appreciated particularly by small states who often lack both human and material resources to promote and sustain their development.

84. In the general legal field, in addition to legislative drafting, experts have, in recent times, been provided in such areas as election management; law teaching; environmental law and maritime boundaries delimitation. A list of CFTC field experts who were in post in legal related assignments at the end of the first quarter of 1996 is set out in **Appendix II**.

85. Occasionally also, as and when requested, the Division assists governments, outside CFTC technical assistance arrangements, in recruiting professional staff into their legal establishments or in finding in-service training placements for the professional staff of Justice Ministries or the Attorney General's Chambers.

The Management and Training Services Division

86. The Management and Training Services Division (MTSD) of the Commonwealth Secretariat derives its funding from the CFTC and has a mandate to work closely with member countries to:

- provide advisory services to enhance managerial capacity in government, public and private sector enterprises and NGOs; and

- provide skills enhancement through training in priority areas to achieve sustainable development and to assist in capacity building of national and regional institutions.

87. In considering requests for assistance, priority is given to study or training projects which will materially contribute to a country's economic and social development and to building up its infrastructure. The Legal and Constitutional Affairs Division works closely with MTSD in assessing requests for training in the -legal field such as the Diploma and Masters degree in legislative drafting courses at the University of the West Indies, Barbados. The Division has also worked closely with MTSD in mounting our series of administrative law workshops in support of good, honest and accountable government.

Women and Youth Affairs Division

88. The Women and Youth Affairs Division (WYAD) has consistently worked to promote the recognition and protection of women's rights as an integral part of human rights, at the national, regional and global levels. Specific steps have been initiated by them to provide technical assistance and facilitate the sharing of experiences between Commonwealth countries and different regions of the Commonwealth on strategies to address women's human rights.

89. The activities initiated by WYAD have included a judicial colloquium held at Victoria Falls, Zimbabwe in 1994, in collaboration with the Legal and Constitutional Affairs Division and the Commonwealth Magistrates and Judges Association (CMJA). Senior judges met to consider international and regional human rights norms and mechanisms relating to women's rights and to assess the implications of such norms for litigation and decision-making at the national level. The judges participating in the colloquium issued the Victoria Falls Declaration on the Promotion of the Human Rights of Women. They concluded that the implementation of the Declaration would be facilitated by developing a handbook for Commonwealth judges and lawyers and which would contain, among other things, a compilation of jurisprudence of international and national decision-making bodies relevant to women's human rights. A copy of the Victoria Falls Declaration is annexed **Appendix III**.

90. In 1995 WYAD, in collaboration with CMJA organised a second colloquium in Beijing which provided a wider forum for the discussion of the Victoria Falls Declaration and further colloquia are planned for the Asia-Pacific region in 1996 and for the Caribbean region in 1997. A copy of a News Release issued at the end of the Beijing colloquium is annexed **Appendix IV.**

91. A further initiative aims at developing curriculum materials and case law to be used in higher institutions for trainers in legal studies and policy-makers who require sensitization to women's human rights for the formulation and implementation of policies. The curriculum and case law materials will be so designed as to address some of the issues identified in the Victoria Falls Declaration.

INTERNATIONAL CRIMINAL COURT

92. The international debate on the proposed establishment of an International Criminal Court has been monitored by the Commercial Crime Unit because of the significance of this proposal to many member countries - in particular those Caribbean countries who first mooted such a body almost a decade ago. The matters in issue regarding the establishment of the court were canvassed in a paper submitted to Senior Officials at their meeting in Malta and were discussed. The relevance of this initiative to the administration of international criminal justice will, of course, depend on the final outcome of the debate on the jurisdiction of such a court, but it is expected that issues of transnational criminality will remain central to the proposition and the Division will continue its work of monitoring relevant developments in this area. Ministers will have before them a paper **LMM(96)21** on the present state of the developments in the subject.

INTEGRITY IN PUBLIC LIFE

93. Over recent years much of the world community has addressed itself to the issue of honest government and combating corruption. The Secretariat is following these developments and in particular the work of bodies such as the OECD (through CIME), the Council of Europe and Transparency International, a NGO based in Berlin.

The damage which can be done by the soliciting, making and acceptance of illicit payments, whether at national or international level, is immense. To enable the Commonwealth to play its part in international efforts to maintain integrity, particularly in the public sector, the Division intends to continue to treat it as an issue of primary concern in its efforts to promote honest and accountable government. Although resources are limited, the Division believes that its current activities can be broadened in scope to ensure that honesty and integrity in government and public life are given adequate attention in all aspects of its work. Two complementary papers respectively by the Secretariat and Transparency International dealing with this Agenda item are before the Meeting and are numbered **LMM(96)17 and LMM(96)5.**

OTHER LEGAL ACTIVITIES

Internal Secretariat work

94. In addition to their Commonwealth-wide responsibilities, the Division performs a wide range of duties in carrying out its mandate as the in-house legal adviser to the Secretary General and the Secretariat, including the CFTC which has contractual and other obligations arising from its international operations. These and the Secretariat's other needs take up a considerable proportion of the time of the professional staff of the Division. This has particularly been so during the last three years following the restructuring of the Secretariat.

95. By way of illustration, recently a number of matters, arising in large measure from the restructuring of the Secretariat, tied down several members of the professional staff for some considerable time. These related, among others, to arbitration proceedings instituted against the Secretariat by an aggrieved member of staff; the establishment of a Commonwealth Secretariat Arbitral Tribunal and the privatisation of the Commonwealth Consultative Group on Technology Management (CCGTM) which has now been renamed Commonwealth Partnership for Technology Management (CPTM). Examples of other matters which illustrate the range of issues the Division is called upon to deal with are the establishment of appropriate guidelines for the release of and public access to Shared Commonwealth Records in anticipation of the 30th anniversary the establishment of the Commonwealth Secretariat and the establishment of the Iwokrama Centre for Rain Forest Conservation and Development. Professional staff have also been involved in missions connected with the election monitoring activities of the Secretariat.

Commonwealth Legal Advisory Service

96. The co-operative working relations which the Division has had over the years with the Commonwealth Legal Advisory Service (CLAS) in providing legal services to member governments have been mutually beneficial. This has ensured that our combined slender resources are most effectively

utilised in a complementary manner without duplication of effort. We understand however that the British Institute of International and Comparative Law (BIICL) under whose auspices CLAS operates is in the process of reviewing the operational and financial arrangements for the Service which may have implications for the continuation of the Service. Should CLAS cease to operate, it would be a loss to the beneficiaries of the service, particularly small states. This is especially so as there is no guarantee that such services could then be provided by the Legal and Constitutional Affairs Division whose resources are already overstretched. A note prepared by the Director of the BIICL which gives details of the nature of the work undertaken by CLAS is annexed as **Appendix V.**

International Legal Activities

97. Our activities at the international law level continue to be selective. This ensures that we concentrate on matters and in areas in which the Secretariat has a comparative advantage and in which we can achieve maximum impact.

98. We maintain personal contact with other international bodies, some on a regular basis on account of their work in areas of mutual interest and concern to the Secretariat while contact with others is on an ad hoc and need to contact basis for specific purposes. Among the former are the Hague Conference on Private International Law; the International Commission of Jurists; the UN Centre for Human Rights; the International Maritime Organisation; the World Intellectual Property Organisation; UNCITRAL who have prepared one of the papers before Ministers on transborder insolvency and one of whose representatives is here with us as a resource person; Transparency International; the Financial Action Task Force; Forum Secretariat and Interpol, while among the latter are the African Asian Legal Consultative Committee; CARICOM and UNIDROIT. The Division has also recently initiated contacts with United Nations High Commisioner for Refugees; the UN Sixth Committee and the International Committee of the Red Cross.

Relations with other Non-governmental Organisations

99. The Division could not achieve the degree of effectiveness that it has been able to achieve without the network of professional contacts that it has built up and without the co-operation of other organisations active in areas of mutual interest. For this reason the contact that the Division maintains is strongest with such professional organisations as the Commonwealth Lawyers Association, the Commonwealth Magistrates and Judges Association and the Commonwealth Legal Education Association.

The Commonwealth Lawyers Association

100. Our working relationships with the Commonwealth Lawyers Association (CLA) is both organic and functional and has remained so from the period before its formal inauguration in 1986 to the present time. The Legal Division, as it then was, not only played a significant role in its transformation from its original status, largely as a one-person Legal Bureau, to its present status of a Commonwealth-wide network of professional lawyers, and continues to do so. The Division plays an active role in the affairs of the Association and senior staff of the Division sit ex officio on the Council which meets once every year at the offices of the Law Society of England and Wales in London who provide its Secretariat.

101. Arguably perhaps, the highlight of the Commonwealth's legal calendar is the triennial Commonwealth Law Conference which is held under the auspices of the CLA in association with a national Law Society or Bar Association as the case may be who act as host of the Conference. Recent Conferences which have confirmed the appeal of the three yearly gathering as a premier international convention and an incomparable occasion for renewing professional skills and contacts, have been held in Jamaica, Cyprus and the next two Conferences will be held in Canada (Vancouver 25-29 August 1996) and Malaysia in 1999.

102. Traditionally, several other special interest meetings in which the Division has an interest are held on the wings of the Law Conference. Among these are the meetings of Commonwealth Chief Justices; Commonwealth Law Reform Agencies; Commonwealth Association of Legislative Counsel and the Commonwealth Legal Education Association.

The Commonwealth Legal Education Association

103. The Division's contact with and support for the Commonwealth Legal Education Association (CLEA) has continued. The Association was restructured in 1993 when the Presidency was taken over from Professor Yash Ghai by Professor N R M Menon of the School of Law in Bangalore while Dr Jill Cottrell became Secretary. The Director of the Division, as a matter of practice, continues to serve as Honorary Secretary/Treasurer. Representatives

from each region of the Commonwealth serve on the Executive.

104. Among the Association's objectives are:

- to foster and promote high standards of legal education and research in all Commonwealth countries
- to facilitate the exchange of legal materials among law schools
- to promote programmes of continuing legal education
- to publish a regular newsletter or journal

105. Pursuant to its objectives, the Association pursues an active programme of activities. For example, it has already commenced in India a research project on Social Economic and Cultural Rights proposed in 1993 although the project awaits further funding. The Association has introduced a system of National and Regional Chapters, the first of which, in India, has succeeded in expanding the Association's membership and participation from the sub-Continent. The 1995 Annual General Meeting of the Association was held, to coincide with the meeting of the Executive and the Commonwealth Legal Education Association's Conference on "Social Integration and Human Rights" from 15-17 December 1995, in Durban at the Faculties of Law of the Universities of Natal and Westville. A South African chapter is in the process of being formed. The Association established, for Commonwealth Law Students, an Essay Competition to which £1,000 has been donated.

106. The meeting also resolved to commence a study on "The Needs, Problems and Opportunities in Legal Education in Commonwealth Law Schools", especially in developing States. It will also undertake an examination of the potential for developing States applying new communications techniques to Legal Education.

107. As has become the tradition, the CLEA will again organise the Commonwealth Student Moot competition at the 1996 Commonwealth Law Conference in Vancouver.

108. Mention has already been made of the co-operation between three Commonwealth Legal Associations - the CLEA, the CLA and the Commonwealth magistrates and Judges Association (CMJA) - in support of the Commonwealth Law Book Programme which operates in the UK in conjunction with Book Aid International.

109. During 1996 the Secretaryship of CLEA will be taken over by Mr. John Hatchard, under the continued Presidency of Professor Menon.

The Commonwealth Magistrates and Judges Association

110. The Commonwealth Magistrates and Judges Association (CMJA) was formed in 1970. Most Commonwealth countries and dependencies are represented in the membership which is open to national associations of magistrates, judges and any other judicial bodies. Associate membership is open to any individual who is a past or present member of any level of the judiciary or has connections with the courts within the Commonwealth.

111. The aims and objectives of the Association are: to advance the administration of the law by promoting the independence of the judiciary; to advance education in the law; the administration of justice, the treatment of offenders and the prevention of crime within the Commonwealth; and to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

112. The CMJA publishes the Commonwealth Judicial Journal and a Newsletter twice a year. It also organises study tours, judicial education seminars and triennial conferences which include intensive education programmes.

113. At the 1994 triennial conference at Victoria Falls, Zimbabwe, the General Assembly approved the Victoria Falls Proclamation and wished it to be communicated to Law Ministers. The text of the Proclamation is at **Appendix VI**.

114. In 1994, the CMJA established the Commonwealth Judicial Education Institute (CJEI) as its judicial education arm. The purpose of the Institute, among other things, is to provide support and linkage among existing Commonwealth Judicial Education bodies and to deliver judicial education programmes, at the invitation of the Chief Justice, in those countries where no judicial education body exists. The Institute is located at the Dalhousie Law School, Halifax, Nova Scotia, Canada.

Interights

115. Mention has already been made of the work the Division does in collaboration with Interights to promote values which correspond, and are consistent, with the fundamental values of the Commonwealth. Interights is the International Centre for the Legal Protection of Human Rights. It was established in

1982 to provide leadership in the development of legal protection for human rights and freedoms through the effective use of international and comparative human rights law. It assists judges, lawyers, practitioners, non-governmental organisations and victims with the practical application of human rights law in the national, regional and international courts and tribunals.

116. Interights, with some contribution of funds by the Secretariat, is in the process of establishing a database of judicial decisions which invoke the human rights provisions of national Constitutions (and related provision such as independence of the judiciary) or refer to human rights legislation or comparable international instruments or standards. The creation of the database was suggested at the judicial colloquium held in Abuja, Nigeria in 1991 as a further practical step in communicating information about intentional and comparative human rights law to judges, lawyers and non-governmental organisations.

The Commonwealth Human Rights Initiative

117. *The Division also follows with keen interest* the activities of the Commonwealth Human Rights Initiative funded by a consortium of five Commonwealth non-governmental organisations, including both the CLA and CLEA, and whose main aim is to make the enjoyment of human rights more significant and a common experience for all the nations and peoples of the Commonwealth.

FUTURE ACTIVITIES

118. As a result of the improvement in its staffing resources the Division is gearing itself for an intensive programme of consolidation and taking initiatives in new areas of work which have so far not been possible.

119. Subject to the availability of resources, it is proposed to revive work which had been commenced the previous year on a legislative drafting computerisation project but which had aborted due to difficulties relating to the copyright licensing arrangements. This will enable laws to be drafted directly onto personal computers as part of a longer term process of making laws available in constantly updated form to courts, lawyers and the public and in a more general way to other Commonwealth countries. It is expected that this development will be assisted by the work of the **Commonwealth Legal Computerisation Group** (CLCG) which Ministers established at their Meeting in Mauritius. At their meeting in Malta in 1995, Senior Officials discussed the *modus operandi* of the CLCG and agreed that it would be administered in accordance with the Terms of Reference which are set out in **Appendix VII** for the information of Ministers.

120. Similarly, Senior Officials adopted Terms of Reference to govern the operation of the **Commonwealth Arbitration Assistance Service** which Ministers had also agreed to establish at Mauritius. These are set out in **Appendix VIII.**

121. The implementation of international conventions, including environmental conventions, have in the recent past featured on the agenda of both Ministerial and Senior Officials Meetings. The growing concern about global environmental issues and the measures adopted by the international community in response to these issues reflect their growing importance as a factor in the shaping of national policy. However, while the environment is now an important item on the political agenda of many countries, the implications of implementing international conventions governing environmental issues in terms of legislation and capacity are not fully appreciated.

122. For Small Island States especially, this presents a special challenge. Often, the obligations of membership of a convention are onerous. On the one hand, the benefits or advantages may be attractive for states but on the other hand the resource implications of complying with membership obligations could prove extremely burdensome. In the past, the Division has facilitated accession to relevant conventions by member states through the provision of "accession kits" supplemented by the provision, upon request, of expert legal advice.

123. The Division is planning new and joint activities with other divisions within the Secretariat and other outside bodies in the field of environment law which would assist member countries, particularly small states, to enhance their capacities in dealing with environmental issues in a manner that would be consistent with their sustainable development.

124. Similarly, the Division is ready to embark on assisting members, again especially small states, to grapple with the complexities associated with membership of the World Trade of Organisation and many of the Agreements to which members will become parties.

125. In addition, in the area of the administration of criminal justice, a significant majority of Commonwealth countries are faced with the task of balancing the need to combat serious crime with the equally compelling need to ensure that fundamental

freedoms are protected. The courts in Commonwealth countries are now regularly faced with the task of deciding whether governmental powers used to investigate, prosecute and punish crime are being exercised in ways which are consistent with obligations imposed by national constitutions and international instruments. The Commonwealth is uniquely placed to task a group of eminent Commonwealth experts with finding levels of conduct which satisfy both needs. It is therefore proposed, with the approval and support of Law Ministers, that such a group be formed and asked to report to the Secretary General and through him to Commonwealth Heads of Government, on the relationship between criminal justice systems and fundamental freedoms and on the appropriate Commonwealth standards for the 21st century. Ministers have before them paper **LMM(96)20** which raises the issues involved.

STAFFING

126. It is appropriate to record that the longstanding staffing concerns of the Division appear to have now been recognised. Following the restructuring of the Secretariat in 1993 from which the Division appears to have benefited it has, however, only recently been permitted to recruit staff to fill all the posts to the new establishment level. This should go a long way towards facilitating a more effective delivery of services.

127. The range and depth of the work the Division is expected, and called upon, to carry out has grown and has often extended its resources. Nevertheless, the Division's commitment to its mandate of serving the needs of Commonwealth governments in the legal field to the best of its ability remains undiminished. This commitment is assisted, to a considerable extent, by the Division's good fortune of being able to rely on the generosity of professional colleagues around the Commonwealth in virtually every member country - in Law Ministries, the Chambers of Attorneys-General, from the Judiciary, Parliamentary Counsels' Offices and in Universities. An extract from the Secretariat's Work Programme covering the areas for which the Division is responsible appears as **Appendix IX.**

128. The present strength of the Legal and Constitutional Affairs Division at the professional level now comprises the Director (Zimbabwe), four Assistant Directors (Britain, Australia, Uganda, Western Samoa), Legal Editor (Sri Lanka), Chief Mutual Legal Assistance Officer (Britain), Senior Programme Officer (India), Assistant Legal Editor (Ghana) and Programme Officer (New Zealand). One outstanding post at the level of Senior Programme Officer for the Human Rights Unit has recently been filled and the officer is due shortly to assume office.

APPRECIATION

129. Over the years, the Division has received valuable assistance from a network of helpers who offer their services willingly and gratis. While we recognise the risk in mentioning individual names for special praise, some of these deserve special mention. It would be grossly inadequate not to record our special debt of gratitude to three of our longstanding supporters and consultants - the Hon Mr Justice Michael Kirby, former President of the Court of Appeal of New South Wales recently elevated to the High Court of Australia who has assiduously supplied us with judgments and articles; Professor David McClean and Dr William Gilmore of the Universities of Sheffield and Edinburgh respectively both of whom have played a crucial role in developing and extending the frontiers of intra-Commonwealth mutual legal assistance. A fourth, Professor John L Edwards of the University of Toronto, author of "Law Officers of the Crown" and who was prevented by sudden illness from being present as a consultant at the Mauritius Meeting, sadly passed away not long after that Meeting.

130. Equally, it would be inappropriate and incomplete to conclude this review without recording our profound gratitude to Law Ministers, Attorneys-General and collectively their Senior Officials who are our direct points of contact with governments and in every sense our raison d'etre. Without their guidance and unflinching support the Division might find no secure basis on which to anchor its endeavours. In particular, we would mention the help given, beyond the call of duty, by the Attorney-General's Department, Australia in many areas of the Division's work but more especially with regard to the preparation of the Commonwealth Law Bulletin and in respect of which we also pay warm tribute to our CLB correspondents as well as to the Law Reform Agencies around the Commonwealth who keep us well supplied with information on legal developments throughout the Commonwealth. Without the support of all of these, the Division could not hope to achieve with any degree of confidence the level of success that it has in carrying out its mandate. For all this and to everyone, the Division is profoundly grateful.

March 1996

LEGISLATIVE DRAFTING
Commonwealth Distance Training Course in Legislative Drafting

"Welcome to the Commonwealth Legislative Drafting distance training programme."

Who is this Programme for?

The programme is directed to those individuals at the start of their career as a legislative drafter in a Commonwealth jurisdiction.

It has been developed assuming that a prospective trainee is:

- legally qualified and has had at least a short period of experience in some form of legal practice;
- used to working with legal texts written in English and to writing legal documents in English;
- working in a common law jurisdiction, or at least one that generally follows the common law approach and traditions in relation to the preparation of legislation;
- a public officer and has recently been, or is likely to be, assigned to legislative drafting, but in either case has little experience of the work.

This programme has been designed to help you to understand, acquire and develop the knowledge and skills you need to perform the role of legislative drafter to the best of your ability.

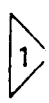
Developing the role of the Legislative Drafter

The work of a legislative drafter is responsible, demanding and complex. We trust that you will discover these materials to be both simulating and rewarding to work through, and that you will find them of great assistance to you in your continuing development as an accomplished and effective drafter. The following pages explain why the Course was developed, how it is organised, and how you may work through it and monitor your own progress as you proceed.

Preparing to start

This introduction to the programme describes how to use your study materials, but there is a general introduction from the author of these materials on audio cassette, which you may like to hear before you start. Play it now or after you have read through this introduction.

Welcome to the course!



Play the audio cassette labelled Tape One; Side A; Track One, to hear Professor Keith Patchett introduce this course.



Why has this Course been developed?

This Course offers a new approach to learning the skills and techniques of legislative drafting. In the past, many trainee drafters have had no choice but to pick these up on the job, in some cases without the supervision or guidance of senior officers. In a few countries, working with experienced officers on actual drafting tasks has been a successful method of learning, largely because of the quality and continuity of supervision and the length of time that is made available.

But in many Commonwealth countries, such facilities are not available. Increasingly, they have looked to formal courses to provide trainees with a systematic and structured training programme on the basics of sound drafting. Such courses are well suited to preparing the ground for the responsibilities that drafting entails.

This Course aims to take this progress a step further.

Many new drafters are unable to take part in training courses, which are usually available only overseas, have a limited number of places and are expensive. The Commonwealth Secretariat and the Commonwealth of Learning have initiated this Distance Training Course to enable trainees to learn and to practise the basics of legislative drafting in independent, individual study in their own jurisdiction.

What does the Course aim to achieve?

This Course is designed to enable you as a 'trainee' to learn and develop drafting skills - for the most part without external tuition. However, trainees will be required at specific intervals throughout the Course, to submit a total of eight drafting projects for external review and advice from an experienced drafter. This will provide you with direct feedback and should enable you to learn from your efforts (and mistakes) and to help assess your own progress.

The Course should not be seen as a substitute for experience; it cannot make you into a seasoned drafter. As in most kinds of legal practice, skills, techniques, know-how and general facility in the work develop by practising them in an actual working environment. This Course is intended to lay the foundations upon which new drafters can build their subsequent experience more securely. It aims to provide a thorough introduction to the basics of sound drafting practice, enabling a trainee to undertake drafting duties with greater confidence and be able to assume significant responsibilities sooner. It provides the beginnings for becoming a good drafter. But at its end, there will still be much to learn, especially from those already established in the field.

A Training Programme and a Reference Work

The modules presented here are assembled in the form of a part distance training format, but they have a dual function. When you have completed the Course, these modules may simply be resequenced to form a unique reference work, containing information from your own jurisdiction that you will be asked to collect as part of the programme activities.

What does the programme consist of?

This six-module Course is supplied in two parts and contained in seven binders, as follows:

1 **Course Text (1)** - start your course of study here...

2 **Course Text (2)** - second part of Course (may be supplied separately)

3 **Exercise Book** - contains exercises referred to in the *Course Text* binders

4 **Exercise (Answers) Book** - answers for the exercises (self checking)

5 **Drafting Projects Book** - contains projects referred to in the *Course Text* binders

6 **Drafting Projects (Answers) Book** - suggested answers (some assessed externally)

7 **Materials Book** - a collection of materials, which you can add to

\+ Audio Cassettes (3) and 'Primer' reference text

Please check that you have a full set of materials and notify your supplier of any problems.

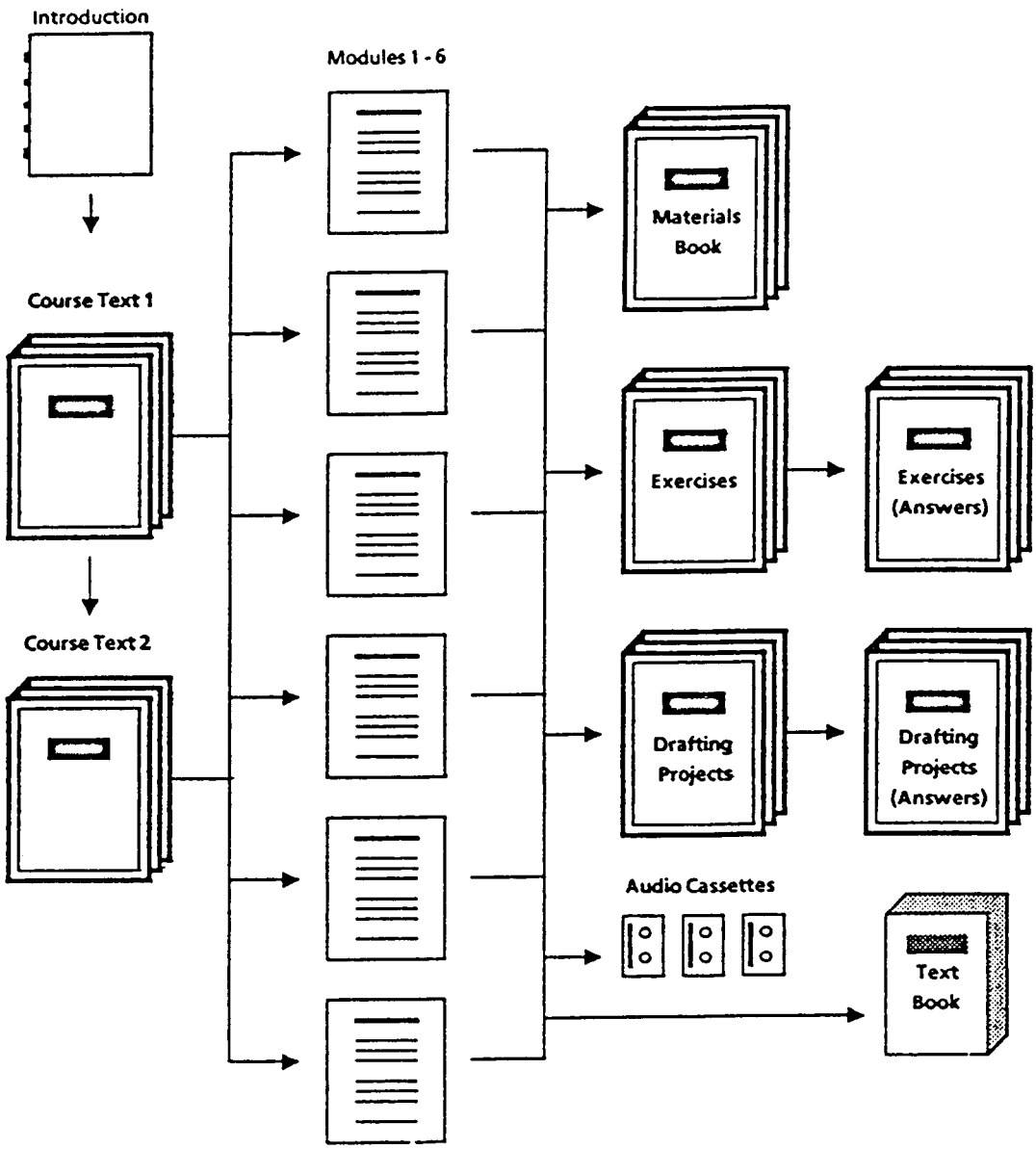
How do the parts fit together?

The Course components and their relationship to each other is shown on the following page:

Legislative Drafting - Component Parts

The Legislative Drafting distance learning programme consists of six modules.

As shown in this diagram, the full set of Course materials can be stored in seven binders. In addition there are three audio cassettes and a grammar guide.



Order of Study

We have set out the Modules in this Course in the order which they might appear in a text on drafting. They begin with matters we think that you need to understand to get the most out of the subsequent materials (**Module 1A** - *Back to basics*). After this general introduction, we deal with the system of legislative drafting and your responsibilities as a Legislative Counsel and how they may be fulfilled (**Module 1B** - *Getting going*). Related to this are the constraints imposed on legislative drafters by practices arising from the way legislation is interpreted and in particular from your Interpretation statute and by the Constitution, notably the Fundamental Freedoms provisions (**Module 2** - *Working within limits*). These Modules contain a good deal of descriptive matter, though they ask you to find out about practice and procedure in your system. They are not principally concerned with composing legislative provisions.

We deal with the composition of statutory rules in the following Modules. We start with the basic task of how to write legislative sentences to create particular legal rules (legislative syntax) and the pitfalls that you should avoid (**Module 3** - *Making the right expression*). As with any technical skill, there are better or worse ways of carrying out this activity. So we consider how you can develop an effective style and sound writing practices (**Module 4A** - *Putting on the style*).

Legislation is more than a set of random legislative sentences. The proposer's requirements must be converted into a complete instrument that is effectively organised and structured in accordance with the practice that is conventional in your jurisdiction. In **Module 4B** - *Getting organised*, we look at the tasks of designing and structuring legislative instruments. In **Module 5** (*Topping .... and Tailing*), we look in detail at technical features of legislation that are typically covered in preliminary and final provisions.

The last Module (**Module 6** - *Particular cases*) covers particular types of legislative provisions that are typical in Commonwealth legislation (amendments and repeals, penal provisions, delegated powers to legislate and subsidiary legislation).

The order we have used may be a logical way to organise the material, but we believe that you will not find it the most effective way to study it. From our experience, we think that you will want to start writing legislative sentences as soon as possible. So we recommend that you consider working with **Module 3**, on legislative expression, immediately you have completed the introduction in **Module 1A**, and before you turn to **Modules 1B** and **2**. But if you are interested in the information in those Modules or think that it may be helpful, read them through fairly quickly, leaving the detailed work on them for later.

We ask you to undertake a series of Drafting Projects. To begin the first of those too, you need to have worked with the Modules on legislative expression. These Projects are designed to develop your experience in a systematic way. The later ones assume that you have acquired the basics with which the earlier ones are concerned. If you are to absorb the lessons they teach, you should undertake them at regular intervals throughout the Course, but only after you have completed the particular parts of the Course to which they are linked. We try to reinforce the knowledge you gain from those parts by the work on the Projects. But we consider that work on particular parts will be made easier if you have completed certain Projects first.

The following chart suggests an order in which the Modules may be studied and the most appropriate points at which to undertake the Drafting Projects. As we have just suggested, do not hesitate to adopt a different order or to have a preliminary look at a later Module if you consider that will make your study easier But our advice is:

- follow the numerical order of the Drafting Projects; we have put them in that order for good reasons. You may make your study more difficult if you do not complete them in the order we suggest;

- take on a Drafting Project only after you have *completed* your study of the parts of the Course which proceed it on this Chart;

- move to full study of the next Module only after you have completed the Drafting Projects that precede it. You will find the task of completing the Projects becomes increasingly awesome if you stock-pile them.

Part 1

1A: Back to basics	1. What's it all about?		
	2. What is legislation?		
	3. Why do we draft as we do?	→	Project 1
	4. How important is grammar?		
3: Making the right expression	1. How do we begin to compose legislative sentences?	→	Project 2
	2. How should we express legislative sentences?	→ →	Project 3 Project 4
2: Working within limits	1. How do we work with the rules of interpretation?		
	2. How do we work under the Interpretation Act?	→	Project 5
3: Making the right expression	3. How do we punctuate legislation?		
	4. What can go wrong in legislative expression?	→	Project 6
1B: Getting going	1. What are the stages in the preparation of legislation?		
	2. What do we do with instructions?	→ → →	Project 7 Project 8 Project 9
4A: Putting on the style	1. How can we develop an effective legislative style?	→ →	Project 10 Project 11
	End of Part 1	→	Project 12

Part 2

2: Working within limits	3. How do we work under the Constitution?		
	4. How do we work with Fundamental Freedoms provisions?	→ →	Project 13 Project 14
4B: Getting organised	1. How should we structure legislation?		
	2. How might we design a legislative plan?	→ →	Project 15 Project 16
5A: Topping	1. What do we include in preliminary provisions?		
	2. How do we write definitions?	→	Project 17
	3. When should we use application provisions?		
5B: .... and tailing	1. What do we include in final provisions?	→	Project 18
	2. How should we repeal legislation?		
	3. When do we need retroactive and retrospective legislation?		
End of Module 5		→	Project 19
6: Particular cases	1. How should we amend legislation?	→	Project 20
	2. How do we draft penal provisions?	→	Project 21
	3. How do we delegate powers to legislate?	→	Project 22
	4. How do we draft subsidiary legislation?	→	Project 23
	End of part 2		Project 24

Submission of Drafting Projects for moderation and assessment

The 24 Drafting Projects which you are asked to complete during the Course are central to the programme. They provide an opportunity for you to put into practice what you are learning and for us to provide you with constructive guidance on your work and, at regular intervals, an assessment of your progress. For those purposes, we require you to submit some of your work on the Drafting Projects to us, although we have designed them, in the main, to enable you to self-assess your own work.

In particular, all participants are asked to submit work on 8 designated Projects. Each of these will be evaluated and an assessment made of your progress. You will receive a report of the assessment, and guidance whenever that appears to be needed or helpful. A record will be kept of each assessment. The eight reports will be influential in the decision as to the award of the final certificate when you complete the programme satisfactorily.

Whether you are expected to submit your work on *others* of the Drafting Projects depends upon the extent to which local arrangements for moderating the Course have proved possible In some countries, you will be able (and expected) to submit work to local moderators on both the designated Projects and most of the others. In other places, for want of local moderators, you must carry out your own assessment from the materials provided, *except* on the 8 designated projects. Those eight must be despatched to an external Agency and dealt with by correspondence or fax.

Elsewhere in the Programme materials you are given details of how the scheme applies to you, and the information about procedures for submitting your work. But in every case when you submit work, you will receive written comments upon it, including constructive advice. At the same time we shall send you a Suggested Answer for the Project in question, with a detailed commentary. You can learn a great deal from these materials and from the criticisms and evaluation. Make time to study them. They are potentially far more important and valuable to your future than the assessment.

A number of the Projects are divided into Parts. The *first* Part is typically designed to give you help in working out the first draft for the Project. That draft you are expected to evaluate for yourself, by referring to a Suggested Answer which we provide in the Course materials. You are *not* to submit that work for evaluation. When we ask you to submit work in these cases, it is on the *last* of the Parts only.

On the next page, we set out the scheme for submission. This indicates the Projects on which *everyone* must submit work and those which are to be submitted only if you have access to a local moderator. In both cases, we indicate those Parts of the Projects on which your work is to be submitted. In some cases, the *entire* project is to be assessed by you, and none of it submitted. (These are marked as "None").

The scheme highlights the following Projects: Nos. 4, 6, 11, 12, 16, 19, 21, 24. These are the eight Projects designated for assessment which *everyone* must submit.

ALWAYS CHECK THE FOLLOWING SCHEME
TO FIND OUT THE PART(S) OF EACH PROJECT
ON WHICH YOU ARE TO SUBMIT WORK.

Drafting Projects	Work to be submitted
Drafting Project 1	Parts 2 and 3 together.
Drafting Project 2	Section 1, Part 2 and Section 2, Part 2 together.
Drafting Project 3	Part 2.
Drafting Project 4	*Part 2.*
Drafting Project 5	None.
Drafting Project 6	*Part 2.*
Drafting Project 7	All (*single part Project*).
Drafting Project 8	Sections A, B and C together.
Drafting Project 9	None.
Drafting Project 10	Sections A, B and C together.
Drafting Project 11	*Part 2.*
Drafting Project 12	*Part 2.*
Drafting Project 13	Part 2.
Drafting Project 14	None.
Drafting Project 15	None.
Drafting Project 16	*Part 2.*
Drafting Project 17	None.
Drafting Project 18	None.
Drafting Project 19	*All* (*single part Project*).
Drafting Project 20	Part 2.
Drafting Project 21	*Part 2.*
Drafting Project 22	Parts 3 and 4.
Drafting Project 23	All (*single part Project*).
Drafting Project 24	*All* (*single part Project*).

What is on the Audio Cassettes?

This programme is supported by three audio cassettes, which are referred to by tape number, side and track, at various intervals during the Course. Most of these commentaries are to be used for review with the suggested answers provided for the Drafting Projects. the full contents are as follows:

TAPE ONE

Side A	- Track 1:	Welcome to the Course	19'49"
	- Track 2:	Introduction to the Drafting Projects	17'58"
Side B	- Track 1:	Drafting Project 1	21'13"

TAPE TWO

Side A	- Track 1:	Drafting Project 6	23'28"
Side B	- Track 1:	Module 1B, Section 2 (Analysing Instructions)	14'43"
	- Track 2:	Drafting Project 12	25'23"

TAPE THREE

Side A	- Track 1:	Drafting Project 14	28'13"
Side B	- Track 1:	Drafting Project 17 (part 1)	17'22"
	- Track 2:	Drafting Project 17 (part 2)	11'57"
	- Track 3:	Drafting Project 18	12'08"

Note: *When you have finished listening to a track stop the tape, and only continue 'playing' on to the next track (which you will find 10 seconds later) when you are ready to listen to it. This will save time searching for individual tracks later.*

How should you study this material?

At the beginning of each Part and of each Section, you will find a Preview page. This indicates:

- the Objectives that you should be aiming for in your study in that Part or Section;

- the matters under study and the principal questions that are dealt with;

- any specific advice on how you may study that particular Part or Section.

You should always start the work by reading the relevant Preview. You will find that suggestions are made there about the order in which Sections may be tackled. But there is also a clear statement when it is recommended that specified features should be completed before others are attempted.

You may wish to experiment with different approaches to the materials, in order to suit your own requirements. For example, you could read quickly through the next section for study before settling to the Activities and Exercises that are set in the one you have just read. Alternatively, you may want to tackle them as you meet them.

You should, however, try to plan your work to complete a Section or a part of a Section during a study session. The modules offers convenient break-points, which you should establish before you start a session. By setting yourself a suitable beak-point, you set a goal for the session, as well as provide a convenient point to stop.

It is vital that you remember that the Course is designed for individual and independent study. You must, therefore:

- work on your own;

  plan your own working sessions;

- complete the work according to your own timetable.

It is intended that you set your own pace to meet your own learning needs.

Planning your study

Work on this programme will require sustained study. During study sessions, you should aim to work for periods of around an hour at a time, with a short break before you start again. The actual length of the study session should be governed by the nature of the study on which you are currently engaged. As mentioned earlier, you should aim to finish a study session at a natural break-point in the text, which you should establish before you start the session.

Distance training is based on the assumption that trainees will organise their study in the way that best meets their circumstances.

At the end of this Introduction, we have provided blank timetables, at least one of which we suggest you fill in as you complete each stage of your work. Use whichever of the timetables best suits the way in which you plan your work. Filling in a timetable as you proceed will allow you to monitor your progress.

How does the programme work?

The Course puts considerable emphasis upon *doing* tasks that confirm and extend understanding of the subject and that will contribute to legislative writing capabilities. This feature is found throughout the Modules. The sequence of materials is designed so that you gradually reinforce and build upon what you learn in one part by your studies in later parts. This should be borne in mind when you are judging your progress.

In studying this Course, you will be expected to do the following:

- **to work through the study materials in the Course Text binder (Parts 1 and 2).**

  These take you through the study topics, drawing out the legal considerations that are important to the drafter and emphasising the drafting implications of the particular matter under study. You will be asked, from time to time, to consider other materials and legislative precedents in support of the text. These are contained in the first section of the Materials Book.

  The text also contains numerous illustrations of the points under consideration. These are set out in Example Boxes:

Example Box 1

> 25. A citizen of Utopia employed in the service of the Republic who, when acting or purporting to act in the course of that employment outside Utopia, does an act which would constitute an offence if done within Utopia, is guilty of that offence.

You will note that this Course uses a distinctive font for quoted examples of legislative text.

- **to undertake specified Activities.**

  These enable you to follow up points in the source materials, in particular by finding out local practice on the matter, or by collecting local statutory precedents that illustrate that practice. These should be kept in the folders in the last part of the Materials Book. The activities are set throughout the Module with space for you to respond or to make notes, in the following way:

Activity Box 1

If your Interpretation Act has an equivalent definition of "person", confirm its contents by copying it in the space provided.

- **to undertake specific Exercises.**

  The exercises are indicated throughout the Course Texts, to provide an opportunity for you to test whether you have thoroughly understood the matter under consideration.

  Exercises are highlighted as shown below:

> **COMPLETE EXERCISE BOX 7 AND THEN COMPARE YOUR ANSWER WITH ANSWER BOX 7**

  You will find the exercises located under the appropriate module and section headings in the Exercise binder. For example:

Exercise Box 3

> Redraft the sentence in **Example Box 12**, as directly and concisely as possible.

Once you have completed the exercise, you are expected to assess your own answers, and so will be directed to compare the answer which you write in the space provided in the Exercise Box with that shown in the corresponding Answer Box, in the Answers binder.

An Answer Box takes the following form:

Answer Box 7

> **The definition term "abut" is a verb; the definition uses a different part of speech (a participle). The correct form is:**
>
> "adjoin" includes abut on or share a common border with.

- **to undertake drafting projects.**

  These are more substantial drafting exercises which you will be asked to do at the end of a Section or Part of the Module. They provide an opportunity for you to apply the knowledge and skills that you should have acquired at that stage.

  You will be directed to these as appropriate, in the yellow *Review* pages which are located at the end of each section. The projects are numbered in sequence, may consist of more than one part, and are located in the Drafting Projects Book.

  There is an oral introduction to working on these on an audio cassette (Tape One; Side A; Track Two) which you should listen to before you undertake the first drafting project.

  At the completion of each project, you will be asked to compare your work with the relevant Suggested Answer, in the Drafting Projects (Answers) Book. In addition to the draft, there are Notes on the principal drafting points which we expect that you will have dealt with.

  For some projects, the written notes are supplemented by spoken comments on the audio cassettes. You will be directed to listen to these at the appropriate time.

  Eight of the Drafting Projects will be assessed externally and you will need to send them for review. There is an overview table which shows the position of these projects (and which ones will be assessed externally).

How long will the work take?

The speed at which you complete the Course depends upon many factors, apart from any problems occasioned by the Course content, for example:

- your familiarity with the subject-matter;
- your personal working speed;
- the environment in which you are working;
- the length of each study session;
- your commitment and concentration.

It is likely that your rate of progress will vary considerably during the course of the programme. You will find it helpful to keep track of your own progress by filling in a record of how much you have done and by what time.

Depending on the time you can set aside for study, the Course may take several weeks or several months to complete. We suggest you complete a timetable such as the example provided in this Introduction, begin by setting yourself targets to achieve and plan to set aside a regular amount of time in order to do so. Review your progress from time to time and amend your targets if necessary.

How do you monitor your progress?

You will want to know, as you work through the Course, whether you are making satisfactory progress. There are two principal ways in which you can do this:

- **the drafting projects**

These are set at the end of the Parts and are there to enable you to put into practice the main features of what you have been learning. You should be able to assess your progress by:

- how readily you were able to deal with the issues raised, and in particular the extent to which you had to refer back to the Course material for guidance;
- comparing your draft with the Suggested Draft.

The Notes that go with the Suggested Draft and the commentaries on the audio cassette are intended to draw your attention to the matters that are likely to have presented difficulties. If you have resolved those on the lines suggested, then you can feel that you have made sound progress.

- **Review pages**

At the end of each Section, you will find a Review of what was contained in that Section, of the objectives when studying it and a repeat of the questions that you will have just dealt with. The Review suggests that you remind yourself of the work you have done, including any Project Draft, to find out whether there are any matters on which you still feel unsure. It is then suggested that you re-work the parts of the Course that touch upon those matters, before you go to any later part of the Course. This is a necessary device in distance training programmes.

In assessing your progress, you must be wholly honest with yourself. The Course is founded on the principle of building blocks. If you are not confident about any segment, you may find that this holds you back at a later stage. At the same time, you must expect to find that many of the finer details only stay with you with practice, which, on the full Course, will be provided in the course of working on subsequent Modules.

How should you begin your study?

If you have not already done so, listen to the first track of the audio cassette. This contains a spoken welcome to the Course. Some points dealt with in this Introduction are mentioned in it, but it aims to put the Course in its wider context of the demanding, but vitally important, work of legislative drafting. After you have listened to the cassette and read this Introduction, you should turn to the Course Book, and start work on the Course, by reading the first Preview pages.

START WORK ON PART 1 COURSE TEXT
BY READING THE PREVIEW TO THE FIRST MODULE AND SECTION

Let us know what you think

As you work through these materials we would like to learn from your experience also, and so we invite you to provide feedback and comments on the programme as you progress. Using this information we aim to ensure that the material meets your needs now and for others in the future.

LEGAL TECHNICAL ASSISTANCE ASSIGNMENTS AND PROJECTS PERFORMED FOR COMMONWEALTH COUNTRIES UNDER THE COMMONWEALTH FUND FOR TECHNICAL CO-OPERATION (CFTC)

Notes

(1) A number of the projects listed below have been completed but many are still in operation, or under consideration or awaiting recruitment and includes other assistance provided the Management and Training Services (formerly Fellowships and Training) Programme of the CFTC.

(2) The reference to ELASD means that the project was undertaken by the Economic and Legal Advisory Services Division (formerly the Technical Assistance Group (in association with other countries, where appropriate).

COUNTRY/REGION/ORGANISATION ASSISTED, DESCRIPTION AND DURATION OF PROJECT

Africa Region

- Project co-ordinator, Trade and Investment Laws of the Preferential Trade Area. March 1991 - 3 years.

University of the South Pacific

- Lecturer in law. August 1994 - 2 years.

Organisation of the Eastern Caribbean States

- Programme co-ordinator, Maritime Boundary delimitation. May 1995 - 2 years.

University of the West Indies

- Director, Legislative Drafting Programme. October 1989 - September 1996.

Commonwealth General

- Distance training of legislative drafters. February 1994 - 1 year.

Bahamas

- MA degree in Maritime Law. October 1993 - 1 year.

Bangladesh

- LLM degree in legislative drafting. October 1993 - 1 year.

Bermuda

- Assistance with securities legislation. September 1993 - continuing (ELASD).

Gambia

- Justice of Appeal, Court of Appeal. November 1993 - 2 years.

- MA degree in Maritime law. October 1993 - 1 year.

Kenya

- Chief Justice of Kenya. April 1993 - 2 years.
- Senior Principal Parliamentary Counsel. October 1995 - 2 years.

Lesotho

- LLM degree in legislative drafting. October 1993 - 1 year.
- Legal draftsperson. August 1995 - 2 years.

Malawi

- Administrative law workshop. 1 week.

Maldives

- MA degree in Maritime law. October 1993 - 1 year.

Malta

- Director, International Maritime Law Institute. September 1992 - 2 years.

Namibia

- Legal draftsperson. April 1991 - June 1996.
- LLB degree. October 1993 - 1 year.
- LLB degree. April 1991 - 40 months.

Nauru

- Secretary form Justice. June 1991 - June 1996.

Nigeria

- LLM degree in legislative drafting. October 1993 - 1 year.

Papua New Guinea

- LLM degree in legislative drafting. October 1993 - 1 year.
- Legal Expert (Marine law). March 1991 - September 1996.

St. Kitts & Nevis

- Law Revision Commissioner. (Under contract)

St. Vincent & the Grenadines

- Legal draftsperson. July 1990 - 4 years.

Seychelles

- Environmental lawyer. January 1993 - 2 years.

Sierra Leone

- Legislative drafting expert. September 1993 - 3 months.

- Legal Expert, Interim National Electoral Commission. June 1995 - 1 year.

Tanzania

- LLM degree in Maritime law. October 1993 - 1 year.

Zambia

- LLM degree in legislative drafting. October 1993 - 1 year.

Zimbabwe

- LLM degree in legislative drafting. October 1993 - 1 year.

VICTORIA FALLS DECLARATION OF PRINCIPLES FOR THE PROMOTION OF THE HUMAN RIGHTS OF WOMEN

Africa Regional Judicial Colloquium on the Domestic Application of International Legal Instruments that Promote Gender Equality

19-20 August 1994, Victoria Falls, Zimbabwe

Introduction

Senior Judges from Commonwealth African countries met at a Regional Judicial Colloquium on 19-20 August 1994, at Victoria Falls in Zimbabwe, to examine the domestic application of international and regional human rights norms as they specifically relate to women. The Colloquium, which was the first such high-level meeting of judges devoted to the human rights of women, was organised and convened by the Women's and Youth Affairs Division of the Commonwealth Secretariat in collaboration with the government of Zimbabwe. Participants comprised of both female and male judges drawn from the following countries: Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, South Africa, Tanzania, Uganda, Zambia and Zimbabwe. The Colloquium was attended by representatives from the Ministry Responsible for Women's Affairs and the Ministry of Legal and Parliamentary Affairs in Zimbabwe, as well as by the African Commission on Human and People's Rights, the United Nations Division for the Advancement of Women and the Association of Women, Law and Development in Africa. The Chief Justice of Zimbabwe, the Hon A Gubbay, opened the Colloquium. The keynote address was delivered by the Hon Madam Justice Beverley McLachlin, of the Supreme Court of Canada, with further addresses delivered by the Hon Justice Bhagwati, former Chief Justice of India, Professor Albie Sachs of the University of Cape Town and the Hon Madam Justice Sandra Oxner, President of the Commonwealth Magistrates' and Judges' Association (CMJA). Discussions resulted in the formulation and endorsement by the participants of the Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, as follows:

1. The participants reaffirmed the principles stated in Bangalore, amplified in Harare, affirmed in Banjul, confirmed in Abuja, reaffirmed at Balliol, Oxford and reinforced at Bloemfontein. These principles reflect the universality of human rights - inherent in men and women - and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. These general principles are applicable in all countries, but the means by which they become applicable may differ.

2. The participants noted that all too often universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. They stressed that civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.

3. The participants were aware that universal human rights, are usually interpreted as applying to regulate the public sphere. Violations of human rights in the private sphere, including the family - the site of much of women's experience of violations - are usually perceived to be outside the reach of human rights. The participants noted that although the State does not usually directly violate women's rights in the private sphere, it often supports or condones an exploitative family structure through various laws and rules of behaviour which legitimate the authority of male members over the lives of female members of the family and, in any event, often it fails to act to protect women from private violations or tolerates or, indeed, encourages, a structure wherein private violations occur all too frequently.

4. The participants recognised that many of the existing international and regional human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity and sometimes fail to provide protection for the gender specific interests of women. The participants emphasised the urgent need for the formulation of further specific rights for women, particularly in the economic and social field. The participants stressed the vital need for women to be centrally involved in decision-making at all levels.

5. The participants recognised that discrimination against women can be direct or indirect. They noted that indirect discrimination requires particular scrutiny by the judiciary. The participants, further, emphasised the need to ensure not only formal, but also substantive equality for women and, for that purpose, affirmative action may be adopted if necessary.

6. The participants noted that although international human rights are inherent in all human kind, very often such rights are perceived to be owned, only or largely, by men. The participants emphasised, as did the 1993 United Nations World Conference on Human Rights, that the human rights of women are as valuable as the human rights of men.

7. The participants recognised that international human rights instruments, both generally and particularly with reference to women, and their developing jurisprudence enshrine values and principles long recognised as essential to the happiness of humankind. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. These constitutional guarantees should be interpreted with the generosity appropriate to charters of freedom. Particularly, the known discrimination guarantee should be construed purposively and with a special measure of generosity.

8. The participants agreed that it is essential to promote a culture of respect for internationally and regionally stated human rights norms and particularly those affecting women. Such norms should be applied in the domestic courts of all nations and given full effect. They ought not to be considered as alien to domestic law in national courts.

9. All Commonwealth governments should be encouraged to ratify the Convention on the Elimination of All Forms of Discrimination Against Women before the Fourth United Nations World Conference on Women to be held in Beijing in 1995. Those governments which have ratified the Convention with reservations, should examine the content of those reservations, with a view to their withdrawal.

10. All Commonwealth governments should ensure that domestic laws are enacted or adjusted to conform with the international and regional human rights standards.

11. The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination Against Women when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions.

12. The participants agreed with the views expressed in the Vienna Declaration and Programme of Action encouraging the speedy preparation of an optional protocol to enable individual petition under the Convention on the Elimination of All Forms of Discrimination Against Women.

13. All Commonwealth governments should subscribe to the principles contained in the Declaration on Violence Against Women, adopted by the UN General Assembly in December 1993. The participants agreed with the Declaration's classification of violence against women as a form of discrimination and violation of human rights.

14. All Commonwealth governments should offer appropriate assistance to the United Nations special rapporteur on violence against women.

15. There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments which particularly pertain to women.

16. The participants recognised and recommended that gender sensitised new initiatives in legal education, provision of material for libraries, programmes of continuing judicial discussion and professional training to lawyers and other interest groups in the protection of the human rights of women and better dissemination of information about developments in this field to judges and lawyers should be undertaken for effective implementation of these principles.

17. The participants emphasised the need to translate the international human rights instruments and the African Charter of Human and Peoples' Rights into local languages, in a form accessible to the people and urged the governments to undertake or support that task.

18. The participants were of the view that the governments should mount extensive awareness campaigns through diverse means to disseminate and impart human rights education and encourage and support efforts by non-governmental organisations in this context.

19. The participants acknowledged the important contribution of non-governmental organisations in the dissemination of information about women's human rights and making women aware of those rights. The participants called upon the governments to acknowledge and support the work of non-governmental organisations in the promotion of the human rights of women.

20. The participants emphasised the need to enable non-governmental organisations to provide *amicus curae* briefs and other legal advice, assistance and representation to women in cases involving human rights issues. The participants also stressed the need to provide free legal aid and advice to women at state cost for enforcement of their human rights.

21. Public interest litigation and other means of access to justice to litigants, especially women, who wish to complain of violations of their rights should be developed. Non-governmental organisations involved in women's issues should also be permitted to bring violations of human rights of women before the courts for redress.

22. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.

23. Closer links and co-operation across national frontiers by the judiciary on the interpretation and application of human rights law should be encouraged.

24. Law schools should be encouraged to develop courses in human rights, which must include a module on the human rights of women.

Commonwealth News Release

APPENDIX IV

95/37

13 September 1995

Colloquium Promoting the Human Rights of Women through Domestic Application on International Human Rights Standards

7 September 1995, NGO Forum, Huairou, China

Successful court challenges to discriminatory nationality and immigration laws were among the highlights of discussion at a Colloquium organised by the Commonwealth Magistrates' and Judges' Association and facilitated by the Commonwealth Secretariat on the promotion of the human rights of women through the domestic implementation of international human rights standards. The meeting, led by four senior women judges from around the Commonwealth, was held at Huairou, China, on 7 September 1995, as part of the NGO Forum at the Fourth World Conference on Women.

Participants, who were joined by the Commonwealth Secretary-General, HE Chief Emeka Anyaoku, discussed a number of cases in which women had been successful in attacking discrimination at the national level by appealing to international standards. Sir Humphrey Maud, Deputy Secretary-General (Economic and Social Affairs) of the Commonwealth Secretariat, underlined the commitment of the Secretariat to mainstreaming gender in all the activities of the Secretariat, particularly in legal and human rights affairs. He recalled that the Secretariat had long been involved in the promotion of the human rights of women by focusing on the Convention on the Elimination of All Forms of Discrimination Against Women.

Speakers drew attention to the Victoria Falls Declaration for the Promotion of the Human Rights of Women adopted by senior Commonwealth judges in August 1994. Participants affirmed this Declaration and made specific suggestions for its implementation. They recommended that:

* human rights activists, NGOs and other organisations alert women and men to the content and application of international and regional human norms;

* human rights activists, NGOs and other organisations encourage the institution of legal proceedings in cases where rights guaranteed under those treaties are violated;

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* NGOs and, in particular, lawyers' groups be encouraged to form national, regional and international networks with a view to the advancement of women's human rights;

* the legal profession be encouraged to be aware of human rights instruments and their application and draw on them in their submissions to court wherever they may be relevant.

The report of the Victoria Falls Colloquium and the results of the Beijing meeting will be presented to the coming meeting of Heads of Governments of the Commonwealth in Auckland in November 1995. The Commonwealth Secretariat plans to hold another colloquium on advancing women's human rights through the use of international standards in the Asia-Pacific region in 1996.

ACTIVITIES OF THE COMMONWEALTH LEGAL ADVISORY SERVICE

A Note by Mr J P Gardner, Director of the British Institute of International and Comparative Law

1. MAIN AREAS OF WORK UNDERTAKEN BY CLAS

a. Advice and assistance on particular legal problems

b. Production of comparative surveys of particular areas of Commonwealth law

c. Critical advice on draft legislation

d. Preparation of bibliographies on particular legal subjects

e. Obtaining and supply of particular legal books and documents on request

f. Placement with it of legal officers from the Commonwealth

g. Advice with regard to recruitment of legal personnel

1.1 The current emphasis of work is on item (a), the provision of legal advice on particular problems at the specific request of Commonwealth governments, and on items (b) and (f). Other activities are limited, in part due to insufficiency of resources and because demand is split within the Commonwealth.

1.2 This note analyses this work and the four other areas of work, identifies its principal features and CLAS's suitability to undertake this work.

1.3 The second part of the note reviews the division of responsibility between CLAS and the Legal and Constitutional Affairs Division of the Commonwealth Secretariat .

2. PRINCIPAL FEATURES OF CLAS'S MAIN ACTIVITIES

2.1 From its inception, CLAS has operated as a demand-led agency. Its task is to respond to actual requests for assistance from Commonwealth states. Its work reflects the expressed needs of Attorneys General and their staff from whom the majority of requests for assistance come.

2.2 The subject matter of the requests varies widely but the nature of the requests and the purpose for which CLAS's assistance is requested is constant: requests concern legislative or procedural reform proposals which are under consideration or in draft. CLAS is asked to provide specialist advice and comparative research drawing on solutions which have been tried and adopted in comparable jurisdictions and information about practical issues or obstacles to the implementation of reforms.

2.3 The work required of the Service is therefore specifically based upon the needs of the requesting Department. It requires, first, analysis of the request and the preparation of terms of reference for the research; secondly, comparative research on legislative or procedural or administrative solutions adopted or considered elsewhere in the Commonwealth; and, thirdly, a review of the policy and practical constraints which have affected the implementation or operation of similar reforms in practice.

2.4 This work involves, first, research with access to Commonwealth legal materials and, secondly, where appropriate, consultation with other Commonwealth jurisdictions on their recent practice and experience. Importantly, the variety of substantive issues raised means that it is necessary to ensure a sufficient pool of research experience and a network of specialists whose advice can be sought in answering the issues raised by the requesting state.

2.5 The British Institute of International and Comparative Law provides this service through CLAS in the following way. Requests are submitted first to the Legal Secretary to the Service who analyses them and carries out an initial review. Those which require research in areas where CLAS has already advised may be answered by developing work already undertaken in preparing abstracts of past advice. The division is intended to identify those which will require more extensive research and those of a more routine character.

2.6 The Legal Secretary, under the supervision of the Director, has the support first of the research staff of the Institute (seven lawyers, all with postgraduate degrees or professional experience, or both). This ensures that a wide range of legal issues, especially those in the area of good government and procedural issues, can be responded to rapidly and with authority.

2.7 In addition, each request for advice is reported to the Commonwealth Sub-Committee of the Institute's Advisory Board who are able to identify issues of particular importance and give guidance. The Committee is chaired by the Rt. Hon. Lord Browne-Wilkinson and consists of eminent specialists from the Bench, private practice, public service and the universities with a detailed knowledge of the Commonwealth. The Committee is able to make suggestions both as to the approach to particular issues and to identify others whose expertise may be drawn on in answering requests. In addition the Institute is well placed to identify specialists for specific assistance from its membership and from its range of academic and practising contacts.

2.8 The research involved in answering requests involves consulting Commonwealth legislative texts and practice. The Institute has its own small working library of comparative material, but its offices are in the same building as the Institute of Advanced Legal Studies which houses the principal research library in law of the University of London. In particular, the Library includes the Commonwealth Law Library of the Foreign and Commonwealth Office which is the largest and most complete holding of Commonwealth statutory materials (approximately 3000 publications).

COMMONWEALTH MAGISTRATES' & JUDGES' ASSOCIATION
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APPENDIX VI

THE VICTORIA FALLS PROCLAMATION 1994

"FOR AN INDEPENDENT JUDICIARY THROUGH JUDICIAL EDUCATION"

WE, JUDGES AND MAGISTRATES from free and independent jurisdictions of the Commonwealth,
Conscious of the necessity of reaffirming the vital rôle of an independent judiciary in realising the Commonwealth vision of a just and progressive society, and of the value of judicial education in securing and strengthening such a judiciary;
Meeting at Victoria Falls, Zimbabwe, in the General Assembly of the Commonwealth Magistrates' and Judges' Association;

DO SOLEMNLY DECLARE AND PROCLAIM as follows :

Article I

The Rule of Law, which is the essential foundation of a just and responsive system of government, requires settled and just laws, fairly administered without fear or favour, for its observance and advancement.

Such laws must offer protection to individual citizens and their rights, and especially to the rights of those who belong to minorities or are otherwise disadvantaged, as well as opportunities for personal and national social and economic development.

Article II

The Rule of Law can only be observed if there is a strong and independent judiciary which is sufficiently equipped and prepared to apply such laws.

Although it is highly desirable that the independence of the judiciary, as one of the arms of government, should be formally protected by constitutional guarantees, the best protection rests in the support of government and people on the one hand, and in the competence and confidence of judges and magistrates in the performance of their offices on the other.

Article III

Provision of formal and informal instruction for judges and magistrates in the performance of their duties, in their responsibilities as independent adjudicators, and in the laws and procedures which they are required to apply is an essential element in a modern and fair legal system.

Article IV

The independence of a judiciary is greatly strengthened by the mutual support which its members, and the practising legal profession, can offer in the pursuance of these ideals. Such support is especially valuable and effective at the inter-Commonwealth level between different jurisdictions.

And, for the practical implementation of the principles and purposes here declared, **WE DO FURTHER RESOLVE** that :

1. This Proclamation and its content shall be formally communicated to :

   The Commonwealth Secretariat; and through the Secretariat to the Commonwealth Heads of Government, and to the heads of the judiciaries in each Commonwealth country or territory;

   Commonwealth public and private bodies and associations concerned with the law and its administration;

   Other national and international bodies concerned with the Rule of Law.

2. The Commonwealth Magistrates' and Judges' Association has, through its Council, established as an integral part of its activity and as a principal instrument for the realisation of its rôle in regard to judicial education in the Commonwealth **The Commonwealth Judicial Education Institute.** Under the authority of the Council of the Association the Institute is charged with the task of securing the furtherance of the principles and purposes stated in this Proclamation through such action as the Commonwealth Magistrates' and Judges' Association shall consider appropriate, and especially by promoting the independence of the judiciary in Commonwealth countries through the provision of appropriate judicial education at all levels.

   Without prejudice to the generality of its primary task, the Institute will :

   i) collect and disseminate information and materials on judicial education and training in Commonwealth countries and best practice therein;

   ii) promote and support the establishment of national and regional centres and provide for mutual assistance from Commonwealth countries to each other in the field of judicial education by the arrangement of exchange visits, the offer and conduct of courses, and the like;

   iii) advise, where so requested, on current provision for judicial education in particular Commonwealth countries.

This General Assembly hereby commends and expresses its warmest support for this initiative.

Declared at Victoria Falls, Zimbabwe, this 26 day of August 1994

THE COMMONWEALTH LEGAL COMPUTERISATION GROUP (CLCG)

TERMS OF REFERENCE

Prepared by the Attorney General's Chambers, Singapore in consultation with the Commonwealth Secretariat

Recognising the potential for computers to energise the legal systems of countries (particularly where statute books had become a morass of amendments and intricate cross-references) and the need to make widely available the experience and expertise already required, Law Minsters had at their Meeting held on 15 to 19 November 1993 in Grand Baie, Mauritius resolved that there be established a panel of experts as a Commonwealth Legal Computerisation Group (CLCG).

Upon the mandate of Law Ministers, Senior Officials had, at the Meeting held from 29 May to 1 June 1995 at Malta, agreed that the CLCG will be administered in accordance with the following **Terms of Reference** :

1. OBJECTIVES OF CLCG

1.1 The objective of establishing the CLCG is to provide technical advice and guidance to individual member Governments on maximising the use of computer technology in the legal field, particularly in legislation, law revision and legal research and in so doing :

> to harness and optimise the use of existing resources, expertise and facilities within the Commonwealth for this purpose.

2. STRUCTURE AND ADMINISTRATION

2.1 The facility is a loose arrangement for voluntary assistance and sharing by the panel of experts and for the coordination and handling of information and associated aspects relating thereto. The assistance will be administered by the Commonwealth Secretariat from its headquarters in London.

2.2 As the facility is essentially an information service which could be initiated by and within the current mandates of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat, it is envisaged that its administration will not require any extra staff or substantial funding.

3. COMMONWEALTH LEGAL COMPUTERISATION GROUP

3.1 There shall be a Commonwealth Legal Computerisation Group of not more than 10 members which will give technical advice and guidance and share their experience and expertise free oof charge to individual Commonwealth governments.

3.2 Members of the Group shall be experts in the field of Computerisation. Membership of the Group shall be determined, if possible, in the first instance on a volunteer basis. Failing this members of the Group shall be elected from persons nominated by member states. Each member state shall be allowed to nominate up to two persons who may serve as alternates as necessary.

3.3 The term of members of the Group shall be 2 years but members may be re-nominated or re-elected.

3.4 Each Commonwealth government shall be responsible for the expenses of the participation of their nominee.

4. FUNCTIONS

The members of the Group shall constitute a standing Committee and shall perform the following functions:

4.1 Oversee pan-Commonwealth developments in the field of computerisation with a view both to securing maximum efficiency and to ensuring that dissimilarities which could eventually lead to disruption in exchanges of legal information are avoided.

4.2 Foster the orderly development of regional co-operation in these areas (including with relevant non-Commonwealth countries).

4.3 Inter alia assist in developing approaches to legal computerisation particularly suitable for small jurisdiction.

4.4 Advise individual governments ad hoc when requested.

4.5 Foster such transfers of technology between Commonwealth countries as may be appropriate.

4.6 Assist in developing any publication programmes that may become desirable.

4.7 Assist in advising on any necessary amendments to relevant legislation to accommodate technical developments (eg evidence, data protection, computer crime).

5. REQUESTS FOR ASSISTANCE

5.1 Commonwealth users wishing to seek assistance from the Group may make requests through:

The Director
Legal & Constitutional Affairs Division
Malborough House
Pall Mall
London SW1Y 5HX
United Kingdom

Tel: 0171-747 6410
Fax: 0171-747 6406

5.2 The Secretariat will channel requests for assistance to appropriate members of the Group for assistance. The member requested will without charge and subject to resource limitations offer technical advice and guidance on the request.

5.3 Members of the Group may also recommend software or hardware vendors if a commercial arrangement is necessary.

5.4 Any visit to the requesting country by a member of the Group or a Consultant recommended by a member of the Group, to provide the necessary assistance may be undertaken by mutual bilateral agreement subject to the requesting party bearing the travelling, accommodation and other expenses involved, unless other funding arrangements have been made.

5.5 Members of the Group may on request conduct demonstrations of their respective computer systems to representatives of the requesting country. The travelling, accommodation and other expenses of the visiting representatives will be borne by the requesting country unless other funding arrangements have been made.

5.6 The Committee shall be serviced by the Commonwealth Secretariat and shall report periodically both to Law Ministers and Senior Officials through the Commonwealth Secretary General.

6. COSTS

6.1 Initial start up costs may not be substantial but would necessarily be incurred for -

(i) collation of information to form basic database on service and expertise available;

(ii) maintaining a database of frequently asked questions and demonstration softwares;

(iii) dissemination of information on the service.

6.2 The reasonable costs incurred by the Commonwealth Secretariat and any member of the Group in connection with the requested assistance unless other funding arrangements have been made shall be borne by the requesting party. However, the mere provision of uncomplicated advice and documents should normally not attract any costs.

7. DURATION OF OPERATION

7.1 The Group will operate for a trial period of 5 years. Thereafter Law Ministers may decide to continue or discontinue the service pending on whether the service meets the needs of member states.

THE COMMONWEALTH ARBITRATION ASSISTANCE SERVICE (CAAS)

TERMS OF REFERENCE

Recognising the efficacy of arbitration in the resolution of international commercial disputes and the importance of international arbitration centres within the Commonwealth, Law Ministers had at their Meeting held from 15 to 19 November 1993 in Grand Baie, Mauritius resolved that there be established a Commonwealth Arbitration Assistance Service (CAAS), the form and structure thereof shall be settled by Senior Officials at their Meeting in Malta in 1995.

Upon the mandate of Law Ministers, Senior Officials had, at the Meeting held from 29 May to 1 June 1995 in Malta, agreed that the CAAS will be administered in accordance with the Terms of Reference as herein appearing

1. OBJECTIVES OF CAAS

1.1 CAAS is a service to provide assistance to Commonwealth users to facilitate an effective and cost-efficient system of dispute resolution for commercial disputes utilising existing Commonwealth resources, expertise and facilities. It is to complement, not compete, with existing Commonwealth national or regional arbitration centres.

1.2 The objectives of CAAS shall be:

- To assist, encourage, promote and facilitate the resolution of international commercial disputes by arbitration, conciliation and other methods of alternative dispute resolution within the Commonwealth.

- To harness and optimise the use of existing resources, expertise and facilities within the Commonwealth for this purpose.

2. STRUCTURE AND ADMINISTRATION

2.1 The facility is a service arrangement, not intended to be a functional arbitration centre, for the co-ordination and handling of information and associated aspects relating to arbitration and for the rendering of assistance to Commonwealth countries and interests in all these matters. The Service will be administered by the Commonwealth Secretariat from its headquarters in London.

2.2 As the facility is essentially an information service which could be initiated by and within the current mandates of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat it is envisaged that its administration will not require any extra staff or substantial funding.

3. ADVISORY COMMITTEE

3.1 There shall be an Advisory Committee which will advise and assist the operation of the facility.

3.2 Members of the Committee shall be persons nominated by Member Jurisdictions.

3.3 The term of the Advisory Committee shall be 1 year but members may be re-nominated or re-elected.

3.4 Each member or nominee shall be responsible for the expenses of their own participation.

4. FUNCTIONS

4.1 CAAS will undertake the following functions:

(a) Serve as repository for arbitration rules, relevant legislations and judicial or arbitral decisions in the Commonwealth.

(b) Facilitate the harmonisation of arbitration laws and the adoption by Member Jurisdictions of international conventions or model laws on arbitration.

(c) Provide information on the arbitration centres, mediation and other forms of alternative dispute resolution or schemes available in the Commonwealth and elsewhere, and the types of services which those centres could offer.

(d) Provide information concerning the types of disputes which could be resolved through arbitration centres, and the modalities for their resolution.

(e) Provide information on the courses or programmes available for the training of arbitrators, conciliators, mediators and other ADR professionals.

(f) Compile in consultation with governments and arbitration centres, lists of appropriate Commonwealth persons competent and qualified to serve as arbitrators, conciliators, mediators, tribunal members or willing to serve in any specialist capacity.

(g) To provide such other related assistance as may be requested by Commonwealth users.

5. REQUESTS FOR ASSISTANCE

5.1 Commonwealth users wishing to seek assistance under the CAAS may make requests through:

The Director
Legal & Constitutional Affairs Division
Commonwealth Secretariat
Marlborough House, Pall Mall
London SW1Y 5HX
United Kingdom

Tel: 0171 747 6410
Fax: 0171 747 6406

6. COSTS AND FUNDING

6.1 Initial start up costs may not be substantial but would necessarily be incurred for:

(i) the collation of information to form a basic database on arbitration legislations, rules, judicial or arbitral decisions;

(ii) the setting-up of a database including computer hardware, software and database costs;

(iii) the dissemination of information on the service.

6.2 Initial funding shall be by way of voluntary contributions from Member Jurisdictions.

6.3 Costs incurred by the Commonwealth Secretariat in connection with the requested assistance shall be borne by the requesting party. The Commonwealth Secretariat may charge such administrative fees as it deems appropriate.

7. DURATION OF OPERATION

7.1 The CAAS will be implemented for a trial period of 5 years. Thereafter Law Ministers may decide to continue or discontinue the service.

Sub-Programme Activity Framework

Sub-Programme Code/Title: **B8.2 Human Rights**

Division of Lead Director: **LCAD** **Executing Divisions:** **HRU, LCAD**

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.2 (a)	Human rights education and training	To promote greater awareness of human rights concerns among public officials, judges, teachers, other target groups Encourage wider accession and effective implementation of international human rights instruments	Continuing activity July 1994 - June 1997	Production of appropriate human rights teaching and training tools Short-term training courses for key officials, including specialised training on treaty obligations, and human rights teaching modules for other target groups Information sharing on human rights issues including human	Specialised human rights training manuals Training workshops Technical co-operation projects on human rights for secondary schools and for special groups Access to human rights information through print and electronic media including circulation of newsletter Database on human rights	Wider human rights awareness among public officials, judges, teachers, etc expressed through greater account being taken of human rights principles and standards in their respective areas of concern Adoption of human rights teaching by the participating educational institutions	Numbers of key officials trained Incorporation of human rights education in targeted schools Increase in human rights awareness among targeted groups Feedback on use of database Demand for newsletter Increase in accessions and evidence of

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.2 (a) ...				rights jurisprudence Link up with information networks Staff time Travel, including participation at relevant international/ regional meetings Consultants Subscriptions		More effective implementation of international instruments	improved reporting under international human rights instruments

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.2 (b)	Institution-building	To strengthen national and regional institutions for human rights	Continuing activity July 1994 - June 1997	Experts commissioned on request from member states Training of officers responsible for reporting obligations under regional human rights instruments Staff time Travel, including participation at relevant international/ regional meetings Consultants including field experts	Technical co-operation projects on national human rights institution-building Manual for reporting officers under regional instruments Surveys on the functioning of national/regional institutions A number of trained officers for reporting under regional instruments	Setting up and strengthening of national human rights institutions in member countries on request Improved reporting by Commonwealth member states under regional instruments	Establishment of national human rights institutions in requesting member states Feedback on better reporting from member states under regional instruments

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.2 (c)	Human rights, democracy and development	To promote integration of human rights concerns in development strategies/projects in line with the UN Declaration on the Right to Development	Continuing activity July 1994 - June 1997	Collaboration with other agencies (e.g. UNDP) working in this field Sensitising Secretariat staff Staff time Travel Consultants	Technical co-operation projects to promote development strategies sensitive to human rights concerns A guidebook on project development to devise ways for taking account of human rights concerns in the Secretariat's socio-economic development programmes	Greater awareness of the linkages between human rights and development among decision-makers, target groups Greater awareness of human rights issues among Secretariat staff	Greater account taken of human rights concerns in development strategies and projects in Commonwealth member states Greater account taken of human rights concerns in the Secretariat's socio-economic development programmes

Sub-Programme Activity Framework

Sub-Programme Code/Title: **B8.3 Assistance on Constitutional Matters**

Division of Lead Director: **LCAD** **Executing Divisions: LCAD, ELASD, GTASD**

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.3 (a)	Assistance on constitutional matters	To meet the needs of Commonwealth governments, on request, in the review and strengthening of their constitutions and constitutional instruments in accordance with Commonwealth practice and national circumstances	1994/5-1996/7	Consultants Attachment of local personnel Staff time	Completed tasks in constitutional reform Trained personnel including constitutional lawyers Contribution to government reviews of their constitutions	Constitutional revision Resolution of specific constitutional issues Constitutional change reflecting Commonwealth values	Constitutions strengthened/ amended Implementation of change by legislation General public acceptance of change

Sub-Programme Activity Framework

Sub-Programme Code/Title: **B8.4 Assistance on Administrative, Judicial and Legal Matters**

Division of Lead Director: **LCAD** **Executing Divisions: LCAD, GTASD, MTSD, ELASD**

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (a)	Strengthening national administrative, judicial and legal systems at all levels through effective information sharing	Advance constitutional government and the rule of law by assisting governments in the improvement of the quality of their legal and judicial systems in ways consistent with common practice	1994/95-1996/97	Staff time Consultants Printing and distribution of publications commissioned studies and background papers Judicial colloquia Workshops on administrative law and other relevant areas	Commonwealth Law Bulletin Information required by governments Organised supplies and exchanges of legal publications Agreed strategies for more open justice Agreed guidelines for more open government	Improved government legal resources of practical utility Transparent judicial systems Open and democratic government	Assessment of Commonwealth use of the information service including quantification of requests for the service from users Evaluation of impact Fewer public complaints of maladministration

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (a) ...		Promoting Commonwealth links for legal information and experience sharing by fostering co-operation between law reform agencies, ombudsmen, legislative drafting establishments, bar associations and law societies		<u>Input</u> Staff time <u>Activities</u> Meetings Assisting with the organisation of relevant Commonwealth professional meetings including triennial Law Conferences at which such co-operation can be strengthened	Enhanced net-working and information sharing throughout the Commonwealth between relevant official agencies and legal institutions	Raised professional standards in Commonwealth countries Formation of new professional bodies to deal with emerging legal issues	Use of networks Attendance at meetings (user pays) Membership of professional bodies More effective legal enforcement mechanisms
		Assisting in the development of national legal databases to ensure compatibility and access to other Commonwealth systems	1994/95 - 1996/97	<u>Input</u> Staff time <u>Activities</u> Servicing of Group	Operational Procedures for Commonwealth Legal Computerisation Group Meeting of Group	Sharing of developed legal information retrieval systems	Maximum use of existing software Active bilateral assistance programme

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (b)	Economic, commercial and other serious international crime including money laundering	To strengthen and further develop levels and areas of mutual legal assistance in criminal matters among Commonwealth jurisdictions and between Commonwealth jurisdictions and other countries	1994/95- 1996/97	Staff time Consultants Printing Scholarships Global Conference of Mutual Assistance Central Authorities Advice on implementation of Schemes Drafting assistance for laws and treaties Workshop on operation of Central authorities	Published conference papers or published recommendatons/ agreed procedures for central authorities Published collection of relevant legal advice Drafted laws and treaties Trained staff in member countries	Access to technical papers or improved international co-operation Increased participation in Schemes New laws and treaties in force Functional national central authorities	Evaluation by participants/ repeat attendance: Government/ global acceptance of recommendations Implementation of procedures Effective co-operation between member countries Effective national control of international crime: effective bilateral assistance regimes Improved networks: fast response time to requests for assistance

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (b) ...		To strengthen and develop levels of co-operation between Commonwealth countries and international agencies to combat serious international crime	1994/95- 1996/97	Consultants Staff time Meetings Liaison work	Direct contact between national agencies and appropriate international bodies Supply of information and assistance Completed investigations and shared intelligence Secondment of staff from members for training in Commercial Crime Unit	Greater degree of inter-agency co-operation: working contacts established More effective investigations Members gain required assistance and information Trained staff	Members approach appropriate agency direct for assistance Number of requests received Number of successfully completed requests Assessment of seconded staff
		To facilitate the setting up of frameworks for co-operation among business regulatory agencies	1994/95 - 1996/97	Staff time Consultants Meetings	Model laws Model MOUs advice Documentation	National laws passed Bilateral relations established Working contacts with business regulatory agencies	Wide network of appropriate laws & arrangements Measurable improvement in co-operation between national agencies

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (c)	Co-operation on mutual legal assistance arrangements	To develop co-operation and improved arrangements for formal Commonwealth mutual assistance in criminal matters and extradition, the protection of the material cultural heritage, international abduction of children, international adoptions and international commercial arbitrations	1994/95 - 1996/97	Staff time Consultants Monitoring and providing assistance on the implementation of the Common-wealth Schemes for the Transfer of Fugitive Offenders, Mutual Assistance in Criminal Matters, Transfer of Convicted Offenders, and the Protection of Material Cultural Heritage Taking part in work of UNIDROIT and Hague Conference on Private Inter-national Law	Schemes monitored Assistance delivered Proposals for modernisation made Increased knowledge of world developments	Enhanced and up to date schemes Members able to ascertain laws in other member countries Ability to advise members of global developments	Assessment of effectiveness of schemes Assessment of implementation of schemes Commonwealth country participation in international co-operative regimes

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (c) ...				Provision of advice Conducting of surveys Compilation of analyses of participation Meetings			

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (d)	Improvement in effective delivery of government legal services, especially of small jurisdictions	To assist in developing frameworks for the delivery of quality legal services necessary for the effective transaction of government business, with particular reference to the special needs of small jurisdictions and to foster co-operation, especially at regional level among such jurisdictions	1994/95 - 1996/97	Staff time Commissioned studies Provision of field experts Ad hoc use of consultants	High priority legal posts filled Legal advice rendered Effectively serviced and resourced Commonwealth Arbitration Assistance Service (CAAS) Studies on organisation of effective government legal services	Framework for increased co-operation and assistance between Commonwealth Arbitration Centres Possible agreement between Commonwealth Arbitration Centres for assistance in respect of international arbitration Strengthened organisational and delivery arrangements for government legal services Improved capacity of law officers in small Commonwealth jurisdictions	Assessment of the use and value of service provided Assessment of utility of studies Effectiveness of experts

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (e)	Accession to international conventions	To provide governments, on request, with advice, technical assistance on succession and accession to relevant international conventions and the reporting obligations under them as well as the designing and provision of working manuals	1994/95-1996/97	Staff time Consultants External technical expertise Production of accession kits Provision of advice on law of treaties Workshop on reporting under multilateral conventions	Accession kits General public international law advice Guides to treaty negotiation Trained reporters	Improved Commonwealth usage and participation in international legal system Better compliance by Commonwealth countries	Accession to most relevant conventions by more Commonwealth countries Assessment of members reporting standards

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (f)	Assistance with legislative drafting	To strengthen legislative drafting practices through training and the provision of technical assistance in fields relevant to Programme B8 areas	1994/95-1996/97	Staff time Developing distance learning programme for training of legislative drafters in all aspects including human rights and gender issues Field experts	Increase in number of trained legislative drafters Increase in number of legislative drafting posts filled Laws revised and bills drafted Increased use of on-the-job training opportunities	Development and improvement of on-the-job training facilities Strengthened legislative drafting capabilities in Commonwealth jurisdictions	Completion and full implement-tion of distance training programme Evaluation of programme by law officers Number and quality of trained drafters completing courses Evaluation of work of drafters International recognition of distance training qualification

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (g)	Assistance to small states to overcome legal problems	Co-operation and exchanges of information between small states To increase self-reliance in small jurisdictions	1994/95-1996/97	Staff time Consultants Papers for meetings Attendance at PILOM and other relevant international meetings Meetings Provision of advice	On request, assistance provided to fora dealing with small states issues Holding of meeting of Law Officers of Small Jurisdictions	Particular problems of small states addressed Strengthened co-operation More effective arrangements for the functioning of law offices serving small states Meeting report	Assessment by governments of practical utility and cost-effectiveness

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (h)	Servicing of meetings of Ministers, senior officials and ad hoc committees	To ensure that meetings of Law Ministers, their senior officials and special interest groups established by Ministers are productive and cost-effective	1994/95 - 1996/97	Staff time Consultants Meetings Preparation of papers Establishing and maintaining necessary channels of communication	Decisions of meetings Enhancement of schemes for co-operation Bilateral and multilateral assistance schemes	Enhanced Commonwealth co-operation Increased bilateral assistance between members Technical co-operation	Willingness of member governments to support meetings and to undertake responsibilities as ad hoc members Level of technical advancement achieved

Code (1)	Area of Activity (2)	Immediate Objectives (3)	Time Frame (begins/ends) (4)	Inputs/ Activities (5)	Outputs (6)	Outcomes (7)	Performance Indicators (8)
B8.4 (i)	Provision of Secretariat-wide legal services and advice	To provide the Secretariat (on a regular and timely basis) with quality legal advisory services necessary for the proper administration of their businesses	1994/95- 1996/97	Staff time Provision of legal advice Representation of legal interests in appropriate cases	Legal advice on a wide range of day-to-day activities including personnel and general service contracts and business structures Drafting of documents of legal nature Vetting documents for legal propriety	Resolution or pre-emption of service related issues of real or potential conflict Establishment of precedents for dealing with future problems Clearer appreciation of contractual obligations	Fewer or absence of service related conflicts or complaints Enhanced or greater effectiveness in delivery of services Regular renewal of conflict-free contractual relationships

A REVIEW OF THE ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD: FUTURE OF THE COMMONWEALTH LEGAL ADVISORY SERVICE

A Memorandum by the Government of Britain

INTRODUCTION

1. The purpose of this paper is to invite Commonwealth Law Ministers to:

(i) consider the current and future demand for the services of the Commonwealth Legal Advisory Service (CLAS); and

(ii) if Law Ministers agree that there is sufficient demand, to further agree how the continuation of CLAS might be financed by Commonwealth member countries on a more formal basis.

2. A related issue which Commonwealth Law Ministers might also review is the question of how and where CLAS's future work should be carried out.

BACKGROUND

3. CLAS was established in 1962 following a proposal at the Commonwealth Prime Minister's Conference in 1961 that there was a need to accumulate Commonwealth legal material, and provide for the interchange of ideas on legal matters between Commonwealth countries. It is administered by the British Institute of International and Comparative Law (BIICL). Originally CLAS was established with a general remit to provide information, advice and assistance in legal matters to individual Commonwealth governments, particularly small states. Its main function now, however, is to provide advice and assistance on particular legal reform problems raised by Attorneys'-General Departments, including:

(a) receiving and analysing requests on specific legislative reform;

(b) the preparation of a comparative survey of a particular field of Commonwealth law practice and policy in relation to the request;

(c) the preparation of memoranda and bibliographies on a wide range of topics of general importance to different jurisdictions; the topics reflect those raised in specific requests;

(d) advice on the drafting of legislation by reference to Commonwealth experience and practice; and

(e) the provision of training by secondment for young Commonwealth lawyers in government service.

4. In 1974, because of concerns that there was a degree of duplication between CLAS and the Commonwealth Secretariat, a Review of Commonwealth Legal Co-operation was undertaken under the chairmanship of Sir Roy Marshall. Although there were some views to the contrary, the Review concluded that there was a considerable degree of duplication of function between CLAS and the Commonwealth Secretariat; that it would not be possible to solve the problem of overlap; and that in future the Secretariat should be charged with responsibility for the functions carried out by CLAS.

5. At the Commonwealth Law Ministers' Meeting in Lagos in February 1975 however it was decided that CLAS should remain in being, and that discussions should be held with the Secretariat to avoid duplication with the work carried out by the Legal Affairs Division - now the Legal and Constitutional Affairs Division. Since then CLAS and the Legal and Constitutional Affairs Division have continued to co-exist with a practical division of responsibilities, those of CLAS being summarised in 3 (a) to (e) above.

6. In 1994, a Working Party chaired by Lord Browne-Wilkinson, Chairman of the Commonwealth Sub-Committee of the Advisory Board of the BIICL, looked at two separate but related issues: the assessment of need for the work of CLAS, and the provision of a formal

funding arrangement for CLAS's work. The Working Party concluded that the assessment of needs was one for member states, and that the present informality of funding arrangements was unsatisfactory as it restricted forward planning and prevented adequate follow-up and evaluation. It therefore recommended that the future of CLAS should be considered by the 1996 Meeting of Commonwealth Law Ministers. In the meantime the BIICL would operate CLAS on the current basis but any continued involvement beyond April 1996 would depend upon a satisfactory method being established for the payment of contributions.

NATURE OF CLAS'S WORK

7. The main work undertaken by CLAS is responding to requests from Attorneys'-General Departments for assistance in considering law reform and in preparing legislation. The range as shown in **Annex 1** is very varied. Advice usually reviews the policy factors involved, and memoranda are prepared in relation to law reform topics on which advice has been sought or where major legislative reforms are underway in several states. CLAS also offers placements for legal draftsmen and women.

8. CLAS revived from a period of low activity in 1987. The number of requests received in that year was 12 but this increased to 51 in 1991. However the variety of requests prevents a very detailed response. The take-up rate for abstracts is low (19 requests in 1994). Lord Browne-Wilkinson's Working Party concluded that CLAS was not seen by potential users as addressing a pressing need, but it was regarded as useful by a number of regular users. For the most part it appeared that CLAS's work is either marginal to the needs of most Commonwealth countries or that they are not aware of it.

FUNDING

9. From 1981 the BIICL assumed the responsibility for collecting voluntary contributions from member states. Due however to the difficulties in securing contributions, BIICL proposed to Attorneys-General in 1991 that contributions should be calculated as approximately 1 per cent of their contribution to the Commonwealth Secretariat. There remained no formal basis for this formula derived from Law Ministers and contributions therefore remained voluntary.

10. The following member states currently contribute 1 per cent or over: The Bahamas, Malawi, Brunei Darussalam, Malta, Cyprus, Maldives, Dominica and Tanzania. Although Britain does not contribute 1 per cent (£25,000 against £29,100) it currently provides half of all Commonwealth contributions and over one third of the total cost of running the service, as indicated by the following 1994 figurers:

UK contribution	**£25,000**
Other Commonwealth contributions	**£25,097**
Balance underwritten by BIICL	**£10,407**
Total	**£60,504**

11. These figures illustrate the depth of CLAS's reliance on one member state's contribution for its continued existence, and that the 1 per cent formula has not been achieved. A table of contributions over the last ten years is at **Annex 2**. In 1994 only 23 states out of 54 actually contributed, although additional contributions are received from British dependencies. The recent fall in income is particularly due to two states (Australia and Canada) who have reduced contributions severely over the past years. However, Canada has now doubled its contribution for the current year following a review which recognised the important role which CLAS has for member states of the Commonwealth.

12. The above figures also illustrate the extent to which the activities of CLAS are underwritten by the BIICL. For example, only 65.4 per cent of the budget was recovered in 1995.

BIICL'S CONTRIBUTION

13. In considering how and where CLAS's services should be carried out, Law Ministers will also wish to take account of the in-house services which BIICL provide and which if met elsewhere would have to be provided at cost. These include the Institute's research staff, the facilities of the library in Charles Clore House including that of the Institute of Advanced Legal Studies, and the specialist advice and supervision of the Institute's Commonwealth Advisory Board.

OPTIONS

14. The report prepared by Lord Browne-Wilkinson in 1994 concluded that CLAS was not functioning as intended. It was not responding adequately to the needs of law reform in Commonwealth developing countries, in part perhaps because of ignorance of its existence, but also because of difficulties those states have in identifying and articulating their needs. More significantly, the relatively low number of requests to CLAS and the comparatively small number of states which use the service suggested that it was marginal to the pressing needs of law reform in the Commonwealth. The Working Party identified five options for the future:

(a) no change;

(b) terminate CLAS without replacement;

(c) amalgamate with Legal and Constitutional Affairs Division (or other agency without further funding);

(d) as (c), but with full 1 per cent funding;

(e) retain CLAS with full 1 per cent funding.

15. The report concluded finally that unless a positive decision was taken by Law Ministers, CLAS would continue to decline as funding falls. It also recommended that this course of benign neglect should be avoided.

RECOMMENDATION

16. The Government of Britain considers this situation is in need of urgent resolution. It therefore submits that if Law Ministers are assured that CLAS meets a distinct and continuing role for member states which cannot be met elsewhere at less cost, a formal arrangement for contributions should be agreed on a equitable basis.

March 1996

ANNEX 1

ASSISTANCE GIVEN TO COMMONWEALTH COUNTRIES IN 1994

1. Assistance requiring at least some research (often wide-ranging and lengthy)

(1) Summary of Commonwealth countries assisted (number of times in brackets where more than once):

The Bahamas (3), Barbados, Cyprus (3), Ghana (3), Gibraltar, Hong Kong (5), India (2), Jersey (3), Kenya (2), Malawi, Malaysia, Malta (2), Namibia (7), Pakistan (4), Tanzania (6), Tonga, Trinidad and Tobago, Uganda (2), United Kingdom (2), Western Australia.

Total: 20 jurisdictions (including 1 state and 3 dependencies), 51 requests.

(2) Details of assistance given and when:

Date assistance given	Country	Subject
7 January	Hong Kong	Eligibility of solicitors to be appointed judges
12 January	Hong Kong	Guardianship under the Mental Health Act of the UK
20 January -	India	Application of Article XXI of the GATT
2 February	Pakistan	Women's rights in the law of succession
11 February	Namibia	Constitutional limits on the right to free speech
22 February -	Gibraltar	Conventions and treaties applicable
1 March	Namibia	"Disciplinary force" parallels between the army and the police
10 March	Barbados	Constitutional security of tenure for magistrates
15 March	Namibia	Constitutional right to bail
28 March	Malawi	Comments on new draft constitution
25 April	The Bahamas	Legislation to regulate chiropractors
28 April	Jersey	Rights of audience in dependencies of UK qualified lawyers
17 May	UK (BBC)	Corporal punishment in the Commonwealth
1 June	UK (FCO)	Electoral laws: dual representation systems in

Date assistance given	Country	Subject
29 November	Western Australia	Legislation to control prospecting for fossils
6 December	Ghana	Statute law on defamation
7 December	Namibia	Particular constitutional powers of an Attorney-General
8 December	Malta	Legislation to control imitation firearms
16 December	Ghana	Statutory body to oversee commercial operation of public utility bodies
19 December	Namibia	Evidence to be disclosed by the prosecution before trial

2. Abstracts of work done, and other specific documents, sent in compliance with requests

Gibraltar, Hong Kong (6), Kenya (2), Malta, Namibia (3), Natal, Nigeria, Pakistan, Tanzania (3).

Total: 9 jurisdictions, 19 requests.

ANNEX 2

CONTRIBUTIONS TO CLAS 1985-1994

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Antigua and Barbuda		200		400 (x2)		200	400	400	400	400
Australia	5,484	6,032	6,639	7,299	7,268	6,917	7,500	6,248	7,191	4,500
The Bahamas					500	1,267 (x3)	500	500	500	
Bangladesh				255		255	255	1,005		750
Barbados	200								500	
Belize								400		
Botswana	251	200	251	300			375		750	1,000
Brunei Darussalam				300	300	750	750	750	750	1,000
Canada	6,717	4,974	4,566	4,216	4,567	4,588	4,174	4,645	5,263	4,119
Cyprus	128	250	250	250	500	500	500	500	500	1,000
Dominica									400	
The Gambia										
Ghana										
Grenada						200				
Guyana							1,667 (x2)		500	1,000
India					11,109 (x7)					
Jamaica	300		60		500	420	450	111		
Kenya	142				275	760				

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Kiribati							400	400		
Sri Lanka	400	400		400		400	400	1,150 (x3)		400
Swaziland										
Tanzania										
Tonga	300		300	300	300	388	400	400	400	400
Trinidad and Tobago	255	765 (x3)		1,200 (x4)				1,527 (x2)		
Tuvalu					46	38			150	150
Uganda										
Vanuatu										
Western Samoa										
Zambia				400		700		750		1,000
Zimbabwe		350						750		
Cayman Islands								500		
Gibraltar								150		150
Hong Kong			3,000		3,000	3,000	3,000	3,000	3,500	3,500
Isle of Man							500	500	500	500
Jersey							500	1,000	1,000	1,000
Montserrat							150	150	150	150
Turks and Caicos Islands										150
Total	15,725	15,647	17,109	18,869	29,465	23,375	26,346	30,649	29,297	(25,019)

Other International Developments

THE PROPOSED INTERNATIONAL CRIMINAL COURT

A Paper prepared for the Commonwealth Secretariat by Dr William C. Gilmore, Professor *elect* of International Criminal Law Faculty of Law, University of Edinburgh

A. THE CONTEXT

1. The idea that the international community should create a judicial body to exercise criminal jurisdiction over individuals, as opposed to states,[1] has a lengthy history.[2] It will suffice for present purposes to recall that "it became an issue in international relations after 1945, partly due to the conviction that major war crimes or crimes against humanity should not go unpunished, partly due to a felt need to meet criticisms of the Nuremberg and Tokyo trials as victors justice, imposed *ad hoc* on the vanquished after the event".[3] The post-war political climate was not, however, conducive to the development of such a radical proposal and it was put to one side in the early 1950s.[4]

2. Its revival as a subject of serious international and governmental interest [5] in the latter part of the 1980s was due to a number of factors including, among others, the lessening of cold war political tensions [6] and the growth of concern about the nature and extent of the threat posed by various forms of transnational criminality. In so far as the latter is concerned the proposal by the Prime Minister of Trinidad and Tobago that consideration be given within the United Nations system to the possibility of establishing an international adjudicative body with jurisdiction over illicit drug trafficking and other transnational criminal activities struck a responsive cord.[7] In particular, it helped to focus attention on the special problems faced by small or otherwise vulnerable members of the international community. As the Commonwealth Secretary-General has since noted, it is important to "bear in mind that small countries cannot often handle the complex, expensive and sometimes dangerous consequences of a major trial involving international criminals".[8]

3. Within the United Nations system the General Assembly in 1989 remitted to the International Law Commission (ILC) the task of considering "the question of establishing an International Criminal Court or other international trial mechanism".[9] Initially the work of the ILC on this subject took place within the context of its ongoing efforts to elaborate a draft Code of Crimes against the Peace and Security of Mankind.[10] Progress was such that "[a]t its forty-fourth session, in 1992, the Commission had before it the Special Rapporteur's tenth report on the topic .... , which was entirely devoted to the question of the possible establishment of an international criminal jurisdiction".[11] In the same year the ILC decided to create a Working Group which would focus exclusively on this question. By 1993 the Commission was in a position to receive a highly detailed report from this body containing a draft Statute with an extensive commentary.[12] The ILC "without formally adopting the text, referred it to the General Assembly for comment".[13]

4. While the work of the ILC was in progress concerns which had surfaced within the international community that insufficient attention had been devoted to ensure that individuals responsible for war crimes during the Gulf conflict were brought to justice were greatly reinforced by the tragic events which were unfolding in the former Yugoslavia. International opinion was particularly incensed by evidence of widespread and flagrant violations of the norms of international humanitarian law taking place within the region and especially in the Republic of Bosnia-Herzegovina.[14] On 25 May 1993 the United Nations Security Council formally expressed its determination to put an end to such acts and to bring to justice those responsible for them. Specifically invoking its powers of decision under Chapter VII of the United Nations Charter the Council, in Resolution 827 (1993), established an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law in that area of the Balkans in the period since 1 January 1991.[15] In this regard the Council required all states to afford the ad hoc Tribunal full co-operation and, to that end, to "take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by the Trial Chamber...".[16]

5. Developments within the ILC were examined by Commonwealth Heads of Government when they met in Cyprus in October 1993. The Report of the Committee of the

Whole on Functional Co-operation, which was approved by Heads of Government and attached to their final Communiqué, reads in relevant part as follows: "The Committee welcomed the work of the International Law Commission on the development of a draft Statute for an International Criminal Court. While accepting the difficulties inherent in the realisation of the concept, it recognised that the successful culmination of this initiative could provide the international community with an important instrument against serious international crime. It recommended positive Commonwealth efforts in achieving consensus on the issue and proposed that Law Ministers be requested to undertake such further consideration of the issues involved and the means of implementing the proposal as might be appropriate."[17]

6. It will be recalled that, pursuant to this mandate, Commonwealth Law Ministers, at their Meeting in Mauritius from 15 to 19 November 1993, took note of the work of the ILC and, in the context of discussions on the subject of extradition, explored some of the issues of co-operation which arose both in relation to the draft Statute and, more immediately, in connection with the creation by the Security Council earlier in the year of the ad hoc International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.[18] Insofar as the proposed International Criminal Court was concerned Ministers decided to authorise Senior Officials to revisit this matter at their meeting in Malta in April 1995.[19]

7. At that meeting Senior Officials had before them a paper commissioned by the Secretariat [20] and other materials relating to the progress of this initiative within the United Nations system. Although the Malta discussions revealed differences of view among participating delegations they were able to identify a number of matters of common concern. As noted in the final Communiqué these included:

(a) the need to ensure that the court was only able to exercise jurisdiction over the most serious crimes of concern to the international community as a whole;

(b) the need for precision in specifying the offences which would constitute the subject-matter jurisdiction of the proposed court (Article 20 of the draft Statute);

(c) the need to ensure that the draft Statute was fully sensitive to the reality of the provision of relevant forms of international co-operation on the basis of Commonwealth Schemes rather than international treaties. In particular, they identified the need to secure wording in Article 21(2) which would cover rendition under the London Scheme, which was not technically an "international agreement";

(d) the need for close examination of Article 51 (on co-operation and judicial assistance) to ensure its compatibility with Commonwealth arrangements and practice;

(e) the need to examine more closely the relationship between the Security Council and the Court so as to ensure that the independence and impartiality of the Court would in no way be compromised.

8. Since that time the proposal to establish an International Criminal Court has been further discussed by Commonwealth Heads of Government. The Report of the Committee of the Whole issued at their meeting in New Zealand in 1995 took note of the ongoing work being carried out within the United Nations and "recommended that Law Ministers keep further developments under review".[21]

B. Overview of Developments Since the Mauritius Meeting

9. During late 1993 when Commonwealth discussions were taking place in Cyprus and Mauritius the complex provisions of the draft Statute prepared by the ILC Working Group were receiving further detailed consideration in the Sixth (Legal) Committee at the United Nations General Assembly in New York. In the course of the debates on this issue, which attracted the participation of a substantial number of Commonwealth countries, there was strong support in principle for the initiative.[22] This is not to say, however, that there was evidence of a consensus surrounding the 1993 draft Statute as a whole. Many delegations expressed reservations about a range of issues. However, much of the debate concentrated on such fundamental matters as: the mode of creation of the Court and its relationship to the United Nations; the nature and extent of its jurisdiction including the right of the Security Council to initiate proceedings; and, the method of surrender of alleged offenders to the Court and related questions of international co-operation in criminal matters.[23]

10. In Resolution 48/31 of 4 December 1993 the General Assembly took note of the draft Statute and invited the ILC to continue to afford priority to its work on this subject with a view to finalising its proposals, if possible, in the course of 1994. To this end governments were invited to submit comments to the United Nations Secretary-General by 15 February 1994; an opportunity which was taken by a number of Commonwealth members.[24] The Working Group, now under the Chairmanship of Professor Crawford of Australia, undertook the demanding task of adapting and refining the 1993 proposals in the light of the views which had been articulated both by governments and other interested bodies.[25] The revised text consisting of 60 draft Articles and one Annex, again with extensive supporting commentaries, was formally adopted by the Commission in sufficient time to be included in its 1994 Report to the General Assembly.[26] The text is appended to this paper for ease of reference.

11. By the time this question was reached in the 1994 debates of the Sixth Committee planning in the Security Council to create, under Chapter VII of the Charter, a further ad hoc international tribunal to prosecute those responsible for genocide and other serious violations of international humanitarian law committed in Rwanda was at an advanced stage.[27] For many this initiative served to further underline the strength of the case for the creation of a permanent International Criminal Court. As the New Zealand representative in the Sixth Committee was to remark: "It is ironic that as this debate takes place, the Security Council, which last year established the Yugoslav War Crimes Tribunal for the former Yugoslavia, is considering the establishment of a second ad hoc criminal tribunal to deal with the genocide and other crimes against humanity that were perpetrated earlier this year in Rwanda. The fact that in the space of only two years the Council has felt the need to establish such ad hoc bodies is dramatic evidence of the international community's commitment to securing the prosecution and punishment of persons who engage in these most serious international crimes. However, it would be far better for the international community to be able to have recourse to a single and established International Criminal Court than for the Council to have to engage in the difficult process of establishing such ad hoc tribunals. The latter option runs the risk of there being inconsistencies in elaboration and application of international criminal law."[28]

12. As with the previous year many Commonwealth countries participated actively in the debates in the Sixth Committee in which strong support was expressed for a diplomatic conference to be convened in 1996 to elaborate and adopt a Statute for an International Criminal Court. However, some delegations were of the view that such a decision would be premature. In the final event it was agreed to establish an ad hoc Committee, open to all United Nations members, which would facilitate a further process of intensive consultation. Its task was to review the major issues arising from the ILC draft and to consider the convening of an international conference. This body held intensive discussions in April and August 1995 on the basis of which a detailed report was submitted to the United Nations General Assembly.[29] Following a further debate in the Sixth Committee the General Assembly in Resolution 50/46 decided to establish an open ended preparatory committee. Its mandate is "to discuss further the major substantive and administrative issues arising out of the draft Statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an International Criminal Court as a next step towards consideration by a conference of plenipotentiaries...".[30] The Assembly also urged participation "by the largest number of States"[31] possible in the work of the committee which will meet from 25 March to 12 April and from 12 to 30 August 1996. The committee will report to the 51st session of the General Assembly which will decide on what course of action to adopt.

C. The Draft Statute for an International Criminal Court

13. The 1994 draft Statute prepared by the ILC continues to provide the central focus for the ongoing intergovernmental discussions. Although an in-depth examination of that complex text lies beyond the scope of this paper it would be of value to recall some of its major features at this stage.

14. First, it is of importance to emphasise that the Court, as envisaged by the ILC, is a body which is highly circumscribed in terms of its ambition. As is emphasised in the Preamble, it is to be used only in respect of "the most serious crimes of concern to the international community as a whole". Furthermore, as the ILC has noted: "it is intended to operate in cases where there is no prospect of those persons being duly tried in

national courts. The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial co-operation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts, or to affect the right of states to seek extradition and other forms of international judicial assistance under existing arrangements".[32] Various substantive provisions have been inserted in the text in an effort to ensure that only those cases envisaged in the Preamble are, in fact, dealt with by the Court. For example, under Article 35 the Court may, "on application by the accused or at the request of an interested State ... or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible ... ". As has been pointed out elsewhere, the decision to include this provision, which has no counterpart in the 1993 draft, "reflects the awareness that no matter how stringent the jurisdictional requirements ... may be, there could still be cases in which no action was warranted, or where national investigation and prosecution were sufficient".[33]

15. Throughout 1995, both within the ad hoc Committee and in the Sixth Committee, considerable emphasis was placed on the importance of this principle of "complementarity" in defining the proper role for the proposed Court. However, considerable difficulties have been encountered in translating the principle into a practical definition of the nature of the optimal relationship between the proposed international body and national courts and investigative procedures. Wide divergences of view exist on the precise impact it should have on the substantive provisions of the draft Statute. This was evident, for example, in discussions surrounding matters as diverse as its implications with regard to the proposed subject matter jurisdiction of the Court and its significance for the drafting of appropriate provisions on assistance in relation to investigations and prosecutions and the surrender of persons to the Court.[34] Indeed, there are indications that so open-textured is the concept of complementarity and so varied are the views of individual countries with regard to its translation into practice that its real utility in the current context may be open to question. Some degree of balance and compromise will obviously be necessary. As the delegate of Finland remarked in the Sixth Committee on 2 November 1995: "Safeguards for upholding the primacy of national jurisdictions should not render the Court irrelevant".[35]

16. In order to cater for this limited category of serious offences of international concern the draft Statute seeks to produce a workable structure for investigation, prosecution, and trial and, in cases where convictions are secured, for the appropriate punishment of the individuals concerned. To that end it is divided into eight parts; namely, (1) the establishment of the Court; (2) composition and administration; (3) jurisdiction; (4) investigation and prosecution; (5) the trial; (6) appeal and review; (7) international co-operation and judicial assistance; and, (8) enforcement.

17. In approaching this daunting task "the Working Group did not purport to adjust itself to any specific criminal legal system but rather, to amalgamate into a coherent whole the most appropriate elements for the goals envisaged, having regard to existing treaties, earlier proposals for an International Criminal Court or tribunals and relevant provisions in national criminal justice systems within the different legal traditions".[36] The Working Group was also sensitive to numerous other considerations including that of cost. This factor is perhaps most clearly evident in the compromise decision to suggest the creation of a permanent institution but one which would sit only as and when required.[37] On the other hand the draft Statute is sufficiently flexible to permit the Court to operate on a full-time basis should its actual workload eventually justify such a step.[38]

18. It is clear from the debates in the Sixth Committee and in the 1995 work of the ad hoc Committee that Commonwealth members and other states continue to harbour a range of reservations and concerns about specific issues of detail. It appears, however, that the most significant differences of view continue to revolve around the suggested jurisdictional system for the Court. As the representative of Australia noted on 25 October 1994 "the proposed jurisdiction of the Court and the approach of the Statute with respect to the modalities of how matters would come before the Court are central to the Statute".[39]

(i) Jurisdiction and Related Issues

19. Of critical importance in this regard is the identification of the crimes falling within the jurisdiction of the Court. It will be recalled that the complex provisions on this issue contained in the 1993 text [40] had been subject to considerable criticism.[41] As a consequence a major review was undertaken by the Working Group and the fruits of its labours, designed to bring greater clarity

and simplicity to the subject, are now reflected in Article 20. This provision, which was generally regarded as constituting a major improvement, [42] reads in full as follows: "The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) the crime of genocide;

(b) the crime of aggression;

(c) serious violations of the laws and customs applicable in armed conflict;

(d) crimes against humanity;

(e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern."

20. There are two major changes as compared to 1993. The first relates to jurisdiction over crimes under general international law. Following criticism in the Sixth Committee the ILC decided to abandon its generic approach to this subject, contained in Article 26(2)(a) of the previous text, and to utilise an enumerative system. In doing so it accepted "that in the context of a new and untried jurisdictional system, provisions of indeterminate reference should be avoided. It has therefore limited the Court's jurisdiction ... to a number of specified cases ... ".[43] It should be noted that Article 20(a)-(d) was not intended to be exhaustive but rather to reflect "a common core".[44] In the words of the official commentary, the matters listed are "limited to those crimes under general international law which the Commission believes should be within the jurisdiction of the Court at this stage whether by reason of their magnitude, the continuing reality of their occurrence or their inevitable international consequences".[45]

21. It is of interest that three of the four categories also find inclusion in the Statute of the ad hoc Tribunal for the Former Yugoslavia.[46] The exception is the crime of aggression. In spite of the special difficulties of definition which arise in this area, and the complexity which flows from the responsibilities of the Security Council under Chapter VII of the Charter for such matters, the ILC concluded that it would be "retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nuremberg".[47] It was, however, felt necessary to include a special safeguard provision in this area. Article 23(2) performs this function and is worded thus: "A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint."[48]

22. The second major departure from the 1993 draft in this context relates to the elimination of the previous distinction between "crimes defined by treaties"[49] and so-called suppression conventions.[50] As the 1993 Commentary to draft Article 22 noted, the intention had been to differentiate "between treaties which define crimes as international crimes and treaties which merely provide for the suppression of undesirable conduct constituting crimes under national law".[51] Jurisdiction over the latter, including offences addressed in Article 3(1) of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, [52] was to be further limited by reference to a threshold requirement; namely, that "having regard to the terms of the treaty [they] constitute exceptionally serious crimes".[53] This approach was deemed necessary "in order to prevent the Court from being overwhelmed with minor cases ... ".[54]

23. Having taken into account the debates in the Sixth Committee and the comments subsequently submitted by governments the Commission decided to abandon the system of separate and distinct treatment for these two categories of treaties. It was influenced in its thinking by the fact that the distinction "can be difficult to draw in the context of some of the treaties listed in the 1993 draft Statute, and its retention would add an additional level of complexity".[55] By way of contrast the threshold requirement was retained (though now formulated in terms of "exceptionally serious crimes of international concern") and extended to all of the treaties listed in the Annex. As Professor Crawford has stated: "This is a *jurisdictional* limitation, and can therefore be raised by the Prosecutor or a state either at the time of complaint or before the Presidency when an indictment is being considered. It can also be raised by the Court itself at any time".[56] Furthermore, the power of the Court under Article 35, to which reference was made above, to decide that a case is inadmissible can be exercised

on the ground, *inter alia*, that the crime in question "is not of such gravity to justify further action by the Court".[57]

24. The list of treaties contained in the Annex to the draft Statute to which Article 20(e) refers is intended to be exhaustive.[58] It is, however, widely recognised that a procedure will be required to permit the subsequent incorporation of new conventions establishing crimes of international concern.[59] Only treaties which have entered into force and are universal in scope were deemed suitable for use. The latter criterion represents an additional limitation, at least in respect of suppression conventions, as compared to 1993.[60]

25. The instruments enumerated in the Annex include those addressing such central issues of international concern as war crimes contrary to the Geneva Conventions of 1949 and Protocol I of 1977,[61] hijacking, torture, and apartheid.[62] Significantly in terms of the history of this initiative it embraces: "Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3(1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension".[63] In this effort to limit the remit of the proposed International Criminal Court to only the most serious drug offences possessing an international dimension the ILC is building upon the approach which had commended itself to the drafters of that important United Nations instrument.[64]

26. Reference to the 1988 United Nations Convention in the draft Statute has been welcomed by some members of the international community. These include, among others, those small states which have afforded active support to the initiative taken by Trinidad and Tobago in the late 1980s.[65] Notwithstanding this fact and the importance which has been afforded to the 1988 Convention by, among others, Commonwealth Heads of Government and Law Ministers, reference to drug trafficking as a crime within the jurisdiction of the Court has proved to be highly controversial. As Ambassador Robinson of Jamaica noted in his address to the Sixth Committee on 31 October 1994, a tension has arisen between those favouring the ILC approach and certain other states "who are primarily interested in the Court as an instrument to combat genocide, war crimes, crimes against humanity and even aggression".[66] This is, for example, the position which has been taken by The Netherlands. In the words of the representative of that country, Article 20(e) "broadens the scope of the subject matter jurisdiction beyond the limits of what seems to be acceptable to states at present. .... [T]hese crimes can be tackled to a sufficient extent by the system *aut dedere, aut iudicare*. This system is already laid down in most of the treaties in which such offences are elaborated. These offences, no matter how serious they are, do not meet the criterion that they violate fundamental humanitarian principles or outrage the conscience of mankind".[67]

27. Not all states which have voiced opposition to the inclusion of drug trafficking offences have done so for these reasons. For example, some have based their negative stance on more pragmatic grounds including the absence of sufficient precision in the drafting of Article 3(1) of the 1988 Convention and a concern that the threshold requirements will not prove to be workable or effective.[68]

28. Within the *ad hoc* Committee it soon became evident that there was substantial support for taking an even more restrictive view of the initial scope of subject matter jurisdiction. As is noted in its Report to the General Assembly: "With regard to subparagraph (e) of article 20 ... the view was expressed that the offences established in the treaties listed in the annex might be of lesser magnitude than the other offences provided for in article 20 and that their inclusion within the jurisdiction of the International Criminal Court entailed a risk of trivializing the role of the Court ... . Also in favour of the exclusion of the crimes in question from the jurisdiction of the Court, it was argued that the said crimes were more effectively dealt with by national courts or through international co-operation. With specific reference to terrorism and illegal drug trafficking, concern was expressed that extending the jurisdiction of the Court to the corresponding crimes would result in an overburdening of the Court."[69]

29. While no overall consensus in respect of treaty-based crimes emerged the preponderant view appears to have been that the proposals of the ILC in this regard were over-ambitious. The position articulated by the United Nations Crime Prevention and Criminal Justice Branch and the

United Nations International Drug Control Programme that the Court should be given jurisdiction over a broader range of offences associated with modern organised transnational crime does not appear to have found a receptive audience.[70]

30. Also of significance in this context was the widely held view that whatever the final scope of the subject matter jurisdiction might be, it was highly desirable that the crimes in question be much more precisely defined within the Statute itself. Here Article 20 of the ILC draft was compared unfavourably by many with the very detailed definitions contained in the statutes for the Yugoslav and Rwanda tribunals. As has been pointed out elsewhere: "A procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused."[71]

31. Building on this perceived need for greater certainty and clarity many states questioned whether it would be possible to formulate an acceptable definition of the crime of aggression within an appropriate time-frame.[72]

32. Overall, therefore, discussions within the ad hoc Committee revealed the desire of many states for a very much more modest Court in the terms of jurisdictional reach. There was strong support to limit the offences under the jurisdiction of the Court to some or all of the "core crimes" listed in paragraphs (a) to (d) of article 20. Possible compromise positions were, however, also aired. One consisted of "initially limiting the court's jurisdiction to the first three or four crimes, while providing for some type of mechanism to enable the States parties to the Statute to consider the addition of other crimes at a later stage. A suggestion was also made for an approach in which States could agree to refer to the Court extraordinary cases which were not otherwise covered."[73]

33. This high level of concern over the scope of the subject matter jurisdiction as proposed by the ILC continues in spite of the fact that the ability of the Court to play a role in relation to the offences covered by Article 20 is severely circumscribed by subsequent provisions which, in large measure, give emphasis to the concepts of consent and state control. Thus, as a general rule, the Court may exercise its jurisdiction in respect of a relevant offence only if a complaint is lodged by a State party [74] which has expressed its acceptance, under Article 22, of the jurisdiction of the Court with respect to the crime in question. Pursuant to it a State Party is permitted to "opt in" to the jurisdictional system "with respect to such of the crimes referred to in article 20 as it specifies" in its declaration of acceptance.[75]

34. When a complaint is brought the Court may normally act only if its jurisdiction with respect to that crime has also been accepted both by the "custodial state"[76] and "by the State on the territory of which the act or omission in question occurred".[77] These consent requirements are strict ones. Indeed, in so far as drug trafficking offences are concerned they represent a tightening of the rules when compared to the 1993 text.[78] A further relevant and limiting innovation is to be found in Article 21(2) whereby the assent is also required "of a State which has already established, or eventually establishes, its right to the extradition of the accused pursuant to an extradition request".[79]

35. There are two major exceptions to the general thrust of the draft Statute outlined above; namely, in respect of the crime of genocide and cases referred to the Court by the Security Council. Insofar as the former is concerned the Commission took the view that "the prohibition of genocide is of such fundamental significance, and the occasions for legitimate doubt or dispute over whether a given situation amounts to genocide are so limited, that the Court ought, exceptionally, to have jurisdiction over it by virtue solely of the States participating in the draft Statute, without any further requirement of consent or acceptance by any particular State".[80] This approach which proved to be somewhat controversial finds expression in a number of provisions of the draft Statute.[81] For example, in cases of genocide the requirements for the consent of the "custodial State" and the State on whose territory the act occurred are dispensed with. However, one limitation is common to all alleged offences including genocide. It is contained in Article 23(3) and reads thus: "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression

under Chapter VII of the Charter, unless the Security Council otherwise decides."

36. As Crawford has explained: "This proviso is intended to avoid `collateral challenges' to Security Council action that is under way. But it does not go so far as to give the Security Council a veto over complaints or prosecutions under the Statute in cases where the Council has failed to act, for whatever reason".[82]

37. While the attachment to the concept of tight individual state control of the process remains as a significant dimension to recent intergovernmental discussions there appears to be a fairly widespread sentiment that the current approach of the ILC text should be re-evaluated in the light of any decision to limit the subject matter jurisdiction of the Court.[83] In particular, a number of states which favour the deletion of jurisdiction in respect of treaty crimes would be prepared to accept a relaxation of certain of the preconditions and restraints which surround the exercise of the jurisdiction of the Court as reflected in the 1994 text some of which, at least, were inserted in order to make the possession of jurisdiction over drugs and terrorist offences more acceptable. Particularly noteworthy in this regard has been the suggestion that the inherent jurisdiction of the Court be expanded from genocide to embrace other or all "core offences".[84]

38. The strictness with which the concept of state consent is expressed in the draft Statute is, to some extent at least, mitigated by the authority given to the Security Council to refer cases to the Court in certain circumstances. Provision to this effect is contained in Article 23(1) which reads thus: "Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations."

In such circumstances "a complaint is not required for the initiation of an investigation".[85]

39. This approach has been the source of spirited debate within the United Nations system and was also the subject of discussion by Senior Officials in Malta. In the ILC, it was eventually concluded "that such a provision was necessary in order to enable the Security Council to make use of the Court as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind".[86] By way of contrast, it was decided that no similar power should be conferred on the United Nations General Assembly since it "lacked authority under the Charter to affect directly the rights of States against their will, especially in respect of issues of criminal jurisdiction".[87]

40. While this proposal has attracted a considerable body of support within the international community others have expressed serious doubts or outright opposition to the role envisaged for the Council. To the extent that this negative stance has been based on an assessment of the nature and extent of the powers possessed by the Council under Chapter VII of the United Nations Charter some reconsideration will no doubt be called for in the light of the October 1995 judgment of the Appeals Chamber of the Yugoslav Tribunal in the case of *Prosecutor v. Dusko Tadić*.[88] It will be recalled that in that case the Appeals Chamber rejected the contention that the establishment of the Tribunal had been invalid under the Charter.

41. Notwithstanding this development concern has been expressed in a number of quarters that Article 23 is, in whole or in part, objectionable on other grounds. For example, some delegations have expressed the view that paragraph 2 does not represent an appropriate balance between the requirement of the independence of the Court and the primary responsibility of the Security Council for the maintenance of international peace and security.[89] As noted above, however, no consensus has yet been reached on whether the proposed Court should have jurisdiction over the crime of aggression. If the decision to delete it from Article 20 were to be taken paragraph 2 of Article 23 would be rendered superfluous. However, similar issues as to the appropriate interface between the exercise of power by a political body and the operation of the judicial function are raised by paragraph 3. This remains as an important matter of controversy.

42. At a somewhat different level, there is to be found some sentiment, even among those states which have endorsed the general approach of the 1994 draft Statute, that the Security Council should not have the power to refer complaints against named individuals. At present the wording of Article 23(1) would not preclude such action against named persons although the Commission has expressed the expectation that

the Council would "not normally" adopt such a course of action.[90]

43. It is the considered view of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat that the nature and extent of the differences of view which continue to be held by Commonwealth members and others in relation to the jurisdiction of the Court and associated issues represents the most significant single obstacle to progress. If a broadly acceptable solution is to be forthcoming it will require, in the words of the Commonwealth Secretary-General, "a monumental exercise in compromise ... ".[91] The nature of that eventual compromise may well in turn, and as seen above, have a significant impact on the manner in which other issues are resolved. As was noted in the 1995 Report of the ad hoc Committee: "Attention was also drawn to the implications that the selection of crimes would have on other issues relating to the Court, including the principle of complementarity, the State consent requirements and the trigger mechanism for the exercise of jurisdiction, as well as the obligations of State parties with respect to the co-operation and judicial assistance to be provided to the Court."[92]

(ii) Other Issues of Particular Interest to the Commonwealth

44. Commonwealth Law Ministers have, over many years, afforded priority to promoting and facilitating the greatest possible level of co-operation between member countries in the fight against crime and in the administration of criminal justice. The London Scheme for the Rendition of Fugitive Offenders and the Harare Scheme Relating to Mutual Assistance in Criminal Matters Within the Commonwealth, both as amended in 1990, represent the most visible symbols of that commitment. The approach of the draft Statute for an International Criminal Court to the question of international co-operation is thus one of obvious interest and importance within a Commonwealth context.

45. As was seen at an earlier stage of this paper, a central consideration for the ILC throughout the drafting process has been to elaborate an approach in which the proposed International Criminal Court "will complement existing national jurisdictions and existing procedures for international judicial co-operation in criminal matters ... ".[93] The sensitivity of the Commission to such matters is evident, for example, in its treatment of the preconditions to the exercise of jurisdiction in Article 21. It will be recalled that, in addition to requiring the consent of the custodial and territorial states, the interests of any country which has requested the extradition of the individual concerned in respect of an alleged offence (other than genocide) are acknowledged.[94]

46. In a somewhat similar fashion Article 34 provides "any interested State" with the right to challenge the jurisdiction of the Court. The Commission has indicated its expectation that this term will be afforded a broad interpretation. As it has stated in the Commentary: "a State which has lodged an extradition request with respect to an accused would be an `interested State' for this purpose, as also would be a State whose co-operation had been sought under Part 7 of the Statute".[95] A further interesting illustration of the general approach of the ILC is found in Article 54. Pursuant to this provision a custodial state which is a party to a relevant Article 20(e) treaty but which has not expressed its acceptance of the jurisdiction of the Court in relation thereto "shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose". As the Commission has pointed out, "[a]s between parties to the Statute this in effect integrates the International Criminal Court into the existing system of international criminal jurisdiction and co-operation in respect of treaty crimes".[96]

47. The ILC has been primarily concerned with fashioning what it sees as an appropriate interface between the draft Statute and existing treaties within the meaning of public international law. However, Commonwealth `Schemes' do not possess this quality. As Professor McClean has stated: "A Scheme does not create binding international obligations, and is not registered under Article 102 of the United Nations Charter; it represents more an agreed set of recommendations for legislative implementation by each Government".[97] At their 1995 meeting in Malta Senior Officials considered that it would be appropriate to seek to ensure that the draft Statute "was fully sensitive to the reality of the provision of relevant forms of international co-operation on the basis of Commonwealth Schemes rather than international treaties". An obvious focus for such attention is provided by Article 21(2) which requires the assent of a state requesting extradition for offences other than

genocide as a precondition for the exercise of the jurisdiction of the Court. At present, however, this applies only where the request is made "under an international agreement"; wording which may be construed as being limited to instruments within the meaning of the Vienna Convention on the Law of Treaties. If so it would not, by definition, extend to a situation in which both the requesting and custodial states regulate their bilateral relationship on the basis of the London Scheme.[98] Only a relatively minor amendment of the existing wording would, it is suggested, be required to place such countries on a plane of equality in this regard.[99] Senior Officials articulated the need to secure appropriate wording in any final text giving effect to an International Criminal Court to satisfy this concern.

48. In the process of drafting the Statute the ILC has also sought to recognise the fact that "[t]he effective functioning of the Court will depend upon the international co-operation and judicial assistance of States".[100] Indeed, for the proposed structure to operate effectively a very intense level of co-operation will be required at all stages.[101] It was largely for this reason, for example, that the decision was taken to depart from the precedent set by Article 18 of the Statute of the ad hoc Tribunal for the Balkans and Article 17 of that for Rwanda and to restrict the jurisdiction of the Court to cases in which either a complaint has been lodged by a state or a matter has been referred by the Security Council. Under the current proposals the prosecutor possesses no independent right to initiate an investigation. As the Commission has explained, "in practice the Court could only satisfactorily deal with a prosecution initiated by complaint if the complainant is co-operating with the Court ... in relation to such matters as the provision of evidence, witnesses, etc.".[102]

49. Central to the approach of the draft Statute to this critical area are Articles 51-57 which together constitute Part 7 entitled "International Co-operation and Judicial Assistance". In the formulation of its approach in this sphere the Commission was faced with a number of difficulties. As has been pointed out elsewhere, "[t]he essential problem ... is that a state that does not accept the jurisdiction of the Court with respect to a given offense, or that is not a party to the treaty on which the charge is based ... cannot be expected to co-operate with the Court in the same way as a state that is a party and does accept the court's jurisdiction".[103] In this important sense, therefore, the task faced by the ILC was considerably more complex than that which arose in connection with the establishment of the ad hoc Tribunals by the Security Council. For instance, by virtue of Chapter VII of the Charter, it was possible to work on the basis of the imposition of a uniform obligation on all member states.

50. Article 51(1) of the draft Statute imposes a general obligation on state parties to co-operate with the Court in relation to investigations and proceedings. Paragraph 2 thereof then empowers the Registrar to request co-operation in relation to a range of matters including the identification and location of persons; the production of evidence; arrest and detention; and, the taking of other steps "which may facilitate the administration of justice, including provisional measures as required".[104] Requirements concerning the content and communication of such requests are laid down in Article 57.[105]

51. Finally, in paragraph 3 the specific obligation which attaches to all state parties in respect of genocide and to those which have, in other cases, accepted the jurisdiction of the Court in relation to the crime in question is set out: namely, to respond to such requests "without undue delay". This is a less robust formulation than is to be found in Article 29 of the Statute of the Yugoslav Tribunal where the requirement is to "comply" with rather than to "respond" to such requests. As the Commission noted in its Commentary, paragraph 3 "does not, in terms, require States to comply with such requests, since whether they will be able to do so will depend on the circumstances: a State cannot, for example, arrest a person who has fled its territory".[106]

52. It is apparent that the approach of the ILC in this context has been to draw from, but not to be restricted by, existing mutual assistance in criminal matters arrangements. One clear example of the latter tendency is to be found in Article 26 dealing with the investigation of alleged crimes. As has been noted elsewhere, paragraph 2 thereof "seems to empower the Prosecutor to undertake a range of activities, including the collection of evidence and the conduct of on-site inspections, without the need to secure the approval or assistance of the States parties in whose territories these activities might be carried out. Article 26.2(e) lends weight to this view by providing that the Prosecutor may `as

appropriate, seek the co-operation of any State or of the United Nations'."[107]

53. By way of contrast, in the critical area of the surrender of accused persons to the International Criminal Court the ILC has opted to suggest the creation of an entirely new regime of assistance which is not rooted in existing international extradition or rendition practice. Drawing upon the precedents established by the two ad hoc Tribunals the Commission has utilised in Article 53 the alternative concept of "transfer" to cover cases where an accused is made available to the Court. Notwithstanding this fact the decision was also taken to retain certain principles familiar in extradition law and practice, such as speciality, [108] and to incorporate modified versions of others.[109]

54. Furthermore, and as with Article 51, it was necessary to address various differing levels of obligation in relation to transfer depending on the fact circumstances of the case. In this respect Article 53 makes provision for four different categories of obligation for state parties.[110] In the words of the official commentary:

"(a) All States parties to the Statute will have accepted the Court's "inherent" jurisdiction over genocide under articles 20 (a) and 21 (1) (a). In that case, subject to the other safeguards and guarantees in the Statute, the transfer obligation in article 53 (2) (a) will apply.

(b) The same obligation should apply to States parties which have accepted the jurisdiction of the Court with respect to the crime in question; they must take immediate steps to arrest and surrender the accused person to the Court under paragraph 2 (a).

(c) In the case of crimes defined by the annexed treaties, a State party which is also a party to the relevant treaty defining the crime in question but which has not accepted the Court's jurisdiction must arrest and either transfer, extradite or prosecute the accused.

(d) In any other case, a State party must consider whether its own law permits the arrest and transfer of the accused. As to other crimes under general international law, some States may not have some of these crimes (e.g. aggression) as part of their own criminal code; it was thought that the only obligation that could be imposed in such cases, if a State does not accept the jurisdiction of the Court in relation to the crimes, was that spelt out in paragraph 2 (c)."[111]

55. These and related matters were subject to discussion within the ad hoc Committee under the heading `Relationship between States parties, non-States parties and the international criminal court'.[112] To facilitate that process an open-ended Working Group was asked to prepare detailed guidelines [113] which are reproduced at Appendix II of this paper for ease of reference.

56. The resulting debate served to underline the centrality of the topic of international co-operation to the effective functioning of the proposed Court. Here the principle of complementarity was also a key issue although it was widely recognised that the role to be played by it in this area "was ultimately connected with other issues such as the overall scope and nature of the jurisdiction of the Court, the regime of States' consent, or the trigger mechanism, to be provided under the statute".[114] Considerable attention was also paid to the advantages and disadvantages of the regime of co-operation proposed by the ILC as well as to the identification and analysis of alternative approaches. No consensus position has, as yet, emerged.

57. One further issue of interest to Commonwealth countries in the context of international co-operation arises from the decision of the ILC to exclude from the draft Statute any treatment of the subject of the confiscation of the proceeds of crime. The ability to take such action, and to receive significant international assistance in so doing, has been increasingly emphasised in the years since the conclusion of the Harare Scheme in 1986.[115] Confiscation is now generally regarded as a necessary strategic weapon in the fight against those forms of criminal activity which generate significant profits. Its relevance in the present context flows primarily though not exclusively from the inclusion in the Annex of the 1988 United Nations Convention on drug trafficking.

58. The current stance of the draft Statute on this matter, it will be recalled, contrasts with that taken in the 1993 text. There Article 53 (Applicable Penalties) permitted the Court to "order the confiscation of property unlawfully

obtained or the proceeds of unlawful conduct".[116] Funds derived from such confiscation orders could, along with fines paid, be devoted to a number of specified purposes including defraying the costs of the trial.[117] In deciding, for a variety of reasons, to delete reference to this and related matters from what is now Article 47, the Commission expressed the view that confiscation was a subject "best left to national jurisdictions and to international judicial co-operation agreements, of which there is a growing network".[118]

59. While there is no doubt considerable merit in the desire not to interfere with the developing international practice in this specialised area the introduction of an international scheme for the investigation, prosecution and conviction of individuals will necessarily give rise to certain technical difficulties. For example, provisions concerning co-operation in the tracing, freezing and seizing of proceeds contained in agreements and arrangements have been based on the assumption or requirement that proceedings are in train, or in contemplation, in the requesting state. Similarly assumptions in respect of the involvement of the courts of the requesting state were naturally made in the drafting of provisions relating to the obligation to confiscate.

60. By way of illustration, it will be recalled that the Harare Scheme is explicitly designed to provide for assistance by one country "in respect of criminal matters arising in another ... ".[119] A criminal matter arises for the purposes of the Scheme when it is certified "that criminal or forfeiture proceedings have been instituted in a court exercising jurisdiction in that country or that there is reasonable cause to believe that an offence has been committed in respect of which such criminal proceedings could be so instituted".[120] The question arises whether the existing wording of these and other relevant provisions is sufficiently open textured to accommodate the introduction of the International Criminal Court experiment without change. Should it be concluded that safeguarding the efficiency and effectiveness of the Scheme in this regard would require additional measures attention would have to be given in due course to the possible formulation of further amendments. An alternative or supplementary strategy might be to urge the inclusion of some form of appropriate treatment of this matter in the text of the draft Statute itself. A somewhat analogous measure has, for example, been introduced in Article 53(3) whereby "[t]ransfer to the Court is to be taken, as between parties to the Statute which accept the jurisdiction of the Court with respect to the crime, to constitute compliance with *aut dedere aut judicare* provisions in extradition treaties".[121] Indeed, the use of "deeming provisions" in treaties concerning crimes of international concern is fairly common place.[122] Resort to such a course of action in this context would, however, represent only a partial solution in that it would apply only among such members of the Commonwealth as elected to become parties to the Statute of the Court.

D. Conclusion

61. In the period since the Commonwealth Law Ministers Meeting in Mauritius in November 1993 substantial progress has been recorded within the United Nations system in formulating a detailed draft Statute for an International Criminal Court and subjecting it to analysis. That proposal, in giving expression to the now generally accepted principle that the purpose of such an institution "is to fill a gap in the existing international order, not to undermine the primary responsibility of States to bring perpetrators of the most serious offences to justice"[123] without doubt brings this important initiative a step closer to realisation.

62. International consideration of this matter is, however, now entering a critical phase and much remains to be done if the concept is to be transformed into reality. The ILC has brought within sight the possibility of providing, through institutional means, that those responsible for the commission of grave crimes of concern to the international community can more readily be brought to justice. As we have seen, there are various issues of principle, and many outstanding matters of detail, which still need to be resolved. Members of the Commonwealth have, from the outset, played an active and constructive role in this process. If they can bring to the present debate the same spirit of compromise and consensus that has traditionally characterised Commonwealth discussions of legal matters they can do much to ensure that a positive outcome is secured.

NOTES

1. The subject of the criminal responsibility of states is also under discussion within the International Law Commission. See, e.g., *Report of the International Law Commission on the work of its Forty Sixth Session: 2 May - 22 July 1994*, UNGA, Official Records, 49th Session, Supplement No. 10 (A/49/10) (hereafter 1994 ILC Report), at pp.329-343.

2. See, e.g., M.C. Bassiouni and C.L. Blakesley, The Need for an International Criminal Court in the New International World Order, (1992) 25 *Vanderbilt Journal of Transnational Law*, p.151, at pp.152-158.

3. J. Crawford, The ILC's Draft Statute for an International Criminal Court, (1994) 88 *American Journal of International Law*, p.140, at p.141.

4. See, *id.*

5. In the intervening years the subject continued to attract a certain level of academic attention.

6. See, e.g., American Bar Association Task Force on an International Criminal Court, (1993) 27 *International Lawyer*, p.258, at p.260. See also, C. Warbrick, International Criminal Law, (1995) 44 *International and Comparative Law Quarterly*, p.466, at pp.466-468.

7. See, e.g., F. Patel, Crime Without Frontiers: A Proposal for an International Narcotics Court, (1990) 22 *New York University Journal of International Law and Politics*, pp.709-747.

8. Secretary-General's Remarks at the Oxford Conference on International and White Collar Crime, 2 September 1993, (typescript), p.8.

9. 1994 ILC Report, p.26.

10. See, e.g., UN General Assembly Resolutions 45/41, 28 November 1990, and 46/54, 9 December 1991. See also, e.g., 1994 ILC Report, at pp.161-194; and, T. MacCormack and G. Simpson, The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions, (1994) 5 *Criminal Law Forum*, pp.1-55.

11. 1994 ILC Report, p.25.

12. See, UN Doc. A/CN.4/L.490; 19 July 1993; and A/CN.4/L.490/Add.1; 19 July 1993 (hereafter 1993 text).

13. J. Crawford, The ILC Adopts a Statute for an International Criminal Court, (1995) 89 *American Journal of International Law*, p.404, at p.404.

14. See e.g., Parliamentary Assembly, Council of Europe, "Report on the establishment of an international court to try serious violations of international humanitarian law", 28 July 1993 (ADOC 6902/1403 - 15/7/93 - 1 - E). See also, M.C. Bassiouni, The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), (1994) 88 *American Journal of International Law*, pp.784-805.

15. For the text of the Statute of the Tribunal with explanatory commentary see, (1993) 32 *International Legal Materials*, pp.1159-1191. See also, Justice Without Victors, *The Economist* (London) 7 January 1995, p.34.

16. Para 4 of UN Security Council Resolution 827 (1993).

17. (1993) *Commonwealth Law Bulletin*, p.2006.

18. See, "Recent Developments in Extradition", LMM (93) 48, at p.3.

19. See, *supra*, note 17, p.2012.

20. See, SOLM (95) 4.

21. Para 33.

22. See, e.g., Delaume, The Work of the Sixth Committee of the Forty-Eighth Session of the UN General Assembly, (1994) 88 *American Journal of International Law*, p.343, at p.350.

23. See, e.g., A.R. Perera, Towards the Establishment of an International Criminal Court, (1994) *Commonwealth Law Bulletin*, p.298, at pp.302-308.

24. See, UN Doc. A/CN.4/458; 18 February 1994; and, Add. 1-8.

25. See, e.g., Amnesty International, *Establishing a Just, Fair and Effective International Criminal Court* (1994).

26. See, 1994 ILC Report, pp.43-157.

27. For the text of UN Security Council Resolution 955 (1994) and the Statute of the Tribunal see, (1994) 33 *International Legal Materials*, pp.1598-1613. See also, Whose Justice for the Hutus, *The Economist* (London) 30 July 1994, pp.18-19.

28. "Statement Delivered by the New Zealand Representative Mr Gerard van Bohemen", 27 October 1994, (typescript), p.1. See also, Making Rules for War: The World Tries Again, *The Economist* (London) 11 March 1995, at pp.21-23.

29. See, General Assembly, Official Records, Fiftieth Session, Supplement No. 22 (A/50/22).

30. Para 2.

31. Para 4.

32. 1994 ILC Report, p.44. Similarly the 3rd preambular para emphasises that the court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective".

33. *Supra*, note 13, pp.414.

34. See, e.g., *supra*, note 29, at pp.6-10, 21, 27, and 37-38.

35. UN Doc. GA/L/2879; 2 November 1995, p.5.

36. 1994 ILC Report, p.42.

37. See, *id.*, at p.49. See also, *supra*, note 6, American Bar Association, at p.273.

38. See, 1994 ILC Report, at p.57. But see, *supra*, note 25, at p.26 where greater flexibility, in terms of increasing the overall number of judges, is advocated.

39. "Statement by Ms Jan Linehan for the Delegation of Australia", 25 October 1994 (typescript), p.3.

40. See, *supra*, note 3, at pp.143-147.

41. See, e.g., *supra*, note 23, at pp.304-308.

42. See, e.g., "Statement by Ms. Noor Farida Ariffin, Representative of Malaysia", 28 October 1994 (typescript), at p.3.

43. 1994 ILC Report, p.67.

44. See, *id.*, p.71.

45. *Id.*, pp.77-78.

46. See, Articles 3-5 of the Statute, *supra*, note 15.

47. 1994 ILC Report, p.72.

48. It will be recalled that the UN Security Council has yet to make such a determination in practice.

49. See, 1993 text, Article 22.

50. See, 1993 text, Article 26(2)(b).

51. UN Doc. A/CN.4/L.490; 19 July 1993, p.22.

52. See generally, W. Gilmore, *Combating International Drugs Trafficking: The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1991).

53. 1993 text, Article 26(2)(b).

54. *Supra*, note 51, p.30.

55. 1994 ILC Report, p.68.

56. *Supra*, note 13, p.412. For a call for the use of a "more concrete standard" see, UN Doc.A/AC.244/1/Add.1; 30 March 1995, at p.10.

57. Article 35(c). There is considerable sentiment in favour of making the application of this rule mandatory. See, e.g., UN Doc.A/AC.244/2; 21 April 1995, p.20.

58. See, 1994 ILC Report, at p.71.

59. See, e.g., *id.*, at p.147 and *supra*, note 42, at p.3.

60. See, *Supra*, note 3, p.146.

61. The failure to include mention of Protocol II of 1977 has been subjected to criticism in some circles.

62. Other suggestions for inclusion continue to be made.

63. Annex, para 9. For the reasons for the inclusion of reference to Article 2 of the 1988 Convention see, 1994 ILC Report, at pp.145-146.

64. See, 101st Congress, 1st Session, SENATE, Executive Report 101-15, p.26.

65. See, e.g., *supra*, note 3, p.146.

66. "Statement by H.E. Ambassador Patrick Robinson, Jamaican Delegate to the Sixth Committee", 31 October 1994, (typescript), p.3.

67. "Statement by the Representative of the Kingdom of the Netherlands, Mr. Adriaan Bos", 26 October 1994, (typescript), para 5.

68. See, e.g., the view of the United Kingdom, UN Doc. A/CN.4/458/Add. 1; 28 February 1994, at p.16. See also, "Statement by the Honourable Conrad K. Harper, Legal Adviser, United States Department of State", 25 October 1994 (typescript), p.3.

69. *Supra*, note 29, pp.17-18.

70. See, e.g., UN Doc. A/AC.244/1/Add.1; 30 March 1995, at pp.9-10.

71. *Supra*, note 29, p.12.

72. See, *id.*, at pp.13-14.

73. *Id.*, p.11.

74. See, Article 25(2).

75. Article 22(1).

76. But see, Article 54 on the obligation to extradite or prosecute. Jamaica has urged that "the Statute should acknowledge as a basic principle that custody over a person should not be acquired in breach of international law". *Supra*, note 66, p.15.

77. Article 21(1)(b)(ii). Such wording would not encompass serious acts of international drug trafficking carried out by stateless vessels in international waters. This is, however, addressed in a number of international agreements. See, e.g., Article 17(2) of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

78. See, UN Doc. A/CN.4/L.490; 19 July 1993, p.31. However, under Article 26(1) the concept of consent also extended to the exercise of "jurisdiction over specified persons or categories of persons".

79. 1994 ILC Report, p.80.

80. *Id.*, pp.67-68.

81. See, e.g., Article 21(1)(a) and Article 25(1).

82. *Supra*, note 13, p.413.

83. See, *supra*, note 29, at p.11.

84. See, *id.*, at pp.20-23; and, *supra*, note 35, at pp.8-10.

85. Article 25(4).

86. 1994 ILC Report, p.85.

87. *Id.*, p.86.

88. Judgment of 2 October 1995 (Case No. IT-94-1-AR 72).

89. See, e.g., *supra*, note 29, at p.15.

90. 1994 ILC Report p.85.

91. *Supra*, note 8, p.7.

92. *Supra*, note 29, pp.11-12.

93. 1994 ILC Report, p.44.

94. See, Article 21(2).

95. 1994 ILC Report, p.105.

96. *Id.*, p.81.

97. D. McClean, *International Judicial Assistance* (1992), p.151. See also, *Commonwealth Schemes on Mutual Assistance in the Administration of Justice* (1991), at p.iii.

98. It should be noted that the surrogate extradition treaty provisions contained in multilateral conventions dealing with crimes of international concern tend to be drafted in permissive rather than mandatory terms. See, e.g., Article 6(3) of the 1988 UN drug trafficking convention. See also, Article 6(4).

99. The formulation "under an international agreement or arrangement" might go some way to meeting such concerns.

100. 1994 ILC Report, p.129.

101. See, e.g., Articles 26, 28, 29, 38, 41 and 44. See also *supra*, American Bar Association note 6, at p.274.

102. 1994 ILC Report, p.89.

103. *Supra*, note 3, p.150.

104. Article 51(2)(e). See, Article 52 on the issue of provisional measures.

105. On co-operation with States not parties to the Statute of the Court see, Article 56. See also, Article 22(4).

106. 1994 ILC Report, p.130.

107. "Discussion Paper on Assistance in Relation to Investigations and Prosecutions and the Surrender of Persons to the Court" (Typescript submitted to the August 1995 session of the UN Ad Hoc Committee), para 21. (Text supplied by the Attorney-General's Department, Australia).

108. See, Article 55.

109. See, Article 42 for the approach to *non bis in idem*.

110. On the issue of `priority' see, Article 53(4).

111. 1994 ILC Report, p.133.

112. See, *supra*, note 29, p.37 *et seq.*

113. See, *id.*, at p.2.

114. *Id.*, p.37.

115. See, e.g., D. McClean, *op. cit.*, Ch. 9.

116. UN Doc., A/CN.4/L.490/Add.1; 19 July 1993, p.35.

117. See, Article 53(4)(a) of the 1993 text.

118. 1994 ILC Report, p.125.

119. Para 1(2).

120. Para 3(1).

121. 1994 ILC Report, p.134.

122. See, e.g., Article 6(2) of the 1988 UN drug trafficking convention.

123. "Statement by the Representative of the United Kingdom of Great Britain and Northern Ireland", 27 October 1994 (typescript).

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

(UN Doc. A/49/355; 1 September 1994)

II. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

The States parties to this Statute,

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern, and for that purpose to establish an international criminal court;

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole;

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective;

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

There is established an International Criminal Court ("the Court"), whose jurisdiction and functioning shall be governed by the provisions of this Statute.

Article 2

Relationship of the Court to the United Nations

The President, with the approval of the States parties to this Statute ("States parties"), may conclude an agreement establishing an appropriate relationship between the Court and the United Nations.

Article 3

Seat of the Court

1. The seat of the Court shall be established at ... in ... ("the host State").

2. The President, with the approval of the States parties, may conclude an agreement with the host State establishing the relationship between that State and the Court.

3. The Court may exercise its powers and functions on the territory of any State party and, by special agreement, on the territory of any other State.

Article 4

Status and legal capacity

1. The Court is a permanent institution open to States parties in accordance with this Statute. It shall act when required to consider a case submitted to it.

2. The Court shall enjoy in the territory of each State party such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

PART 2. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 5

Organs of the Court

The Court consists of the following organs:

(a) a Presidency, as provided in article 8;

(b) an Appeals Chamber, Trial Chambers and other chambers, as provided in article 9;

(c) a Procuracy, as provided in article 12; and

(d) a Registry, as provided in article 13.

Article 6

Qualification and election of judges

1. The judges of the Court shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices, and have, in addition:

(a) criminal trial experience;

(b) recognized competence in international law.

2. Each State party may nominate for election not more than two persons, of different nationality, who possess the qualification referred to in paragraph 1 (a) or that referred to in paragraph 1 (b), and who are willing to serve as may be required on the Court.

3. Eighteen judges shall be elected by an absolute majority vote of the States parties by secret ballot. Ten judges shall first be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (a). Eight judges shall then be elected, from among the persons nominated as having the qualification referred to in paragraph 1 (b).

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4. No two judges may be nationals of the same State.

5. States parties should bear in mind in the election of the judges that the representation of the principal legal systems of the world should be assured.

6. Judges hold office for a term of nine years and, subject to paragraph 7 and article 7 (2), are not eligible for re-election. A judge shall, however, continue in office in order to complete any case the hearing of which has commenced.

7. At the first election, six judges chosen by lot shall serve for a term of three years and are eligible for re-election; six judges chosen by lot shall serve for a term of six years; and the remainder shall serve for a term of nine years.

8. Judges nominated as having the qualification referred to in paragraph 1 (a) or 1 (b), as the case may be, shall be replaced by persons nominated as having the same qualification.

Article 7

Judicial vacancies

1. In the event of a vacancy, a replacement judge shall be elected in accordance with article 6.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term, and if that period is less than five years is eligible for re-election for a further term.

Article 8

The Presidency

1. The President, the first and second Vice-Presidents and two alternate Vice-Presidents shall be elected by an absolute majority of the judges. They shall serve for a term of three years or until the end of their term of office as judges, whichever is earlier.

2. The first or second Vice-President, as the case may be, may act in place of the President in the event that the President is unavailable or disqualified. An alternate Vice-President may act in place of either Vice-President as required.

3. The President and the Vice-Presidents shall constitute the Presidency which shall be responsible for:

(a) the due administration of the Court; and

(b) the other functions conferred on it by this Statute.

4. Unless otherwise indicated, pre-trial and other procedural functions conferred under this Statute on the Court may be exercised by the Presidency in any case where a chamber of the Court is not seized of the matter.

5. The Presidency may, in accordance with the Rules, delegate to one or more judges the exercise of a power vested in it under articles 26 (3), 27 (5), 28, 29 or 30 (3) in relation to a case, during the period before a Trial Chamber is established for that case.

Article 9

Chambers

1. As soon as possible after each election of judges to the Court, the Presidency shall in accordance with the Rules constitute an Appeals Chamber consisting of the President and six other judges, of whom at least three shall be judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (b). The President shall preside over the Appeals Chamber.

2. The Appeals Chamber shall be constituted for a term of three years. Members of the Appeals Chamber shall, however, continue to sit on the Chamber in order to complete any case the hearing of which has commenced.

3. Judges may be renewed as members of the Appeals Chamber for a second or subsequent term.

4. Judges not members of the Appeals Chamber shall be available to serve on Trial Chambers and other chambers required by this Statute, and to act as substitute members of the Appeals Chamber in the event that a member of that Chamber is unavailable or disqualified.

5. The Presidency shall nominate in accordance with the Rules five such judges to be members of the Trial Chamber for a given case. A Trial Chamber shall include at least three judges elected from among the persons nominated as having the qualification referred to in article 6 (1) (a).

6. The Rules may provide for alternate judges to be nominated to attend a trial and to act as members of the Trial Chamber in the event that a judge dies or becomes unavailable during the course of the trial.

7. No judge who is a national of a complainant State or of a State of which the accused is a national shall be a member of a chamber dealing with the case.

Article 10

Independence of the judges

1. In performing their functions, the judges shall be independent.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

/...

In particular, they shall not while holding the office of judge be a member of the legislative or executive branches of the Government of a State, or of a body responsible for the investigation or prosecution of crimes.

3. Any question as to the application of paragraph 2 shall be decided by the Presidency.

4. On the recommendation of the Presidency, the States parties may by a two-thirds majority decide that the work-load of the Court requires that the judges should serve on a full-time basis. In that case:

(a) existing judges who elect to serve on a full-time basis shall not hold any other office or employment; and

(b) judges subsequently elected shall not hold any other office or employment.

Article 11

Excusing and disqualification of judges

1. The Presidency at the request of a judge may excuse that judge from the exercise of a function under this Statute.

2. Judges shall not participate in any case in which they have previously been involved in any capacity or in which their impartiality might reasonably be doubted on any ground, including an actual, apparent or potential conflict of interest.

3. The Prosecutor or the accused may request the disqualification of a judge under paragraph 2.

4. Any question as to the disqualification of a judge shall be decided by an absolute majority of the members of the Chamber concerned. The challenged judge shall not take part in the decision.

Article 12

The Procuracy

1. The Procuracy is an independent organ of the Court responsible for the investigation of complaints brought in accordance with this Statute and for the conduct of prosecutions. A member of the Procuracy shall not seek or act on instructions from any external source.

2. The Procuracy shall be headed by the Prosecutor, assisted by one or more Deputy Prosecutors, who may act in place of the Prosecutor in the event that the Prosecutor is unavailable. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. The Prosecutor may appoint such other qualified staff as may be required.

3. The Prosecutor and Deputy Prosecutors shall be persons of high moral character and have high competence and experience in the prosecution of criminal cases. They shall be elected by secret ballot by an absolute majority of the States parties, from among candidates nominated by States parties. Unless a shorter term is otherwise decided on at the time of their election, they shall hold office for a term of five years and are eligible for re-election.

4. The States parties may elect the Prosecutor and Deputy Prosecutors on the basis that they are willing to serve as required.

5. The Prosecutor and Deputy Prosecutors shall not act in relation to a complaint involving a person of their own nationality.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor at their request from acting in a particular case, and shall decide any question raised in a particular case as to the disqualification of the Prosecutor or a Deputy Prosecutor.

7. The staff of the Procuracy shall be subject to Staff Regulations drawn up by the Prosecutor.

Article 13

The Registry

1. On the proposal of the Presidency, the judges by an absolute majority by secret ballot shall elect a Registrar, who shall be the principal administrative officer of the Court. They may in the same manner elect a Deputy Registrar.

2. The Registrar shall hold office for a term of five years, is eligible for re-election and shall be available on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided on, and may be elected on the basis that the Deputy Registrar is willing to serve as required.

3. The Presidency may appoint or authorize the Registrar to appoint such other staff of the Registry as may be necessary.

4. The staff of the Registry shall be subject to Staff Regulations drawn up by the Registrar.

Article 14

Solemn undertaking

Before first exercising their functions under this Statute, judges and other officers of the Court shall make a public and solemn undertaking to do so impartially and conscientiously.

/...

Article 15

Loss of office

1. A judge, the Prosecutor or other officer of the Court who is found to have committed misconduct or a serious breach of this Statute, or to be unable to exercise the functions required by this Statute because of long-term illness or disability, shall cease to hold office.

2. A decision as to the loss of office under paragraph 1 shall be made by secret ballot:

(a) in the case of the Prosecutor or a Deputy Prosecutor, by an absolute majority of the States parties;

(b) in any other case, by a two-thirds majority of the judges.

3. The judge, the Prosecutor or any other officer whose conduct or fitness for office is impugned shall have full opportunity to present evidence and to make submissions but shall not otherwise participate in the discussion of the question.

Article 16

Privileges and immunities

1. The judges, the Prosecutor, the Deputy Prosecutors and the staff of the Procuracy, the Registrar and the Deputy Registrar shall enjoy the privileges, immunities and facilities of a diplomatic agent within the meaning of the Vienna Convention on Diplomatic Relations of 16 April 1961.

2. The staff of the Registry shall enjoy the privileges, immunities and facilities necessary to the performance of their functions.

3. Counsel, experts and witnesses before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

4. The judges may by an absolute majority decide to revoke a privilege or waive an immunity conferred by this article, other than an immunity of a judge, the Prosecutor or Registrar as such. In the case of other officers and staff of the Procuracy or Registry, they may do so only on the recommendation of the Prosecutor or Registrar, as the case may be.

Article 17

Allowances and expenses

1. The President shall receive an annual allowance.

2. The Vice-Presidents shall receive a special allowance for each day they exercise the functions of the President.

3. Subject to paragraph 4, the judges shall receive a daily allowance during the period in which they exercise their functions. They may continue to receive a salary payable in respect of another position occupied by them consistently with article 10.

4. If it is decided under article 10 (4) that judges shall thereafter serve on a full-time basis, existing judges who elect to serve on a full-time basis, and all judges subsequently elected, shall be paid a salary.

Article 18

Working languages

The working languages of the Court shall be English and French.

Article 19

Rules of the Court

1. Subject to paragraphs 2 and 3, the judges may by an absolute majority make rules for the functioning of the Court in accordance with this Statute, including rules regulating:

(a) the conduct of investigations;

(b) the procedure to be followed and the rules of evidence to be applied;

(c) any other matter which is necessary for the implementation of this Statute.

2. The initial Rules of the Court shall be drafted by the judges within six months of the first elections for the Court, and submitted to a conference of States parties for approval. The judges may decide that a rule subsequently made under paragraph 1 should also be submitted to a conference of States parties for approval.

3. In any case to which paragraph 2 does not apply, rules made under paragraph 1 shall be transmitted to States parties and may be confirmed by the Presidency unless, within six months after transmission, a majority of States parties have communicated in writing their objections.

4. A rule may provide for its provisional application in the period prior to its approval or confirmation. A rule not approved or confirmed shall lapse.

PART 3. JURISDICTION OF THE COURT

Article 20

Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

/...

(a) the crime of genocide;

(b) the crime of aggression;

(c) serious violations of the laws and customs applicable in armed conflict;

(d) crimes against humanity;

(e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

Article 21

Preconditions to the exercise of jurisdiction

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:

(a) in a case of genocide, a complaint is brought under article 25 (1);

(b) in any other case, a complaint is brought under article 25 (2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:

(i) by the State which has custody of the suspect with respect to the crime ("the custodial State"); and

(ii) by the State on the territory of which the act or omission in question occurred.

2. If, with respect to a crime to which paragraph 1 (b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court's jurisdiction with respect to the crime is also required.

Article 22

Acceptance of the jurisdiction of the Court for the purposes of article 21

1. A State party to this Statute may:

(a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or

(b) at a later time, by declaration lodged with the Registrar;

accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.

3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

4. If under article 21 the acceptance of a State which is not a party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the Court exercising jurisdiction with respect to the crime.

Article 23

Action by the Security Council

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.

Article 24

Duty of the Court as to jurisdiction

The Court shall satisfy itself that it has jurisdiction in any case brought before it.

PART 4. INVESTIGATION AND PROSECUTION

Article 25

Complaint

1. A State party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed.

2. A State party which accepts the jurisdiction of the Court under article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed.

3. As far as possible a complaint shall specify the circumstances of the alleged crime and the identity and whereabouts of any suspect, and be accompanied by such supporting documentation as is available to the complainant State.

4. In a case to which article 23 (1) applies, a complaint is not required for the initiation of an investigation.

Article 26

Investigation of alleged crimes

1. On receiving a complaint or upon notification of a decision of the Security Council referred to in article 23 (1), the Prosecutor shall initiate an investigation unless the Prosecutor concludes that there is no possible basis for a prosecution under this Statute and decides not to initiate an investigation, in which case the Prosecutor shall so inform the Presidency.

2. The Prosecutor may:

(a) request the presence of and question suspects, victims and witnesses;

(b) collect documentary and other evidence;

(c) conduct on-site investigations;

(d) take necessary measures to ensure the confidentiality of information or the protection of any person;

(e) as appropriate, seek the cooperation of any State or of the United Nations.

3. The Presidency may, at the request of the Prosecutor, issue such subpoenas and warrants as may be required for the purposes of an investigation, including a warrant under article 28 (1) for the provisional arrest of a suspect.

4. If, upon investigation and having regard, inter alia, to the matters referred to in article 35, the Prosecutor concludes that there is no sufficient basis for a prosecution under this Statute and decides not to file an indictment, the Prosecutor shall so inform the Presidency giving details of the nature and basis of the complaint and of the reasons for not filing an indictment.

5. At the request of a complainant State or, in a case to which article 23 (1) applies, at the request of the Security Council, the Presidency shall review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, and may request the Prosecutor to reconsider the decision.

6. A person suspected of a crime under this Statute shall:

(a) prior to being questioned, be informed that the person is a suspect and of the rights:

(i) to remain silent, without such silence being a consideration in the determination of guilt or innocence; and

(ii) to have the assistance of counsel of the suspect's choice or, if the suspect lacks the means to retain counsel, to have legal assistance assigned by the Court;

(b) not be compelled to testify or to confess guilt; and

(c) if questioned in a language other than a language the suspect understands and speaks, be provided with competent interpretation services and with a translation of any document on which the suspect is to be questioned.

Article 27

Commencement of prosecution

1. If upon investigation the Prosecutor concludes that there is a prima facie case, the Prosecutor shall file with the Registrar an indictment containing a concise statement of the allegations of fact and of the crime or crimes with which the suspect is charged.

2. The Presidency shall examine the indictment and any supporting material and determine:

(a) whether a prima facie case exists with respect to a crime within the jurisdiction of the Court; and

(b) whether, having regard, inter alia, to the matters referred to in article 35, the case should on the information available be heard by the Court.

If so, it shall confirm the indictment and establish a trial chamber in accordance with article 9.

3. If, after any adjournment that may be necessary to allow additional material to be produced, the Presidency decides not to confirm the indictment, it shall so inform the complainant State or, in a case to which article 23 (1) applies, the Security Council.

4. The Presidency may at the request of the Prosecutor amend the indictment, in which case it shall make any necessary orders to ensure that the accused is notified of the amendment and has adequate time to prepare a defence.

5. The Presidency may make any further orders required for the conduct of the trial, including an order:

(a) determining the language or languages to be used during the trial;

(b) requiring the disclosure to the defence, within a sufficient time before the trial to enable the preparation of the defence, of documentary or other evidence available to the Prosecutor, whether or not the Prosecutor intends to rely on that evidence;

(c) providing for the exchange of information between the Prosecutor and the defence, so that both parties are sufficiently aware of the issues to be decided at the trial;

(d) providing for the protection of the accused, victims and witnesses and of confidential information.

Article 28

Arrest

1. At any time after an investigation has been initiated, the Presidency may at the request of the Prosecutor issue a warrant for the provisional arrest of a suspect if:

(a) there is probable cause to believe that the suspect may have committed a crime within the jurisdiction of the Court; and

(b) the suspect may not be available to stand trial unless provisionally arrested.

2. A suspect who has been provisionally arrested is entitled to release from arrest if the indictment has not been confirmed within 90 days of the arrest, or such longer time as the Presidency may allow.

3. As soon as practicable after the confirmation of the indictment, the Prosecutor shall seek from the Presidency a warrant for the arrest and transfer of the accused. The Presidency shall issue such a warrant unless it is satisfied that:

(a) the accused will voluntarily appear for trial; or

(b) there are special circumstances making it unnecessary for the time being to issue the warrant.

4. A person arrested shall be informed at the time of arrest of the reasons for the arrest and shall be promptly informed of any charges.

Article 29

Pre-trial detention or release

1. A person arrested shall be brought promptly before a judicial officer of the State where the arrest occurred. The judicial officer shall determine, in accordance with the procedures applicable in that State, that the warrant has been duly served and that the rights of the accused have been respected.

2. A person arrested may apply to the Presidency for release pending trial. The Presidency may release the person unconditionally or on bail if it is satisfied that the accused will appear at the trial.

3. A person arrested may apply to the Presidency for a determination of the lawfulness under this Statute of the arrest or detention. If the Presidency decides that the arrest or detention was unlawful, it shall order the release of the accused, and may award compensation.

4. A person arrested shall be held, pending trial or release on bail, in an appropriate place of detention in the arresting State, in the State in which the trial is to be held or if necessary, in the host State.

Article 30

Notification of the indictment

1. The Prosecutor shall ensure that a person who has been arrested is personally served, as soon as possible after being taken into custody, with certified copies of the following documents, in a language understood by that person:

(a) in the case of a suspect provisionally arrested, a statement of the grounds for the arrest;

(b) in any other case, the confirmed indictment;

(c) a statement of the accused's rights under this Statute.

2. In any case to which paragraph (1) (a) applies, the indictment shall be served on the accused as soon as possible after it has been confirmed.

3. If, 60 days after the indictment has been confirmed, the accused is not in custody pursuant to a warrant issued under article 28 (3), or for some reason the requirements of paragraph 1 cannot be complied with, the Presidency may on the application of the Prosecutor prescribe some other manner of bringing the indictment to the attention of the accused.

Article 31

Persons made available to assist in a prosecution

1. The Prosecutor may request a State party to make persons available to assist in a prosecution in accordance with paragraph 2.

2. Such persons should be available for the duration of the prosecution, unless otherwise agreed. They shall serve at the direction of the Prosecutor, and shall not seek or receive instructions from any Government or source other than the Prosecutor in relation to their exercise of functions under this article.

3. The terms and conditions on which persons may be made available under this article shall be approved by the Presidency on the recommendation of the Prosecutor.

PART 5. THE TRIAL

Article 32

Place of trial

Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.

Article 33

Applicable law

The Court shall apply:

(a) this Statute;

(b) applicable treaties and the principles and rules of general international law; and

(c) to the extent applicable, any rule of national law.

Article 34

Challenges to jurisdiction

Challenges to the jurisdiction of the Court may be made, in accordance with the Rules:

(a) prior to or at the commencement of the hearing, by an accused or any interested State; and

(b) at any later stage of the trial, by an accused.

Article 35

Issues of admissibility

The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this Statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question:

(a) has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;

(b) is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or

(c) is not of such gravity to justify further action by the Court.

Article 36

Procedure under articles 34 and 35

1. In proceedings under articles 34 and 35, the accused and the complainant State have the right to be heard.

2. Proceedings under articles 34 and 35 shall be decided by the Trial Chamber, unless it considers, having regard to the importance of the issues involved, that the matter should be referred to the Appeals Chamber.

Article 37

Trial in the presence of the accused

1. As a general rule, the accused should be present during the trial.

2. The Trial Chamber may order that the trial proceed in the absence of the accused if:

(a) the accused is in custody, or has been released pending trial, and for reasons of security or the ill-health of the accused it is undesirable for the accused to be present;

(b) the accused is continuing to disrupt the trial; or

(c) the accused has escaped from lawful custody under this Statute or has broken bail.

3. The Chamber shall, if it makes an order under paragraph 2, ensure that the rights of the accused under this Statute are respected, and in particular:

(a) that all reasonable steps have been taken to inform the accused of the charge; and

(b) that the accused is legally represented, if necessary by a lawyer appointed by the Court.

4. In cases where a trial cannot be held because of the deliberate absence of an accused, the Court may establish, in accordance with the Rules, an Indictment Chamber for the purpose of:

(a) recording the evidence;

(b) considering whether the evidence establishes a prima facie case of a crime within the jurisdiction of the Court; and

(c) issuing and publishing a warrant of arrest in respect of an accused against whom a prima facie case is established.

5. If the accused is subsequently tried under this Statute:

(a) the record of evidence before the Indictment Chamber shall be admissible;

(b) any judge who was a member of the Indictment Chamber may not be a member of the Trial Chamber.

Article 38

Functions and powers of the Trial Chamber

1. At the commencement of the trial, the Trial Chamber shall:

(a) have the indictment read;

(b) ensure that articles 27 (5) (b) and 30 have been complied with sufficiently in advance of the trial to enable adequate preparation of the defence;

(c) satisfy itself that the other rights of the accused under this Statute have been respected; and

(d) allow the accused to enter a plea of guilty or not guilty.

2. The Chamber shall ensure that a trial is fair and expeditious and is conducted in accordance with this Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. The Chamber may, subject to the Rules, hear charges against more than one accused arising out of the same factual situation.

/...

4. The trial shall be held in public, unless the Chamber determines that certain proceedings be in closed session in accordance with article 43, or for the purpose of protecting confidential or sensitive information which is to be given in evidence.

5. The Chamber shall, subject to this Statute and the Rules have, inter alia, the power on the application of a party or of its own motion, to:

(a) issue a warrant for the arrest and transfer of an accused who is not already in the custody of the Court;

(b) require the attendance and testimony of witnesses;

(c) require the production of documentary and other evidentiary materials;

(d) rule on the admissibility or relevance of evidence;

(e) protect confidential information; and

(f) maintain order in the course of a hearing.

6. The Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is maintained and preserved by the Registrar.

Article 39

Principle of legality (nullum crimen sine lege)

An accused shall not be held guilty:

(a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the act or omission in question constituted a crime under international law;

(b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the accused;

at the time the act or omission occurred.

Article 40

Presumption of innocence

An accused shall be presumed innocent until proved guilty in accordance with law. The onus is on the Prosecutor to establish the guilt of the accused beyond reasonable doubt.

Article 41

Rights of the accused

1. In the determination of any charge under this Statute, the accused is entitled to a fair and public hearing, subject to article 43, and to the following minimum guarantees:

(a) to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge;

(b) to have adequate time and facilities for the preparation of the defence, and to communicate with counsel of the accused's choosing;

(c) to be tried without undue delay;

(d) subject to article 37 (2), to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court, without payment if the accused lacks sufficient means to pay for such assistance;

(e) to examine, or have examined, the prosecution witnesses and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses for the prosecution;

(f) if any of the proceedings of or documents presented to the Court are not in a language the accused understands and speaks, to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;

(g) not to be compelled to testify or to confess guilt.

2. Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide.

Article 42

Non bis in idem

1. No person shall be tried before any other court for acts constituting a crime of the kind referred to in article 20 for which that person has already been tried by the Court.

2. A person who has been tried by another court for acts constituting a crime of the kind referred to in article 20 may be tried under this Statute only if:

(a) the acts in question were characterized by that court as an ordinary crime and not as a crime which is within the jurisdiction of the Court; or

(b) the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted under this Statute, the Court shall take into account the extent to which a penalty imposed by another court on the same person for the same act has already been served.

Article 43

Protection of the accused, victims and witnesses

The Court shall take necessary measures available to it to protect the accused, victims and witnesses and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means.

Article 44

Evidence

1. Before testifying, each witness shall, in accordance with the Rules, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. States parties shall extend their laws of perjury to cover evidence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury.

3. The Court may require to be informed of the nature of any evidence before it is offered so that it may rule on its relevance or admissibility.

4. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

5. Evidence obtained by means of a serious violation of this Statute or of other rules of international law shall not be admissible.

Article 45

Quorum and judgment

1. At least four members of the Trial Chamber must be present at each stage of the trial.

2. The decisions of the Trial Chamber shall be taken by a majority of the judges. At least three judges must concur in a decision as to conviction or acquittal and as to the sentence to be imposed.

3. If after sufficient time for deliberation a Chamber which has been reduced to four judges is unable to agree on a decision, it may order a new trial.

/...

4. The deliberations of the Court shall be and remain secret.

5. The judgment shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgment issued, and shall be delivered in open court.

Article 46

Sentencing

1. In the event of a conviction, the Trial Chamber shall hold a further hearing to hear any evidence relevant to sentence, to allow the Prosecutor and the defence to make submissions and to consider the appropriate sentence to be imposed.

2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

Article 47

Applicable penalties

1. The Court may impose on a person convicted of a crime under this Statute one or more of the following penalties:

(a) a term of life imprisonment, or of imprisonment for a specified number of years;

(b) a fine.

2. In determining the length of a term of imprisonment or the amount of a fine to be imposed, the Court may have regard to the penalties provided for by the law of:

(a) the State of which the convicted person is a national;

(b) the State where the crime was committed; and

(c) the State which had custody of and jurisdiction over the accused.

3. Fines paid may be transferred, by order of the Court, to one or more of the following:

(a) the Registrar, to defray the costs of the trial;

(b) a State the nationals of which were the victims of the crime;

(c) a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime.

PART 6. APPEAL AND REVIEW

Article 48

Appeal against judgment or sentence

1. The Prosecutor and the convicted person may, in accordance with the Rules, appeal against a decision under articles 45 or 47 on grounds of procedural error, error of fact or of law, or disproportion between the crime and the sentence.

2. Unless the Trial Chamber otherwise orders, a convicted person shall remain in custody pending an appeal.

Article 49

Proceedings on appeal

1. The Appeals Chamber has all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair or that the decision is vitiated by error of fact or law, it may:

(a) if the appeal is brought by the convicted person, reverse or amend the decision, or, if necessary, order a new trial;

(b) if the appeal is brought by the Prosecutor against an acquittal, order a new trial.

3. If in an appeal against sentence the Chamber finds that the sentence is manifestly disproportionate to the crime, it may vary the sentence in accordance with article 47.

4. The decision of the Chamber shall be taken by a majority of the judges, and shall be delivered in open court. Six judges constitute a quorum.

5. Subject to article 50, the decision of the Chamber shall be final.

Article 50

Revision

1. The convicted person or the Prosecutor may, in accordance with the Rules, apply to the Presidency for revision of a conviction on the ground that evidence has been discovered which was not available to the applicant at the time the conviction was pronounced or affirmed and which could have been a decisive factor in the conviction.

2. The Presidency shall request the Prosecutor or the convicted person, as the case may be, to present written observations on whether the application should be accepted.

3. If the Presidency is of the view that the new evidence could lead to the revision of the conviction, it may:

(a) reconvene the Trial Chamber;

(b) constitute a new Trial Chamber; or

(c) refer the matter to the Appeals Chamber;

with a view to the Chamber determining, after hearing the parties, whether the new evidence should lead to a revision of the conviction.

PART 7. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 51

Cooperation and judicial assistance

1. States parties shall cooperate with the Court in connection with criminal investigations and proceedings under this Statute.

2. The Registrar may transmit to any State a request for cooperation and judicial assistance with respect to a crime, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons; and

(e) any other request which may facilitate the administration of justice, including provisional measures as required.

3. Upon receipt of a request under paragraph 2:

(a) in a case covered by article 21 (1) (a), all States parties;

(b) in any other case, States parties which have accepted the jurisdiction of the Court with respect to the crime in question;

shall respond without undue delay to the request.

Article 52

Provisional measures

1. In case of need, the Court may request a State to take necessary provisional measures, including the following:

(a) to provisionally arrest a suspect;

(b) to seize documents or other evidence; or

(c) to prevent injury to or the intimidation of a witness or the destruction of evidence.

2. The Court shall follow up a request under paragraph 1 by providing, as soon as possible and in any case within 28 days, a formal request for assistance complying with article 57.

Article 53

Transfer of an accused to the Court

1. The Registrar shall transmit to any State on the territory of which the accused may be found a warrant for the arrest and transfer of an accused issued under article 28, and shall request the cooperation of that State in the arrest and transfer of the accused.

2. Upon receipt of a request under paragraph 1:

(a) all States parties:

(i) in a case covered by article 21 (1) (a), or

(ii) which have accepted the jurisdiction of the Court with respect to the crime in question;

shall, subject to paragraphs 5 and 6, take immediate steps to arrest and transfer the accused to the Court;

(b) in the case of a crime to which article 20 (e) applies, a State party which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to that crime shall, if it decides not to transfer the accused to the Court, forthwith take all necessary steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution;

(c) in any other case, a State party shall consider whether it can, in accordance with its legal procedures, take steps to arrest and transfer the accused to the Court, or whether it should take steps to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution.

3. The transfer of an accused to the Court constitutes, as between States parties which accept the jurisdiction of the Court with respect to the crime, sufficient compliance with a provision of any treaty requiring that a suspect be extradited or the case referred to the competent authorities of the requested State for the purpose of prosecution.

4. A State party which accepts the jurisdiction of the Court with respect to the crime shall, as far as possible, give priority to a request under paragraph 1 over requests for extradition from other States.

5. A State party may delay complying with paragraph 2 if the accused is in its custody or control and is being proceeded against for a serious crime, or serving a sentence imposed by a court for a crime. It shall within 45 days of receiving the request inform the Registrar of the reasons for the delay. In such cases, the requested State:

(a) may agree to the temporary transfer of the accused for the purpose of standing trial under this Statute; or

(c) shall comply with paragraph 2 after the prosecution has been completed or abandoned or the sentence has been served, as the case may be.

6. A State party may, within 45 days of receiving a request under paragraph 1, file a written application with the Registrar requesting the Court to set aside the request on specified grounds. Pending a decision of the Court on the application, the State concerned may delay complying with paragraph 2 but shall take any provisional measures necessary to ensure that the accused remains in its custody or control.

Article 54

Obligation to extradite or prosecute

In a case of a crime referred to in article 20 (e), a custodial State party to this Statute which is a party to the treaty in question but which has not accepted the Court's jurisdiction with respect to the crime for the purposes of article 21 (1) (b) (i) shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

Article 55

Rule of speciality

1. A person transferred to the Court under article 53 shall not be subject to prosecution or punishment for any crime other than that for which the person was transferred.

2. Evidence provided under this Part shall not, if the State when providing it so requests, be used as evidence for any purpose other than that for which it was provided, unless this is necessary to preserve the right of an accused under article 41 (2).

3. The Court may request the State concerned to waive the requirements of paragraphs 1 or 2, for the reasons and purposes specified in the request.

Article 56

Cooperation with States not parties to this Statute

States not parties to this Statute may assist in relation to the matters referred to in this Part on the basis of comity, a unilateral declaration, an ad hoc arrangement or other agreement with the Court.

Article 57

Communications and documentation

1. Requests under this Part shall be in writing, or be forthwith reduced to writing, and shall be between the competent national authority and the Registrar. States parties shall inform the Registrar of the name and address of their national authority for this purpose.

2. When appropriate, communications may also be made through the International Criminal Police Organization.

3. A request under this Part shall include the following, as applicable:

(a) a brief statement of the purpose of the request and of the assistance sought, including the legal basis and grounds for the request;

(b) information concerning the person who is the subject of the request on the evidence sought, in sufficient detail to enable identification;

(c) a brief description of the essential facts underlying the request; and

(d) information concerning the complaint or charge to which the request relates and of the basis for the Court's jurisdiction.

4. A requested State which considers the information provided insufficient to enable the request to be complied with may seek further particulars.

PART 8. ENFORCEMENT

Article 58

Recognition of judgments

States parties undertake to recognize the judgments of the Court.

Article 59

Enforcement of sentences

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept convicted persons.

2. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State.

3. A sentence of imprisonment shall be subject to the supervision of the Court in accordance with the Rules.

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Article 60

Pardon, parole and commutation of sentences

1. If, under a generally applicable law of the State of imprisonment, a person in the same circumstances who had been convicted for the same conduct by a court of that State would be eligible for pardon, parole or commutation of sentence, the State shall so notify the Court.

2. If a notification has been given under paragraph 1, the prisoner may apply to the Court in accordance with the Rules, seeking an order for pardon, parole or commutation of the sentence.

3. If the Presidency decides that an application under paragraph 2 is apparently well-founded, it shall convene a Chamber of five judges to consider and decide whether in the interests of justice the person convicted should be pardoned or paroled or the sentence commuted, and on what basis.

4. When imposing a sentence of imprisonment, a Chamber may stipulate that the sentence is to be served in accordance with specified laws as to pardon, parole or commutation of sentence of the State of imprisonment. The consent of the Court is not required to subsequent action by that State in conformity with those laws, but the Court shall be given at least 45 days' notice of any decision which might materially affect the terms or extent of the imprisonment.

5. Except as provided in paragraphs 3 and 4, a person serving a sentence imposed by the Court is not to be released before the expiry of the sentence.

Annex

Crimes pursuant to Treaties (see art. 20 (e))

1. Grave breaches of:

(i) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, as defined by Article 50 of that Convention;

(ii) the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, as defined by Article 51 of that Convention;

(iii) the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, as defined by Article 130 of that Convention;

(iv) the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, as defined by Article 147 of that Convention;

(v) Protocol I Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, as defined by Article 85 of that Protocol.

2. The unlawful seizure of aircraft as defined by Article 1 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970.

3. The crimes defined by Article 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971.

4. Apartheid and related crimes as defined by Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973.

5. The crimes defined by Article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973.

6. Hostage-taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages of 17 December 1979.

7. The crime of torture made punishable pursuant to Article 4 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

/...

8. The crimes defined by Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988 and by Article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988.

9. Crimes involving illicit traffic in narcotic drugs and psychotropic substances as envisaged by Article 3 (1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988 which, having regard to Article 2 of the Convention, are crimes with an international dimension.

GUIDELINES FOR THE CONSIDERATION OF THE QUESTION OF THE RELATIONSHIP BETWEEN STATES PARTIES, NON-STATES PARTIES AND THE INTERNATIONAL CRIMINAL COURT

(UN General Assembly, Official Records, 50th Session, Supplement No. 22)

I. General Issues Relating to States' Co-operation with the International Criminal Court

1. The question of co-operation is intrinsically linked with the overall problem of the applicability of national law to the national part of the co-operation: in this context the question arises as to whether the State, when acting within the framework of co-operation, acts within the ambit of the court's authority as its organ or whether the co-operation is performed by the State on its own authority and subject to national law.

2. Choice of mutually non-exclusive approaches for dealing with assistance (both surrender and judicial assistance) in the Statute:

(a) A general facilitating provision, relying on existing judicial assistance and extradition regimes; for example, for judicial assistance, a general provision supplemented by a non-exclusive list of the type of assistance that could be sought;

(b) A detailed regime in, or annexed to, the statute; for example, for surrender of accused persons, a new mechanism of "transfer" as proposed by the ILC.

3. Extent of obligations of States Parties to assist:

(a) Absolute, or subject to exceptions; if exceptions, what should be the exceptions and what are the justifications for those exceptions?

(b) Factors which may influence the extent of obligations: State's consent to jurisdiction of the International Criminal Court for the type of crime, or for the specific crime at issue;

(c) Principle of complementarity;

(d) Traditional considerations of essential interests (*ordre public*);

(e) Compliance with other conventions.

4. Role of national laws/courts in guaranteeing fundamental rights: can or should national authorities defer to the International Criminal Court on these matters?

II. Clusters of Issues Relating to Specific Aspects of Co-operation

First Cluster: Apprehension and Surrender

1. Triggering act by the International Criminal Court: arrest warrant issued by the court. Confusion created by concept of "provisional arrest" in article 28 (as compared to Article 52).

The difference between pre-indictment arrest and post-indictment arrest.

Are a court arrest warrant and some form of accusation prerequisites to the apprehension of the accused by a State?

2. Request by the International Criminal Court for arrest of accused - form and content of the request and its communication to national authorities:

(a) For provisional arrest (Art. 52); for formal request for arrest and surrender (Art. 57);

(b) Extent to which detailed guidance is needed in the statute (or in an annex thereto).

3. Arrest of accused by national authorities for purposes of surrender to the International Criminal Court (based either on a request for provisional arrest (Art. 52) or a formal request for arrest and surrender (Art. 57)).

Roles of national authorities and of the International Criminal Court at the phase of initial arrest:

(a) Executing warrant of the court versus executing request to arrest, pursuant to national authority and laws?

(b) Applicability of national judicial proceedings [constitutional requirements/fundamental rights];

(c) Protection of the rights of the accused in connection with arrest - application of the standards of the court versus national standards;

(d) Arrest of persons other than the accused.

4. Pre-surrender detention:

(a) Determined by the court (application of Art. 29 to be considered) or determined by national authorities?

(b) Governed by national law, relevant international standards, or standard provided in the statute of the International Criminal Court?

5. The surrender decision:

(a) Role, if any, of national courts or other authorities;

(b) Applicability of national judicial proceedings; in the affirmative, what legal issues may be addressed (e.g., identity of accused, whether valid court accusation and arrest warrant; crime charged is a crime within the jurisdiction of the court, legal rights of the accused concerning the request for surrender):

- Different national requirements regarding sufficiency of evidence;

- Relevance of dual criminality and statutes of limitation;

(c) Application of national law, particularly issues/rights of fundamental or constitutional dimension.

6. Absolute obligation to surrender versus general obligation subject to exceptions. If exceptions, to what extent are traditional limitations on extradition appropriate in the context of the International Criminal Court?

Some examples of traditional limitations or exceptions include:

- Non bis in idem;

- Political offence;

- Nationality of the accused.

Some examples of traditional delays include:

- Pendency of national proceedings relating to same crime;

- Deferral of surrender versus temporary surrender where accused subject to proceedings for other offence.

7 Transfer of accused to the court or to a "detaining" State acting as custodian for court pre-trial detainees:

(a) Does transfer of the accused (or the decision to surrender) occasion a shift in primary responsibility for the accused from the national authorities to the International Criminal Court?

(b) Which authorities are responsible for transfer?

8. Problems of transit through third States in the course of transfer of accused to the International Criminal Court or to a "detaining" State:

- Scope of the duties of the transit State.

9. Pre-trial detention of the accused:

(a) (The text of the draft Statute does not clearly distinguish between (a) detention by national authorities pending national decision to surrender and (b) detention (pre- or post-trial) by national authorities agreeing to act as custodial agent for the court - referred to here as a "detaining" State);

(b) Determined by the court (Art. 29) or by "detaining" State authorities?

(c) Whether the statute of the court, other relevant international standards or national law should control;

(d) Accused's challenges to the lawfulness of detention:

- Decided by the court (Art. 29(3)) or by national authorities?

- Does recourse to the court under article 29(3) exclude accused's fundamental rights under national law to challenge in national courts the lawfulness of detention? If not, what is *locus standi* of the International Criminal Court in proceedings before a national court?

10. Other surrender issues:

(a) Obligations to the International Criminal Court versus obligations/rights under existing extradition treaties, other bilateral or multilateral arrangements, or status-of-forces agreements:

- Should the international criminal court's request be given priority (Art. 53(4))?

- Should the answer to this question depend on whether a State party to the statute has consented to the jurisdiction of the court over the crime at issue?

(b) Rule of speciality (Art. 55).

Second cluster: judicial assistance

1. Judicial Assistance During Investigation Phase (Prior to the Indictment)

- Different kinds of judicial assistance (should an enumerative list be included; should a distinction be drawn between compulsory and non-compulsory measures?);

- Should the prosecutor be entitled to carry out activities on the territory of a State other than the host State:

  - On its own (such as to collect documentary and other evidence, to conduct on-site investigations);

  - On its own but subject to the consent to the State concerned;

  or should the State concerned carry out those activities (in conformity with traditional practice in matters of international judicial assistance)?

- Possibility of different approaches under different circumstances;

- Examination of lawfulness of on-site activities undertaken by the prosecutor or carried out on behalf of the prosecutor by a State; sanction and compensation for unlawful acts;

- Need to clarify the relation between articles 26 and 51;

- Requirement and conditions of consent of the State concerned;

- Extent of the legal obligation to comply with a request by the International Criminal Court to carry out such activities:

  - Exceptions and limitations to such obligation;

  - Which States are obliged? Is the criterion consent to the jurisdiction of the court over the crime, participation in the statute or any other factor?

  - Applicability of constitutional requirements or of standards of fundamental human rights to the activities of the prosecutor;

  - Applicability of national law and procedures;

  - Possibility of ad hoc arrangements of the prosecutor with a State concerning modalities for transfer of information.

2. Co-operation relating to indictment (Arts. 30 and 38)

- Notification of the indictment to the suspect through national authorities;

- Forms of assistance of States to the court to bring the indictment to the attention of the accused.

3. Judicial assistance during post-indictment phase and during trial (Art. 38) (many of the issues described under point 1 arise in this context as well)

- Legal effect of a request by the court under paragraph 5 (b) and (c); legal obligation incumbent on (which) State?

- Legal consequences of a refusal to comply with such a request for the refusing State (impact on process?);

- Request for co-operation made on behalf of the accused;

- Capacity to compel attendance of witnesses (are there other alternatives?).

4. Provisional measures (Art. 52)

- Form and content of a request for provisional measures;

- Legal consequences of the provisional seizure of documents and other evidence (compensation for costs incurred);

- Which procedures are applicable to a State's measures to prevent injury to or intimidation of a witness or the destruction of evidence?

- Legal implications of the absence of a subsequent formal request.

5. Speciality (Art. 55)

- Power of the International Criminal Court to deviate from the rule of speciality in respect of evidentiary documents and materials - condition of the consent of State?

- Power of the court to request waiver of the condition of speciality - duty to comply?

6. Communications and documents (Art. 57)

- Form and content of communications and documents required in the context of co-operation;

- Modern methods of communication and conditions of their use.

7. Obligations

- Obligations to the court versus obligations/rights under existing extradition treaties and arrangements on judicial assistance.

Third cluster: recognition of judgements of the International Criminal Court

- Different types of judgements of the court and their impact on their recognition and implementation;

- Character of a judgement of the court - qualified as a national judgement?

- Is it subject to examination through national procedures? If so, to what extent?

- Applicability of national law on recognition procedures (continued enforcement or conversion);

- Protection of the rights of third parties.

Fourth cluster: enforcement of sentences

- Requirement of consent of State (case-by-case or general acceptance?) (see sub-topics (a) and (b) below);

- Necessary documentation (see sub-topics (a) and (b) below):

(a) Enforcement of sentences involving imprisonment:

- Imprisonment according to national law or international standards;

- Applicability of national procedure (to, for example, temporary absences);

- Status of the International Criminal Court in the supervision of the imprisonment;

- State's duties concerning communications between the prisoner and the International Criminal Court;

- National court versus International Criminal Court responsibility for decisions on pardon, parole and commutation of sentences;

(b) Enforcement of sentences involving penalties other than imprisonment:

- Procedure for the enforcement of judgements (national versus internationally regulated);

- Protection of the rights of third parties;

- Asset sharing.

Fifth cluster: mutual recognition of judgements

- *Non bis in idem:*

  - As a bar to judicial assistance;

  - As a bar to trial proceedings;

  - Recognition by the International Criminal Court of other national judgements.

COMPUTERISATION ACTIVITIES

A Paper by the Department of Justice, Canada

DEPARTMENTAL OVERVIEW

1. The mission of the Department of Justice is to:

- support the Minister of Justice in working to ensure that Canada is a just and law-abiding society with an accessible, efficient and fair system of justice;
- provide high-quality legal services and counsel to the Government and to client departments and agencies; and
- promote respect for rights and freedoms, the law and the Constitution.

2. Since 1990, the Department of Justice has faced significant increases in demand for legal services at the same time as resources are diminishing. In response, the Department has sought new ways to conduct business in order to fulfil its mission and operate within these constraints. A major enabler in this has been the use of information technology, both for communication with the Canadian public and for internal processes.

COMPUTERIZATION OF SERVICES TO THE CANADIAN PUBLIC

3. Increased use is being made of public access networks and CD-ROMs, both to convey information and to provide a forum for public input.

(a) *Public Access Networks*

4. The Department of Justice's Law Information section, which manages the Public Legal Education and Information (PLEI) program, along with non-governmental organizations (NGOs), provincial, federal and territorial government representatives studied ways to provide improved public legal education and information services in a more efficient and cost effective manner. A second aim of the study was to improve communication and access among various stakeholders involved in public legal education and information. The result of this study was a recommendation to develop a computer network to be known as the PLEI Network (PLEI-Net). PLEI-Net then grew into an expanded network called the Access to Justice Network (ACJNet). This network allows users to send electronic mail and documents to each other, to participate in electronic conferences and to search bibliographic databases. From the beginning, two organizations, the University of Alberta's Faculty of Extension, Legal Studies Program, in Edmonton, and the NirvCentre in Toronto, have been active partners with the Department of Justice in the management and development of the ACJNet.

5. ACJNet has reduced the operating cost of the many PLEI organizations by reducing the need for travel, sharing research, and reducing printing costs. It is an electronic community where people come together to discuss current issues, share ideas, share documents and develop a repository of information, both published and unpublished.

6. Since the spring of 1995, ACJNet has had a site on the World Wide Web. The ACJNet home page, located at **http: //129.128.19.117/acjnet/acjnet.html** serves as a door to public law and justice information, leading the visitor to the homepages of various PLEI organizations, other governments and university. It also provides links to homepages of special programs, partnerships and events, such as the National Crime Prevention Council, and soon a page for the International Crime Prevention Convention to be held at the end of March 1996 in Vancouver. From ACJNet, you can access electronic documents from PLEI organizations, Statutes, both federal and provincial, white pages and phone directories of individuals and organizations connected to law or justice. This innovative approach to providing PLEI has proven to be a resounding success, as is testified by the number of people who visit the ACJNet homepage. At last count there were 35,000 people who had visited the site from 42 countries. In a recent one-month period (August-September, 1995) ACJNet clients transmitted more than 13,000 files, consisting of almost 33 million bytes of information.

(b) *Justice Canada CD-ROM*

7. The loose-leaf updates of the Statutes of Canada are no longer published in printed format. They have been replaced with CDs containing consolidations of the Statutes and Regulations and the Gazette Index.

COMPUTERIZATION WITHIN THE DEPARTMENT OF JUSTICE

8. Within the department, the work of employees is being facilitated and enhanced by the introduction of several automated systems. These include research tools and facilities, the management of case information and administrative systems. They are being delivered in several ways, including CD-ROMs and Web Server technology. The entire department uses MicroSoft Office as the basic office productivity tool. Department of Justice offices across the country have electronic mail connectivity.

(a) ***Research Tools***

(i) *Justice Text Workbench* -- The Justice Text Workbench provides a single, easy-to-use reference source on CD-ROM for the legal professionals and support staff within the Department of Justice. It includes the Statutes and Regulations of Canada, Prosecution Guides, Financial Management Manuals and other frequently-used reference materials. A for-sale version of it is available to the public, containing the Statutes, Regulations and Gazette Index.

(ii) *Library System* - The Library focuses on providing multimedia research facilities, electronic access to global information and enhanced access to the departmental legal corporate memory. The on-line library catalogue is being made available throughout the department.

(iii) *Legal Opinions and Precedents Online Retrieval System (LOPORS)* is a legal research tool for all authorized employees of the Department of Justice, enabling full-text search access to a central database of material of approved precedential value, as well as the ability to create local data banks of relevant material. The purpose is to provide a research tool ensuring that there will be consistency in the interpretation and application of the Law. LOPORS will also reduce research time and help avoid duplication of opinions.

(iv) *Press Clippings & Hansard On-line* will provide access to daily news services on-line, by downloading selected articles of interest to the Department from a commercial provider. Daily information from Hansard will also be available electronically on several local area networks. Cumulative Hansards will be stored for access by employees from their computers.

(b) ***Management of Cases and Information***

(i) *Case Mangement* - An integrated case management information system has been developed to meet the operational and management information requirements of the Department's litigation and legal service activities. It provides a means by which case-related files, documents and activities can be managed and measured. It is currently in use in selected areas of the Department and will be expanded across the Department in the future.

(ii) *Recorded Information Management System (RIMS)* is made up of several modules covering all aspects of file and document management from file and document creation, through control, to the ultimate disposition of the information. RIMS objectives include fast and easy access to files and document information and the preservation of valuable archival records. RIMS and Case Management are integrated applications.

(iii) *Litigation Support* - In support of innovative approaches to major prosecutions, litigators are provided with appropriate, up-to-date off-the-shelf software, hardware and services to meet case-specific needs. System support is normally aimed at facilitating the handling and analysis of legal documents and reference manuals, and may include such elements as imaging, full-text retrieval and analysis of voluminous files.

(c) ***Administrative Systems***

(i) *Timekeeping System* - Will provide the means of tracking and capturing data on personnel activities, to identify and quantify work done for client departments. Currently, an off-the-shelf software package is being evaluated for this use.

(ii) *Crown Agents Reporting System (CARS)* - Crown Agents are private sector lawyers appointed to represent the Attorney-General of Canada on legal matters. The CARS system provides the Department with a repository of information on their appointment and about their cases. It also

assists in processing and auditing all accounts received from Crown Agents.

(iii) *Bulletin Board System (BBS)* - To facilitate internal communications, a corporate Bulletin Board System is being implemented and made available to all employees. It will enable all staff to access daily information feeds and announcements of general interest.

(iv) *"Out There" the Communications and Consultation Database* - This system is under development, and is intended to provide a centralized database of external contacts with whom the Department consults or liaises in the course of doing business. This will facilitate activities such as event planning, identification of client populations for specific projects, dissemination of publications and will provide a basis for assessing the results of consultations.

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