

ASSISTANCE TO SMALL STATES TO MEET THEIR LEGAL NEEDS

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

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

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

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

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

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

 ANNEX TO LMM(83)9

ASSISTANCE TO SMALL STATES TO MEET THEIR LEGAL NEEDS

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

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

was made then to particular projects and to certain types of assistance afforded to small States, but it remains apparent that there is room for a more systematic approach to the provision of such assistance to those States which are, by reason of their smallness, particularly hard pressed to service their legal needs. The Reports prepared in 1979-80 for the Secretariat by Dr. G.P. Barton (some Pacific Jurisdictions), Professor K.W. Patchett (Bermuda and the Caribbean) and G.C. Thornton (East, Central and Southern Africa, Mauritius and Seychelles) indicate the frequency with which similar needs are identified in small States in all parts of the Commonwealth and the unlikelihood that these States will be able to meet those needs from their own resources, or without considerable assistance from other States.

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

Existing Technical Assistance Arrangements

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

A. Bilateral Government arrangements

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

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

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

(i) Training programmes

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

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

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

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

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

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

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

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

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

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

(ii) Legal experts for ad hoc projects

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

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

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

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

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

(iii) Establishment posts

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

(iv) Special projects

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

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

B. International and institutional arrangements

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

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

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

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

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

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

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

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

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

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

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

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

C. Arrangements for voluntary service and recruitment of personnel

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

(i) Volunteer programmes

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

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

25. It is suggested that this source of assistance merits closer attention especially as a way of covering the responsibilities of local legal personnel when released for training or of providing a legal input to fledgeling non-governmental activities.

(ii) Recruitment of Personnel

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

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

D. Non-governmental activities

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

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

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

Shortcomings of present aid arrangements in the Legal Field*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Development of Assistance Arrangements

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

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

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

A. Provision of personnel

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

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

(a) Training

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

(i) Professional qualification courses

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

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

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

(ii) Specialist postgraduate study

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

(iii) Short post-experience courses

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

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

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

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

(iv) Placements and in-house training

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

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

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

(b) Expert personnel

(i) Recruitment

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

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

(ii) Legal assistance units

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

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

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

B. Special projects

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

(a) Printing and publishing of laws and law reports

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

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

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

(b) Institutional reforms

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

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

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

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

(c) Availability of legal information

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

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

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

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

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

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

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

C. Co-ordination of aid activities

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

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

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

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

D. Professional links

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

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

Conclusion

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