2005 Meeting of Commonwealth Law Ministers and Senior Officials

Accra, Ghana
17-20 October 2005

Memoranda

Commonwealth Secretariat

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PREFACE

Commonwealth Law Ministers from 37 jurisdictions met in Accra, Ghana from 17 to 20 October 2005. This volume contains the Memoranda prepared for the Meeting, together with the Communiqué and Meeting Agenda, and 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 Ghana in 2005. Previous Meetings have been held in London, United Kingdom (1966 and 1973), Nigeria (1975), Canada (1977), Barbados (1980), Sri Lanka (1983), Zimbabwe (1986), New Zealand (1990), Mauritius (1993), Malaysia (1996), Trinidad and Tobago (1999) and St Vincent and the Grenadines (2002).

Legal and Constitutional Affairs Division
Commonwealth Secretariat

January 2006

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ACCRA, GHANA, 17-20 OCROBER 2005

COMMUNIQUE

1. Commonwealth Law Ministers met in Accra, Ghana, from 17 to 20 October 2005. The Meeting was opened at a ceremony in the Accra International Conference Centre at which the speakers were the Attorney General and Minister of Justice of Ghana; the Chief Justice of Ghana; the Deputy Secretary General of the Commonwealth; and the Minister of Foreign Affairs of Ghana representing His Excellency the President of the Republic of Ghana, who personally received Heads of Delegation on the final day of the Meeting. The plenary sessions of the Meeting were held in the Homowo Conference Centre, Accra under the chairmanship of the Attorney General and Minister of Justice of Ghana. Ministers expressed their warm appreciation for the generous hospitality accorded to them by the Government of Ghana and the preparations for the Meeting made by their host and the Commonwealth Secretariat.

2. Law Ministers' deliberations covered many important contemporary issues touching on aspects of their responsibilities for civil and criminal justice, the progressive development and reform of the law, the role of law and the legal profession in supporting democracy and good governance, as well as certain areas of international law.

JUVENILE JUSTICE

3. Every Commonwealth country is a party to the United Nations Convention on the Rights of the Child, and that provided the background for Law Ministers' consideration of juvenile justice policy. The discussion was assisted by a paper reviewing present policies in a number of Commonwealth jurisdictions. Law Ministers were able to offer insights from the experience of their own countries, many of which had recently, or were about to, review their juvenile justice legislation. There was general support for some key policies: diversion from court proceedings; diversion from custody; and the use of lawyers and judges with specialised training. Several Law Ministers were able to report the success of restorative justice initiatives which offered a constructive approach and had a part to play in preventive programmes to which Ministers attached importance.

4. Law Ministers welcomed the work already undertaken by the Commonwealth Secretariat and asked that the Secretariat should explore the issues further, drawing in particular on the experience of developing countries and including issues concerning the child as a witness. They encouraged the Commonwealth Secretariat to continue to support member countries in complying with the United Nations Convention and to bring a further paper on good practice in juvenile justice to their next Meeting.

LAW REFORM

5. The Meeting heard a presentation on behalf of the Commonwealth Association of Law Reform Agencies (CALRA) in support of its paper on the role and effectiveness of law reform agencies. Law Ministers were very conscious of the need for continuous reform of the law to keep pace with changes in society, to cope with the often highly technical requirements of international bodies such as the Financial Action Task Force, and in some cases to complete the overhaul of legislation dating from pre-Independence times. Individual Ministers from the Caribbean, Southern Africa and the Pacific were able to testify to the great advantages to be gained from collaboration with other law reform agencies in their region: duplication was avoided and the resulting commonality in legislation across a region was very helpful.

6. Noting that only about a half of Commonwealth countries had a law reform agency, Law Ministers welcomed the establishment of CALRA, encouraged the creation of law reform agencies in more Commonwealth countries, and agreed that an adequately-resourced agency, working independently of Government but responsive to Government priorities, offered many advantages over other models. The Meeting hoped that CALRA would continue its work and give consideration to the particular needs of small jurisdictions.

REGULATING BROADCASTING ORGANISATIONS

7. The Meeting received a paper prepared by the Commonwealth Secretariat at the request of Law Ministers of Small Jurisdictions who at their meeting in 2004 had considered the principles which should govern the regulation of broadcasting organisations. The paper contained a set of Guidelines for an Independent Regulatory Framework for Commonwealth Broadcasting Organisations. Law Ministers recognised features of broadcasting regulation which promote democracy: a right of appeal and a right of reply; an obligation for news to be accurate and impartial; and rules which prevent discrimination and incitement to crime, including racial or religious hatred. They saw it as an accepted best practice to have a regulatory body independent of political or industry influence and control. There should be clear legal provision as to the remit and funding of the regulator and the process of appointment. The Meeting endorsed the Guidelines and encouraged the Commonwealth Secretariat to assist Member States in their implementation.

LEGAL EDUCATION IN THE COMMONWEALTH

8. Turning their attention to legal education, Law Ministers received a thoughtful paper prepared by the Commonwealth Legal Education Association (CLEA). They welcomed the CLEA's work on curriculum development notably in subjects such as human rights in the Commonwealth and transnational crime. Law Ministers recognised the problems of small States without a law school, and also the need for specialist training in such matters as mutual legal assistance and extradition.

9. Many jurisdictions experienced difficulties in gaining access to legal materials. The Attorney-General of Australia informed the Meeting of the establishment of the Commonwealth Legal Information Institute which offered access to 486 databases from 51 Commonwealth jurisdictions. The Meeting adopted a resolution in the following terms:

> Commonwealth Law Ministers welcomed the development of the Commonwealth Legal Information Institute (CommonLII). The Meeting noted that CommonLII is an Internet research facility providing free access to legal information from all Commonwealth countries. The Meeting encouraged all countries to co-operate in the development of CommonLII by providing, to the extent possible, access to their legal materials, including legislation, case law and law reform reports.

CONSTITUTIONAL DEVELOPMENTS IN THE COMMONWEALTH

10. Law Ministers received a report on the work of the Commonwealth Secretariat in responding to a need recognised by Commonwealth Heads of Government in 2003 to intensify efforts to assist members in strengthening democracy and democratic institutions through the provision of constitutional, electoral and legal assistance. The report included a detailed paper which had been considered by Senior Officials at their meeting in 2004. This examined, inter alia, the methodology of constitutional change and a range of related good governance issues. Ministers recalled in this context the speech by the Chief Justice of Ghana at the Opening Ceremony in which he urged them to honour their responsibility to uphold the independence of the judiciary.

11. Ministers gave accounts of distinctive features in their countries' Constitutions and heard of recent experiences of constitutional reform in five African countries, Kenya, Nigeria, South Africa,

Swaziland and Uganda, and of judicial reforms in Cameroon, the Caribbean and the United Kingdom. They asked the Legal and Constitutional Affairs Division to continue work in this field including the giving of advice and assistance on the development of appellate court structures and systems; reviewing bills of rights in Commonwealth constitutions; and capacity building in establishing sound constitutional structures.

GENDER AND HUMAN RIGHTS IN THE COMMONWEALTH

12. The Commonwealth Plan of Action for Gender Equality 2005-2015 identifies four critical areas for Commonwealth action over the next ten years: gender, democracy, peace and conflict; gender, human rights and law; gender, poverty eradication and economic empowerment; and gender and HIV/AIDS. A paper before the Meeting noted progress made in some areas, but recalled the statement in the Plan of Action that 'the lack of a gender perspective in the administration of the law has stymied gains made in international and regional treaties and conventions'. Law Ministers recognised that the mere enactment of legislation was not sufficient and that systemic problems needed to be overcome, which required attention to education and health issues as well as the promotion of active dialogue and engagement among those working in the justice system and the wider civil society. Ministers noted that the gap between commitment and reality is huge in gender and unfortunately appeared to be increasing.

13. The Meeting adopted a resolution in the following terms:

> Commonwealth Law Ministers noted that the Plan of Action for Gender Equality 2005-2015 (which was agreed at the 7th Women's Affairs Ministers Meeting in Fiji Islands in May-June 2004) identified the area of gender, human rights and law as one of the four critical areas for Commonwealth action over the next ten years.
>
> The Meeting recognised the importance of enacting and enforcing laws for the achievement of gender equality. In this regard, as Ministers responsible for law and justice, they resolved to play their part in the implementation of the Commonwealth Plan of Action for Gender Equality.
>
> Ministers also encouraged the Legal and Constitutional Affairs Division to work closely with the Gender Section of the Social Transformation Programmes Division and the Youth Affairs Division to ensure the implementation of the Commonwealth Plan of Action for Gender Equality.

COMMONWEALTH LAND-LOCKED STATES AND THE LAW OF THE SEA

14. At their 2004 Meeting, Senior Officials considered a report by the Commonwealth Secretariat concerning the rights of Land-locked States under the provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Law Ministers heard a presentation of the issues by Professor Stephen Vasciannie, speaking to a paper explaining the background and addressing issues which had arisen in the course of discussions within the Commonwealth. Having heard from the Law Ministers of a number of Commonwealth Land-locked States which had not yet become parties to UNCLOS, the Meeting endorsed the efforts of the Commonwealth Secretariat to sensitise member countries to the immediate need to accede to UNCLOS with the necessary enabling legislation, and encouraged both Land-locked States and their coastal neighbouring states to utilise the provisions of UNCLOS to foster relations and recognise the benefits of entering into regional arrangements for access to the sea. It noted that the Commonwealth Secretariat planned further action, including a further seminar in November 2005, and was ready to assist Governments. Law Ministers welcomed the suggestion that the Secretariat should extend its work to include a focus on the needs of 'Geographically Disadvantaged States'.

PROLIFERATION OF SMALL ARMS AND LIGHT WEAPONS

15. The Meeting received a paper prepared by the Commonwealth Secretariat in response to the concern expressed by Heads of Government in 2003 at the proliferation of small arms and light weapons (SALW). This proliferation had had a tragic impact in some countries, could destabilise a whole region and contribute to the spread of transnational crime and terrorism. These concerns were borne out in the accounts some Law Ministers gave as to the consequences experienced in their own countries.

16. The Meeting noted the United Nation Plan of Action of 2001, the Firearms Protocol to the UN Convention on Transnational Organised Crime, and a number of regional initiatives in many of which Commonwealth countries had played a leading part. They asked the Commonwealth Secretariat to continue monitoring developments in this field and to prepare a summary of the obligations concerning the transfer and use of SALW which Commonwealth Member States already had under international law; to develop model legislative provisions for marking, tracing, brokering and transferring SALW; and to work with other organisations in capacity-building.

INTERNATIONAL HUMANITARIAN LAW

17. Law Ministers were grateful to the International Committee of the Red Cross for a paper, with full supporting material, which provided information on the accession of Commonwealth member countries to International Humanitarian Law (IHL) treaties, updating a review presented to Law Ministers at their Meeting in 1999. However, they also noted that the necessary national implementing legislation was not always in place, so that some countries which were parties to IHL treaties were not able to honour all of their treaty obligations.

18. Law Ministers encouraged member countries to consider acceding to further IHL treaties and acknowledged the importance of effective domestic implementation of those treaties. They noted that for most IHL treaties model implementing legislation, prepared by the ICRC or in some cases by the Commonwealth Secretariat, was already available or would shortly be published. For the remaining IHL treaties, they encouraged the Secretariat and the ICRC to develop model legislation and to report back to their next Meeting. Some Commonwealth countries already had inter-ministerial National IHL Committees which brought together those with responsibility for applying IHL and national Red Cross or Red Crescent societies, and the Meeting encouraged more countries to follow this practice. They welcomed the news that a second Commonwealth Red Cross and Red Crescent Conference on IHL was planned for 2007.

CRIMINAL DEFAMATION IN THE COMMONWEALTH

19. The Meeting received a paper prepared by the Commonwealth Press Union (CPU) reviewing the history and present status in a number of Commonwealth countries of criminal defamation and arguing the case for its abolition. The CPU rooted its arguments on the premise that the existence of the offence posed a threat to freedom of expression. It argued that criminal defamation laws were unnecessary, and were frequently abused, being used in cases which do not involve the public interest.

20. Law Ministers recognised that the CPU paper was a piece of advocacy by a particular interest group and identified a number of errors in its account of the current legal position in Commonwealth countries. There were indeed important and challenging issues as to the balance between the freedom of the press and the wider public interest, which had been addressed – with differing results – in many member countries. The paper did not address those issues in any depth, and some Ministers expressed strong disagreement with particular arguments it deployed. Nor did the paper examine

alternatives to the abolition of criminal defamation, such as its replacement by a more narrowly defined offence coupled with the development of clear ethical standards for the media.

21. Law Ministers agreed that any future consideration would be assisted by a more balanced analysis of the issues by the Commonwealth Secretariat.

HUMAN RIGHTS

22. The Meeting received papers describing the educational, promotional and awareness-building activities of the Commonwealth Secretariat's Human Rights Unit, in pursuit of attainment of the Commonwealth's strategic goal of strengthening respect for and fulfilment of basic human rights in member countries. These activities were premised on the belief that effective promotion and protection of human rights requires knowledge of human rights (with their proper and reasonable limitations) among public decision-makers at all levels, law enforcement officials and the judiciary, members of civil society, the media and the professions, students and young people, and women and vulnerable persons. Law Ministers endorsed the Unit's work in developing a model human rights curriculum, work with schools, with police, and with law enforcement officers. The Meeting reaffirmed the importance of human rights education, gave its support to the human rights education and awareness activities of the Human Rights Unit and encouraged the Unit to do more work in this regard.

AMENDMENTS TO THE HARARE SCHEME

23. In response to a mandate given to them by Law Ministers at their Meeting in St Vincent and the Grenadines, Senior Officials had agreed to the draft amendments, based on those prepared by an Expert Working Group, to the Harare Scheme on Mutual Assistance in Criminal Matters in the Commonwealth to deal with the preservation of computer data. The amendments provided for requests for the preservation (as opposed to the interception) of computer data, and provided for direct requests from agency to agency because of the need for an immediate response in this context. Data would be preserved for 120 days, within which time a formal request for the production of the data could be made in accordance with the other provisions of the Scheme. Ministers reiterated that the Harare Scheme was of great practical importance but agreed that it needed revision to deal with new forms of criminal activity and technological innovations since its adoption in 1990. They noted that access to data preserved by Internet service providers could be crucial in securing successful prosecutions.

24. Law Ministers adopted the amendments as set out in a consolidated text of the Scheme reproduced in Annex 1 to this Communiqué.

25. The Meeting noted that Senior Officials had given consideration to issues relating to the interception of communications and had decided that this required further study by a group which would include both technical experts and a wide range of Commonwealth legal representation.

CIVIL RECOVERY OF CRIMINAL ASSETS AND TERRORIST PROPERTY

26. At their Meeting in St Vincent and the Grenadines, Law Ministers asked the Commonwealth Secretariat to provide model legislative provisions dealing with the seizure and forfeiture of terrorist assets and for civil forfeiture regimes. The Secretariat undertook this work in collaboration with the United Nations Office on Drugs and Crime in Vienna. With the assistance of experts from a number of Commonwealth countries and drafting services provided by Canada, a text was produced and was adapted by the Commonwealth Secretariat as a Draft Commonwealth Model Law on the Civil Recovery of Criminal Assets including Terrorist Property. This text, with certain amendments agreed by Senior Officials, was before the Meeting.

27. Law Ministers, having heard testimony about the successful use of civil recovery provisions, agreed to endorse the draft Model Law as set out in the Annex to paper LMM(05)15(revised).

A COMMONWEALTH NETWORK OF CONTACT PERSONS

28. Law Ministers welcomed a proposal developed by their Senior Officials for the further enhancement of the effectiveness of legal co-operation in criminal matters in the Commonwealth by the establishment of a Commonwealth Network of Contact Persons. The main purpose of the Network would be to facilitate access to practical information on the requirements and procedures of a country to which a request for assistance would be made. Senior Officials had prepared a Framework setting out the basic structure and functions of the proposed Network.

29. Law Ministers agreed to the establishment of the Network in accordance with the Framework, which is set out in Annex 2 to this Communiqué. They reserved for future consideration the extent to which the Network should deal with regulatory as opposed to criminal cases.

CAPACITY BUILDING TO COMBAT TERRORISM

30. Much work had been carried out by the Commonwealth Secretariat in assisting member countries to implement UN Security Council Resolution 1373, and Law Ministers expressed appreciation for this work, notably the preparation of model legislation. Their decision to establish a Commonwealth Network of Contact Persons would complement this work. A paper by the Secretariat identified a range of future activities which could be undertaken, in connection with the abuse of technology, tracking the movement of terrorists, and abuse of refugee systems.

31. The Meeting heard with pleasure of the establishment by Canada of a Counter-Terrorism Capacity Building Programme to provide training and technical assistance in many of the areas covered by the paper; and also Australia's willingness to provide specialist training programmes to countries in its region. Ministers from other countries spoke of the beneficial regional co-operation in East Africa and the ASEAN region.

32. The Meeting was aware of the work being done under the aegis of such bodies as the United Nations and the Financial Action Task Force. There was no wish to duplicate this work, but there was seen to be a clear role for the Commonwealth in the sharing of good practice and the giving of practical assistance. Law Ministers encouraged the Commonwealth Secretariat to pursue all the ideas set out in the paper.

BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME

33. Law Ministers had expressed at their 2002 Meeting their commitment to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. At that Meeting they considered a draft Commonwealth Statement which applied those Basic Principles to the position of victims of crime and was adapted to the practices of common law jurisdictions. They referred the draft for further consideration by Senior Officials, who agreed to a revised text at their 2004 meeting.

34. The Meeting considered the revised text and after agreeing to a number of amendments, Law Ministers adopted the Commonwealth Statement in terms which appear as Annex 3 to this Communiqué. They asked the Commonwealth Secretariat to consider further the role of Parole Boards and similar bodies in this context.

MODEL BILL ON THE PROTECTION OF PERSONAL INFORMATION

35. Senior Officials agreed in 2004 to recommend to Law Ministers a draft Model Bill on the Protection of Personal Information, an earlier draft having been revised with the assistance of the United Kingdom Information Commissioner's office. The Model Bill deals with personal information processed by private organisations. Law Ministers welcomed the revised text as striking a proper balance between the competing principles operating in this complex field, though a number of suggestions were made for the further improvement of the Bill in any future revision. The Model Bill as set out in the Annex to paper LMM(05)19 was adopted by Law Ministers.

MODEL BILL ON COMPETITION

36. A revised Model Bill, on competition and certain aspects of consumer protection, was prepared by the Commonwealth Secretariat responding to a request made by Commonwealth Heads of Government in 1999. After an initial consideration by Law Ministers in St Vincent and the Grenadines, the Bill was taken through a detailed revision process involving four regional Expert Meetings and a final Expert Group meeting in London in July 2005. In their renewed consideration of the draft Model Bill, Law Ministers recognised that some countries already had legislation which adopted different policies on, for example, the location of adjudicatory functions, enforcement powers and the prohibition of unfair contract terms. The Meeting believed that those who had prepared the Bill had honoured the mandate given by Law Ministers in 2002 to take into account the needs of small and vulnerable sectors of the economy within the wider context of trade liberalisation. Law Ministers expressed their appreciation of the work undertaken in preparing the Model Bill and agreed to adopt it in the form in which it appeared in paper LMM(05)20.

COMMONWEALTH ACTION IN PRIVATE INTERNATIONAL LAW

37. The Meeting received a paper which explored the implications for the existing intra-Commonwealth arrangements of work undertaken by the Hague Conference on Private International Law. Ministers noted the progress being made in the negotiation of a new Convention on the International Recovery of Child Support and other forms of Family Maintenance. They considered favourably a suggestion that would enable both countries involved in making an effective maintenance order under the reciprocal enforcement legislation in most Commonwealth countries to be regarded as the 'state of origin' under the new convention. They asked the Commonwealth Secretariat to consider the eventual text of the new convention and to report on its implications for Commonwealth practice.

38. Law Ministers also asked the Commonwealth Secretariat to review the intra-Commonwealth arrangements for the recognition and enforcement of money-judgments, which were seen as obsolete having regard to developments in recent decades. Account should be taken of work already done on this topic by Governments and law reform agencies in a number of member countries.

LEGAL ASSISTANCE FOR HIPC COUNTRIES

39. The Meeting received a report on the work of the Commonwealth Secretariat in providing legal assistance to HIPC countries. This was part of an initiative supported by Commonwealth Heads of Government and involving the Commonwealth HIPC Ministerial Forum (which had met most recently in Barbados in September 2005) and the Economic Affairs Division of the Secretariat. Law Ministers expressed appreciation for the progress already made and endorsed the continuing efforts of the Secretariat to move as quickly as possible to render legal services to HIPC countries through the establishment of a legal clinic in the Secretariat.

ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD

40. The Meeting received a report summarising the work of the various sections of the Legal and Constitutional Affairs Division of the Commonwealth Secretariat, together with a number of information papers dealing with specific topics. These included papers on the following topics:

(a) Work to develop model legislative provisions on combating money-laundering and the financing of terrorism;

In this context the Meeting heard of the resolution of the Caribbean Financial Action Task Force that, in view of the great importance of this issue to so many States, it should be dealt with by a United Nations body rather than the more restricted Financial Action Task Force.

(b) The dissemination of the Commonwealth (Latimer House) Guidelines on the Accountability of and Relationship Between the Three Branches of Government; and the recommendations of the Commonwealth Colloquium on Combating Corruption within the Judiciary;

(c) The work of an Expert Group dealing with the establishment of final or regional appellate courts in place of the Judicial Committee of the Privy Council;

In noting this paper, Ministers heard accounts of the constitutional difficulties faced by some Caribbean countries in transferring the jurisdiction now exercised by the Privy Council to the newly-established Caribbean Court of Justice, and of the progress being made towards the inauguration of the SADC Tribunal.

(d) The implementation by small States of international environment instruments;

(e) The implementation of the WTO General Council Decision on Intellectual Property Rights and Affordable Drugs; and

(f) The *Commonwealth Law Bulletin*.

41. Appreciation was expressed of the breadth and quality of the Division's work. Ministers welcomed the extent to which the Commonwealth Secretariat worked in collaboration with other organisations, stressing the value of such co-operation in avoiding wasteful duplication of effort. Attention was drawn to the work undertaken on Land and Development following up the Kingstown Declaration on that subject. It was noted that this was one area in which other donors were active, but the Commonwealth Secretariat was ready to respond to any requests for specific assistance.

ASSET REPATRIATION

42. Law Ministers received for information the Report of the Commonwealth Working Group on Asset Repatriation, which was set up at the request of Commonwealth Heads of Government, who would be considering the report at their meeting in Malta in November 2005. They heard a presentation by the chairman of the Working Group, who explained the recommendations which were designed to deal with the problem of the recovery of assets of illicit origin and the repatriation of those assets to their country of origin. The Meeting recognised the considerable achievement which the report represented, and Ministers made comments on a number of particular recommendations.

TRAINING IN LEGISLATIVE DRAFTING

43. At their Meeting in St Vincent and the Grenadines, Law Ministers asked the Commonwealth Secretariat to develop short courses on legislative drafting to supplement in-house training and to seek long-term solutions to the problem of recruiting, training and retaining drafters. They noted with pleasure that a 12-week course had been devised and was being offered initially in Ghana; and that the offer of placements in the office of parliamentary counsel in Scotland had been taken up by several countries.

44. The Meeting noted the view that both conditions of service and practical working conditions needed to be improved if the long-term problems were to be solved.

EXTENDED CONTINENTAL SHELF

45. The Meeting received a paper on rights and deadlines under Part VI of the UN Convention on the Law of the Sea dealing with the continental shelf. Ministers from countries which had made or were preparing to make submissions to the Commission on the Limits of the Continental Shelf testified to the very considerable demands on time and resources which a submission required. The deadline for submissions had already been extended by a Decision of the States Parties and there was support for the view that a further extension would be required if developing countries were to have an adequate opportunity to make submissions.

REPORTS FROM PARTNER ORGANISATIONS

46. The Commonwealth Secretariat works closely with a number of partner organisations and the Meeting heard reports from the Commonwealth Legal Education Association, the Commonwealth Magistrates and Judges Association, the Commonwealth Human Rights Initiative, the Commonwealth Lawyers Association, the Commonwealth Parliamentary Association and the Commonwealth Association of Law Reform Agencies.

FUTURE BUSINESS: INTELLECTUAL PROPERTY ENFORCEMENT

47. The Meeting agreed to a resolution in the following terms:

> Law Ministers resolved that Senior Officials and the Commonwealth Secretariat should examine the development of appropriate responses to piracy and counterfeiting of intellectual property products within the Commonwealth and make recommendations at the next Law Ministers Meeting.

NEXT LAW MINISTERS MEETING

48. The Lord Advocate of Scotland on behalf of the United Kingdom extended an invitation to Law Ministers to hold their next Meeting in Scotland at a date in 2008. The Meeting gratefully accepted this invitation.

ANNEX 1

SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

including amendments made by Law Ministers in April 1990, November 2002 and October 2005

PURPOSE AND SCOPE

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other for(a)

(2) This Scheme provides for the giving of assistance by the competent authorities of tne country (the requested country) in respect of criminal matters arising in another country (the requesting country).

(3) Assistance in criminal matters under this Scheme includes assistance in

(a) identifying and locating persons;

(b) serving documents;

(c) examining witnesses;

(d) search and seizure;

(e) obtaining evidence;

(f) facilitating the personal appearance of witnesses;

(g) effecting a temporary transfer of persons in custody to appear as a witness;

(h) obtaining production of judicial or official records;

(i) tracing, seizing and confiscating the proceeds or instrumentalities of crime; and

(j) preserving computer data.

MEANING OF COUNTRY

2. For the purposes of this Scheme, each of the following is a separate country, that is to say

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and

(b) each country within the Commonwealth which, though not sovereign and independent, is not designated for the purposes of the preceding sub-paragraph.

CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies 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.

(2) "Offence", in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof.

(3) "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order

(a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been

(i) derived or obtained, whether directly or indirectly, from; or

(ii) used in, or in connection with,

the commission of an offence;

(b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or

(c) imposing a pecuniary penalty calculated by reference to the value of any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii).

REQUESTS FOR COMPUTER DATA - DEFINITIONS

4. For the purposes of this Scheme

(1) "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:

(a) the type of communication service used, and the period of service;

(b) the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;

(c) any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.

(2) "computer system" means a device or a group of interconnected or related devices, including the Internet, one or more of which, pursuant to a program, performs automatic processing of data;

(3) "computer data" means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;

(4) "service provider" means:

(a) a public or private entity that provides to users of its services the ability to communicate by means of a computer system, and

(b) any other entity that processes or stores computer data on behalf of that entity or those users.

(5) "traffic data" means any computer data:

(a) that relates to a communication by means of a computer system; and

(b) is generated by a computer system that formed a part in the chain of communication; and

(c) shows the communication's origin, destination, route, time, date, size, duration, or type of underlying service.

(6) "Content data" means the content of the communication; that is, the meaning or purpose of the communication, or the message or information being conveyed by the communication. It is everything transmitted as part of the communication that is not traffic data.

(7) "Preservation of computer data" means the protection of computer data which already exists in a stored form from modification or deletion, or from anything that would cause its current quality or condition to change or deteriorate. Computer data that is stored on a highly transitory basis as an integral function of the technology used in its transmission is not computer data which already exists in a stored form for the purposes of this definition.

CENTRAL AUTHORITIES

5. Each country shall designate a Central Authority to transmit and to receive requests for assistance under this Scheme.

ACTION IN THE REQUESTING COUNTRY

6. (1) A request for assistance under this Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country.

(2) The Central Authority of the requesting country shall, if it is satisfied that the request can properly be made under this Scheme, transmit the request to the central Authority of the requested country and shall ensure that the request contains all the information required by the provisions of this Scheme.

(3) The Central Authority of the requesting country shall provide as far as practicable additional information sought by the Central Authority of the requested country.

ACTION IN THE REQUESTED COUNTRY

7. (1) Subject to the provisions of this Scheme, the requested country shall grant the assistance requested as expeditiously as practicable.

(2) The Central Authority of the requested country shall, subject to the following provisions of this paragraph, take the necessary steps to ensure that the competent authorities of that country comply with the request.

(3) If the Central Authority of the requested country considers

(a) that the request does not comply with the provisions of this Scheme, or

(b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or

(c) that the request cannot be complied with, in whole or in part, or

(d) that there are circumstances which are likely to cause a significant delay in complying with the request,

it shall promptly inform the Central Authority of the requesting country, giving reasons.

(4) The requested country may make the granting of assistance subject to the requesting country giving an undertaking that:

(a) the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person; or

(b) a court in the requesting country will determine whether or not the material is subject to privilege.

(5) If the requesting country refuses to give the undertaking under sub-paragraph (4), the requested country may refuse to grant the assistance sought in whole or in part.

REFUSAL OF ASSISTANCE

8. (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme if the criminal matter appears to the Central Authority of that country to concern

(a) conduct which would not constitute an offence under the law of that country; or

(b) an offence or proceedings of a political character; or

(c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or

(d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.

(2) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme

(a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or

(b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.

(3) The requested country may refuse to comply in whole or in part with a request for assistance to the extent that the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country.

(4) An offence shall not be an offence of a political character for the purposes of this paragraph if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.

MEASURES OF COMPULSION

9. (1) The competent authorities of the requested country shall in complying with a request under this Scheme use only such measures of compulsion as are available under the law of that country in respect of criminal matters arising in that country.

(2) Where under the law of the requested country measures of compulsion cannot be applied to any person to take the steps necessary to secure compliance with a request under this Scheme but the person concerned is willing to act voluntarily in compliance or partial compliance with the terms of the request, the competent authorities of the requested country shall make available the necessary facilities.

SCHEME NOT TO COVER ARREST OR EXTRADITION

10. Nothing in this Scheme is to be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

CONFIDENTIALITY

11. The Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

LIMITATION OF USE OF INFORMATION OR EVIDENCE

12. The requesting country shall not use any information or evidence obtained in response to a request for assistance under this Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country.

EXPENSES OF COMPLIANCE

13. (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.

CONTENTS REQUEST FOR ASSISTANCE

14. (1) Except in the case of a request for the preservation of computer data under Article 1 (3) (j) of this Scheme, a request under the Scheme shall:

(a) specify the nature of the assistance requested;

(b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;

(c) indicate any time-limit within which compliance with the request is desired, stating reasons;

(d) contain the following information:

(i) the identity of the agency or authority initiating the request;

(ii) the nature of the criminal matter; and

(iii) whether or not criminal proceedings have been instituted.

(e) where criminal proceedings have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identity of the accused person;

(iii) the offences of which he stands accused, and a summary of the facts;

(iv) the stage reached in the proceedings; and

(v) any date fixed for further stages in the proceedings.

(f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts.

(2) A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.

REQUESTS FOR THE PRESERVATION OF COMPUTER DATA

15. (1) A request for the preservation of computer data under this Article made by an agency or authority competent to make such a request under the laws of the requesting country can be directly transmitted to an agency or authority competent to receive such a request under the laws of the requested country.

(2) A request for the preservation of computer data shall

(a) specify the identity of the agency or authority making the request;

(b) contain a brief description of the conduct under investigation;

(c) contain a description of the computer data to be preserved and its relationship to the investigation or prosecution, and in particular identifying whether the computer data to be preserved includes:

(i) subscriber information

(ii) traffic data

(iii) content data

(d) contain a statement that the requesting country intends to submit a request for mutual assistance to obtain the computer data within the period permitted under this Article.

(3) The preservation of computer data pursuant to a request made under this Article shall be for a period of 120 (one hundred and twenty) days, pending submission by the requesting country of a request for assistance to obtain the preserved computer data. Following the receipt of such a request, the data shall continue to be preserved

pending the determination of that request and, if the request is granted, until the data is obtained pursuant to the request for assistance.

(4) If the requested country considers that the preservation of computer data pursuant to a request made under this Article will not ensure the future availability of the computer data, or will threaten the confidentiality of, or otherwise prejudice the investigation in the requesting country, it shall promptly inform the requesting country, which shall then determine whether the request should nevertheless be executed.

(5) Notwithstanding the general grounds for refusal contained in Article 8, a request for the preservation of computer data under this Article may be refused only to the extent that it appears to the requested country that compliance would be contrary to the laws and/or constitution of that country, or would prejudice the security, international relations, or other essential public interests of that country.

IDENTIFYING AND LOCATING PERSONS

16. (1) A request under this Scheme may seek assistance in identifying or locating persons believed to be within the requested country.

(2) The request shall indicate the purpose for which the information is requested and shall contain such information as is available to the Central Authority of the requesting country as to the whereabouts of the person concerned and such other information as it possesses as may facilitate the identification of that person.

SERVICE OF DOCUMENTS

17. (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.

(2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(3) The Central Authority of the requested country shall endeavour to have the documents served:

(a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or

(b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.

(4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

(5) A person served in compliance with a request with a summons to appear as a witness in the requesting country and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country notwithstanding any contrary statement in the summons.

EXAMINATION OF WITNESSES

18. (1) A request under this Scheme may seek assistance in the examination of witnesses in the requested country.

(2) The request shall specify, as appropriate and so far as the circumstances of the case permit:

(a) the names and addresses or the official designations of the witnesses to be examined;

(b) the questions to be put to the witnesses or the subject matter about which they are to be examined;

(c) whether it is desired that the witnesses be examined orally or in writing;

(d) whether it is desired that the oath be administered to the witnesses or, (as the law of the requested country allows, that they be required to make their solemn affirmation);

(e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and

(f) any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country.

(3) The request may ask that, so far as the law of the requested country permits, the accused person or his legal representative may attend the examination of the witness and ask questions of the witness.

SEARCH AND SEIZURE

19. (1) A request under this Scheme may seek assistance in the search for, and seizure of property or computer data in the requested country.

(2) The request shall specify the property or computer data to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required to be adduced in an application under the law of the requested country for any necessary warrant or authorization to effect the search and seizure.

(3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property or computer data seized.

OTHER ASSISTANCE IN OBTAINING EVIDENCE

20. (1) A request under this Scheme may seek other assistance in obtaining evidence.

(2) The request shall specify, as appropriate and so far as the circumstance of the case permit:

(a) the documents, records, property or computer data to be inspected, preserved, photographed, copied or transmitted;

(b) the samples of any property or computer data to be taken, examined or transmitted; and

(c) the site to be viewed or photographed.

PRIVILEGE

21. (1) No person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he could not be compelled to give:

(a) in criminal proceedings in that country; or

(b) in criminal proceedings in the requesting country.

(2) For the purposes of this paragraph any reference to giving evidence includes references to answering any question and to producing any document.

PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS

22. (1) A request under this Scheme may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.

(2) For the purposes of this paragraph "judicial records" means judgments, orders and decisions of courts and other documents held by judicial authorities and "official records" means documents held by government departments or agencies or prosecution authorities.

(3) The requested country shall provide copies of judicial or official records which are publicly available.

(4) The requested country may provide copies of judicial or official records not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

TRANSMISSION AND RETURN OF MATERIAL

23. (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record or property, the requested country

(a) may postpone the transmission of the material if it is required in connection with proceedings in that country, and in such a case shall provide certified copies of a document or record pending transmission of the original;

(b) may require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.

(2) Where any document, record or property is transmitted to the requesting country in compliance with a request under this Scheme, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless that country has indicated that its return is not desired.

(3) The requested country shall authenticate material that is to be transmitted by that country.

AUTHENTICATION

24. A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:

(a) purports to be signed or certified by a judge or Magistrate, or to bear in the stamp or seal of a Minister, government department or Central Authority; or

(b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY

25. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required; and

(c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.

(3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and

(a) ask whether they agree to appear;

(b) inform the Central Authority of the requesting country of their answer; and

(c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

(4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

PERSONAL APPEARANCE OF PERSONS IN CUSTODY

26. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify:

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required.

(3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.

(4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.

(5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

(6) Where persons in custody are transferred, the requested country shall notify the requesting country of:

(a) the dates upon which the persons are due under the law of the requested country to be released from custody; and

(b) the dates by which the requested country requires the return of the persons

and shall notify any variations in such dates.

(7) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub-paragraph (6).

(8) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.

(9) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.

(10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agreed.

IMMUNITY OF PERSONS APPEARING

27. (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.

(2) The immunity provided for in that paragraph shall cease:

(a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it;

(b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

28. (1) A request under this Scheme may seek assistance in identifying, locating and assessing the value of property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.

(2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

SEIZING AND CONFISCATING THE PROCEEDS OF INSTRUMENTALITIES OF CRIME

29. (1) A request under this Scheme may seek assistance in securing:

(a) the making in the requested country of an order relating to the proceeds of instrumentalities of crime; or

(b) the recognition or enforcement in that country of such an order made in the requesting country.

(2) For the purpose of this paragraph, "an order relating to the proceeds of instrumentalities of crime" means:

(a) 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;

(b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and

(c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.

(3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.

(4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

(5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

(6) The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:

(a) for the giving of notice of the making of orders restraining or confiscating property; and

(b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order

(i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and

(ii) restoring such property or the value of the interest therein to the applicant.

DISPOSAL OR RELEASE OF PROPERTY

30. (1) The law of the requested country shall apply to determine the disposal of any property

(a) forfeited; or

(b) obtained as a result of the enforcement of a pecuniary penalty order as a result of a request under this Scheme.

(2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.

(3) The law of the requested country may provide that the proceeds of an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be

(a) returned to the requesting country; or

(b) shared with the requesting country in such proportion as the Requested country in its discretion deems appropriate in all the circumstances.

CONSULTATION

31. The Central Authorities of the requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.

OTHER ASSISTANCE

32. After consultation between the requesting and the requested countries assistance not within the scope of this Scheme may be given in respect of a criminal matter on such terms and conditions as may be agreed by those countries.

NOTIFICATION OF DESIGNATIONS

33. Designations of dependent territories under paragraph 2 and of Central Authorities under paragraph 4 shall be notified to the Commonwealth Secretary-General.

COMMONWEALTH NETWORK OF CONTACT PERSONS (CNCP)
FRAMEWORK OF THE CNCP

PRINCIPLES OF THE CNCP

The purpose of the network of Contact Persons will be;

1. to facilitate international co-operation in criminal cases between Commonwealth Member States including mutual legal assistance and extradition.

2. to provide legal and practical information necessary to the authorities in their own country and Commonwealth Member States wishing to invoke international co-operation.

The network of Contact Persons will be an informal network. The Contact Person does not act as the Central Authority of a member State unless the Central Authority also acts as Contact Person; and the role of the Central Authority under the Harare Scheme on Mutual Assistance in Criminal matters remains unaffected by the establishment of the CNCP.

Article 1 - Establishment

The Commonwealth Network of Contact Persons, hereinafter referred to as the Network or CNCP, which shall include prosecutors and other authorities with responsibility in criminal matters, shall be established in the Commonwealth.

It will be for each Member State, taking into account their own constitutional rules, legal traditions and internal structure to nominate Contact Person(s).

The Contact Person(s) may include the Central Authority, if the Member State so chooses.

Article 2 – Objective

The objective of the CNCP is to improve and enhance international assistance and co-operation in criminal cases.

Article 3 – Composition

1. The CNCP shall comprise of at least one Contact Person from each of the jurisdictions of the Commonwealth.

2. The Commonwealth Secretariat shall designate one of its officials to co-ordinate the activities of the CNCP.

Article 4 – Functions of the Network

The CNCP shall, in particular:

(a) facilitate the establishment of appropriate contacts between Contact Persons in the various criminal jurisdictions of the Commonwealth in order to carry out the functions laid down in Article 5;
(b) meet periodically, as arranged by the Commonwealth Secretariat, to review activities;
(c) make every effort to collaborate with other Networks.

Article 5 – Functions of the Contact Persons

1. The Contact Persons shall seek, to the extent permitted by their domestic laws, to facilitate international co-operation in criminal matters between Member States of the Commonwealth. They shall enable the most appropriate direct contacts between prosecution agencies, other competent authorities and Contact Persons in Commonwealth jurisdictions. They may, if necessary, travel to meet other Contact Persons, on the basis of an agreement between the administrations concerned.

2. The Contact Persons shall seek to provide legal and practical information to prosecution agencies, other competent authorities and Contact Persons in their own and other Commonwealth jurisdictions to improve international co-operation in criminal cases.

3. They shall aim to improve co-ordination of international co-operation in criminal cases where a series of requests from a Commonwealth jurisdiction necessitates co-ordinated action in another Commonwealth jurisdiction.

4. Contact Persons, through the Commonwealth Secretariat, shall distribute any changes in legislation or procedure introduced within their jurisdiction

Article 6 – Meetings

1. Contact Persons shall endeavour to meet periodically to review the activities of the CNCP.

2. The aims of the periodic meetings shall be as follows:

   (a) to allow the Contact Persons to get to know each other and exchange experiences;
   (b) to provide a forum for discussion of practical and legal problems encountered; and
   (c) to provide to the Commonwealth Secretariat any information or collective opinions which may assist the Secretariat in its work.

Article 7 - Provision of Information

1. It will be the responsibility of each Member State initially to provide the details of the Contact Person(s) to the Commonwealth Secretariat.

2. It shall be the responsibility of each Contact Person to check the accuracy of the data contained in the system and to inform the Commonwealth Secretariat immediately if any of these details need to be amended or updated.

Article 8 – Role of the Commonwealth Secretariat

Activities of the network should be co-ordinated by the Commonwealth Secretariat which shall, *inter alia*:

1. maintain an up-to-date list of Contact Persons;
2. maintain an up-to-date web page concerning the activities of the CNCP;
3. facilitate meetings of Contact Persons;
4. disseminate information amongst Contact Persons.

COMMONWEALTH STATEMENT OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIMES

Commonwealth Law Ministers recall the adoption by the United Nations General Assembly of Resolution 40/34 which recognised "that the victims of crime and the victims of abuse of power, and also frequently their families, and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders", and the adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Basic Principles);

Commonwealth Law Ministers reaffirm the principle that victims must be treated with courtesy, compassion and respect for personal dignity.

To express their commitment to the Basic Principles, Ministers agree that member countries would give consideration to the national implementation of measures designed to give practical effect to these Principles, in particular for serious crime. They believe that:

1. Guidelines and training programmes should be developed to ensure that Police:

   - are sensitive to the needs of victims;
   - are informed, knowledgeable, and supportive of existing social services and programmes for victims;
   - introduce, to the extent possible, procedures consistent with legal requirements to allow for the prompt return of property to victims, including the consideration of alternative methods of retaining and introducing evidence such as the use of photographs; and
   - establish procedures to ensure that, to the extent possible, victims of crime requiring information are periodically informed of the general status of investigations, taking into consideration the need to ensure the proper administration of justice.

2. Prosecutors, in the exercise of their powers and performance of their duties should:

   - be sensitised to the fact that public interest should specifically take into consideration the views of victims, including consideration of pre-trial sessions with victims for this purpose, if possible and appropriate;
   - endeavour to provide information to victims – either directly or through another authority - about the status of the case such as scheduling, progress, final outcomes and general reasons for those outcomes;
   - to the extent possible and as appropriate taking into account all of the relevant fair trial interests, bring to the attention of the court the impact of the offence, investigation and the trial process on the victim, the better to inform the court's decisions on bail, adjournments, sentencing, compensation and restitution
   - take appropriate action with respect to any persons who harass, threaten, injure or otherwise attempt to intimidate or retaliate against victims or witnesses, including referring the matter to the police or an application for bail variation, the withdrawal of bail, or the revocation of parole;
   - use a victim and witness on-call system, where practicable, to ensure that victims do not waste time unnecessarily in court;

- to the extent possible, introduce procedures consistent with legal requirements to allow for the prompt return of property to victims, including the consideration of alternative methods of retaining and introducing evidence such as the use of photographs;
- establish and maintain liaison with victim support structures; and
- be sensitised to the trauma and well being of victims of serious crimes.

3. Law Ministers may propose for the consideration of the Chief Justices and other members of the Judiciary of their respective jurisdictions, the following suggestions that they believe will assist in the achievement of national adherence to the Basic Principles:

- encouraging participation in a training programme sensitising judges to the needs and interests of victims of crime in relation to the judicial process;
- allowing victims and witnesses to be on-call for court proceedings where practicable;
- in so far as possible, ensuring that their court officials establish separate waiting rooms for prosecution and defence witnesses;
- means by which members of the judiciary can bear their share of responsibility for reducing court congestion by ensuring that all participants fully and responsibly utilise court time;
- to allow, to the extent possible and appropriate taking into account all of the relevant fair trial interests, the views, if any, of victims to be made known to the court at bail hearings, postponements, sentencing, restitution or any compensation hearings;
- sensitising judges, where applicable, to consider ordering restitution to the victim in appropriate cases where such orders are possible;
- ensuring that, after having given any evidence, the victim's attendance at the trial is facilitated if he or she so wishes and, as requested, a member of the victim's family as well; and
- giving substantial weight to the victim's interest in the speedy return of property before trial in ruling on the admissibility of photographs of that property as being sufficient evidence.

4. Ministers also agree that they will give consideration to the passage, where necessary or appropriate, of legislation that will assist in the realisation of adherence to the Basic Principles. They further agreed that national consideration should be given to the development of appropriate mechanisms designed to provide assistance to the victims. They recognise that the precise form that such mechanisms could take must remain a matter for national decision, taking into account economic, social and cultural norms of each member country.

AGENDA AND INDICATIVE TIMETABLE

DAY 1: MONDAY, 17 OCTOBER 2005

18:00 – 20:00 **Opening Ceremony of the LMM and Reception**
Venue: International Conference Centre, Accra

DAY 2: TUESDAY, 18 OCTOBER 2005

8:30 – 9:00 *Registration*

9:00 – 9:15 Election of Chairperson

Adoption of the Agenda

AGENDA ITEM 1: ISSUES FOR MINISTERIAL CONSIDERATION

Justice and Good Governance Issues

9:15 – 10:00 **Agenda Item 1(a):** Towards Good Practice in Juvenile Justice Policy in the Commonwealth [paper LMM(05)3]

10:00 – 10:45 **Agenda Item 1(b):** Law Reform Agencies: Their Role and Effectiveness [paper LMM(05)4]

10:45 – 11:00 ***Cocoa Break***

11:00 – 11:45 **Agenda Item 1(c):** Developing Legal Education in the Commonwealth: Some Current Issues [paper LMM(05)5]

11:45 – 12:30 **Agenda Item 1(d):** Guidelines for an Independent Regulatory Framework for Commonwealth Broadcasting Organisations [paper LMM(05)6]

12:30 – 13:30 ***Lunch Break***

13:30 – 14:15 **Agenda Item 1(e):** Constitutional Developments in the Commonwealth [paper LMM(05)7]

14:15 – 15:00 **Agenda Item 1(f):** Gender and Human Rights in the Commonwealth: Critical Issues for Action in the Plan of Action for Gender Equality 2005-2015 [paper LMM(05)8]

15:00 – 15:15 ***Cocoa Break***

Legal Development Issues

15:15 – 16:00 **Agenda Item 1(g):** Commonwealth Landlocked States and the Law of the Sea [paper LMM(05)33]

Criminal Law Issues

16:00 – 16:45 **Agenda Item 1(h):** Report on the Proliferation of Small Arms and Light Weapons within the Commonwealth [paper LMM(05)10]

16:45 – 17:30 **Agenda Item 1(i):** International Humanitarian Law (IHL) [paper LMM(05)11]

18:00 – 20:00 *Reception*

DAY 3: WEDNESDAY, 19 OCTOBER 2005

Criminal Law Issues Continued:

09:00 – 09:45 **Agenda Item 1(j):** Criminal Defamation in the Commonwealth – A Case for Abolition [paper LMM(05)12]

Human Rights Issues

09:45 – 10:30 **Agenda Item 1(k):** Human Rights Education and Awareness Projects [paper LMM(05)13]

10:30 – 10:45 *Cocoa Break*

AGENDA ITEM 2: RECOMMENDATIONS FROM SOLM

Criminal Law Issues

10:45 – 11.30 **Agenda Item 2(a):** The Harare Scheme on Mutual Assistance in Criminal Matters: Possible Amendments to The Scheme and Discussion of Interception of Communications and Related Matters [paper LMM(05)14]

11:30 – 12:15 **Agenda Item 2(b):** Civil Recovery of Criminal Assets and Terrorist Property: Harare Scheme on Mutual Assistance and Draft Model Legislative Provisions [paper LMM(05)15]

12:15 – 13:15 *Lunch Break*

13:15 – 14:00 **Agenda Item 2(c):** Proposal for the Establishment of the Commonwealth Network of Contact Persons [paper LMM(05)16]

14:00 – 14:30 **Agenda Item 2(d):** Further Initiatives in Capacity Building to Combat Terrorism [paper LMM(05)17]

14:30 – 15:00 **Agenda Item 2(e):** Revised Commonwealth Statement of Basic Principles of Justice for Victims of Crime [paper LMM(05)18]

15:00 – 15:15 *Cocoa Break*

Justice and Good Governance Issues

15:15 – 15:45 **Agenda Item 2(f):** Model Bill on the Protection of Personal Information [paper LMM(05)19]

Legal Development Issues

15:45 – 16:15 **Agenda Item 2(g):** Revised Model Bill on Competition [paper LMM(05)20]

16:15 – 16:45 **Agenda Item 2(h):** Commonwealth Action in the Field of Private International Law [paper LMM(05)21]

16:45 – 17:15 **Agenda Item 2(i):** Report on Legal Assistance for HIPC Countries [paper LMM(05)29]

DAY 4: THURSDAY, 20 OCTOBER 2005

AGENDA ITEM 3: ROUNDTABLE DISCUSSIONS (Updates on Commonwealth Secretariat Activities)

09:00 – 12:30 **Agenda Item 3(a):** Report of Activities of the Commonwealth Secretariat in the Legal Field [paper LMM(05)22]

Criminal Law Issues

(i) Report of the Commonwealth Working Group on Asset Repatriation [paper LMM(05)23]
(ii) Common Law Model on Anti-Money Laundering (AML) and Combating the Financing of Terrorism (CFT) Laws [paper LMM(05)24]

Justice and Good Governance Issues

(iii) Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government [paper LMM(05)25]
(iv) Curriculum Development and Training In Legislative Drafting [paper LMM(05)26]
(v) Building Integrity and Combating Corruption in Commonwealth Judiciaries [paper LMM(05)27]

Legal Development Issues

(vi) Update on the Establishment of Final / Regional Appellate Courts [paper LMM(05)31]
(vii) Implementing International Environment Instruments in Small States [paper LMM(05)9]
(viii) Update on Developments on the Commonwealth Law Bulletin [paper LMM(05)32]

(ix) Implementation of WTO Agreements on Intellectual Property Rights and Access to Affordable Drugs under LDS – An Update [paper LMM(05)28]

(x) Issues Concerning Rights/Obligations and Deadlines under Part VI of UNCLOS in relation to the Extended Continental Shelf [paper LMM(05)35]

Agenda Item 3(b): Report on Activities by the Human Rights Unit [paper LMM(05)36]

Agenda Item 3(c): Co-operation with Partner Organisations - Reports from Partner Organisations [paper LMM(05)30]

12:30 – 13:30 *Lunch Break*

16:00 – 17:30 **(i) LMM Communiqué: Consideration by SOLM**

(ii) LMM Final Communiqué: Adoption by LMM

(iii) Acknowledgements

17:30 *CLOSING*

18:00 PRESS CONFERENCE

DAY 5: FRIDAY, 21 OCTOBER 2005

10:00 – 16:00 *TRIP HOSTED BY THE GOVERNMENT OF GHANA*

MEMORANDA

JUSTICE AND GOOD GOVERNANCE ISSUES

TOWARDS GOOD PRACTICE IN JUVENILE JUSTICE POLICY IN THE COMMONWEALTH

Report by Allison Morris and Loraine Gelsthorpe*

EXECUTIVE SUMMARY

1. Introduction

1. The purpose of this review is to examine juvenile justice policy in different Commonwealth countries to help identify what might constitute good practice. This review does not suggest that there is, or should be, only one way of 'doing' juvenile justice. Rather it seeks to identify a number of key issues which all juvenile justice systems have to address, and to review, through legislation and practice, the range of options available within a small number of Commonwealth countries. Also 'good practice' itself is not self-evident, value-free or unequivocal. Thus, this review represents only the beginning of debates about what this might constitute within the Commonwealth.

2. Methodology

2. In identifying the key issues for juvenile justice policy we examined, first, various United Nations documents. For the purposes of this paper, we have focused on the Standard Minimum Rules for the Administration of Justice (the Beijing Rules) and the Convention on the Rights of the Child (UNROC). We also examined the resolution of the Economic and Social Council of the United Nations on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. The number of jurisdictions discussed is necessarily limited within the time-frame available to us. We chose jurisdictions we were relatively familiar with and/or which had recently reviewed their legislative provision for juvenile offenders. Specifically, we examined legislation in Australia, Canada, England, Ghana, New Zealand, Northern Ireland and Scotland and draft legislation in South Africa. Juvenile justice legislation in some Commonwealth jurisdictions is long, complex and covers a wide range of topics. At this stage of our work, we have been necessarily selective in what we discuss. We have also consulted literature which reviewed practice and recent empirical research in these jurisdictions, where available, and any recent policy documents relating to juvenile justice.

3. Key Issues

3.1 Ages of criminal responsibility, prosecution and adulthood

3. There are differences in the age of criminal responsibility and the age at which juvenile justice jurisdiction ends in the Commonwealth countries reviewed. These reflect their diverse social, economic, cultural and political systems. However, there is merit in some common standards and, at the very least, it seems appropriate, in line with the UNROC, for offenders to be treated as 'juveniles' until the age of 18. The age of criminal responsibility was traditionally viewed as the age at which societies were willing to punish child offenders and so 'higher' ages were seen as protective. Given the shifts in emphasis in the aims of juvenile justice, there may be less reason to protect children

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from restorative or rehabilitative intervention and so 'lower' ages of criminal responsibility may be more acceptable. A good compromise could be to distinguish between the age of criminal responsibility (which could be low) and the age of prosecution (which could be high).

4. Because of public and media concerns in some of the Commonwealth countries reviewed, serious juvenile offenders can be dealt with as adults. However, we may need to distinguish here between trial procedures and penalties. Young children are unlikely to be capable of understanding and participating in court proceedings. Changes to procedures are possible, as has been done in some countries with respect to child victims. But the issues are somewhat different with respect to child offenders and trials for children are relatively rare. Consideration could, therefore, be given to legislating for a higher age of prosecution, even for offences of murder and manslaughter (children below this age who committed serious offences could still be dealt with under care and protection mechanisms). An alternative approach is to treat all individuals under the age of 18 as juveniles for criminal justice matters, as the UNROC suggests. Treating only child offenders who commit certain offences as vulnerable and in need of special protection has little logic. Age should continue to be a major mitigating factor with respect to penalties.

3.2 Dealing with antisocial behaviour

5. Paragraph 3 of the Beijing Rules states that the Rules should apply not only to children who have committed criminal offences, but also to children who have committed what would conventionally be described as 'status offences' – acts which would not be punishable if committed by an adult. However, the restrictive orders introduced in some jurisdictions to regulate such behaviour have failed to provide adequate safeguards and, as such, are in breach of the Beijing Rules. Steps should be taken either to ensure compliance with these Rules or to abolish these orders.

3.3 The aims of juvenile justice

6. Taking some steps to set out what the juvenile justice system is trying to accomplish is an important preliminary task for legislatures as these aims, values and principles can then be relied on to guide practice and to measure the system's effectiveness in meeting its objectives. Most of the Commonwealth jurisdictions reviewed have done this. However, these aims, values and principles should be tied together in a coherent framework and should not lead decision makers in conflicting directions. Examples of the values and principles which could be endorsed are: recognition of children's vulnerability and developmental stages; restoration and reintegration; diversion from court and custody; fairness; due process; and the accommodation of diversity. They should be clear in their purpose and transparent.

3.4 Restorative justice processes and juvenile justice

7. Research on restorative conferencing shows that, to a large extent, it has achieved the key restorative aims of involving offenders, victims and supporter; achieving agreement about a co-operative and constructive response to offending; healing victims' hurt; and holding offenders accountable. Research also shows that offenders, their victims and their supporters generally have positive experiences in conferences. Compared to offenders and victims in youth or juvenile courts, those in conferences perceive the processes as fair and they are generally more satisfied with outcomes. This suggests that there is merit in exploring ways in which restorative justice processes can be made a major part of youth justice systems. There will continue to be debate about the best mechanisms for translating restorative justice values into practice, but research will continue to be a helpful tool here.

3.5 Diversion from court

8. Every jurisdiction examined accepts the value of diversion from court and so the issue is how best to achieve this. This review suggests that it is necessary to restrict police discretion though there are different ways of doing this. Also, despite legislative (or other policy) intentions, diversion does not always occur and so attempts to encourage it require careful monitoring to ensure that this objective is being realised.

3.6 Diversion from custody

9. This review shows that all of the jurisdictions examined wished to reduce the use of custody for juvenile offenders. However, jurisdictions differed in the extent to which they had been able to achieve this. It appears that, in some jurisdictions, whilst there is political will to reduce the use of custody, the independence of those sentencing can still undermine these intentions. This alerts us to the importance of the commitment of all juvenile justice professionals to the values underlying whatever legislation is implemented and to the need for tight and rigidly applied criteria to restrict the use of custody.

3.7 The range of dispositions available

10. This review has shown that most jurisdictions examined have a range of dispositions available to the courts from discharges to custody. However, those sentencing may need guidance to prevent idiosyncratic, inconsistent and discriminatory sentencing. The jurisdictions reviewed offer a number of alternative ways of achieving this. Clear and consistent guidelines that reflect the overall objects and principles of the jurisdiction's juvenile justice system are an important starting point in the achievement of fair and non-discriminatory sentencing that is consistent in its approach.

3.8 Protecting young offenders' rights

11. In recognition of the special nature of juvenile justice, it is clear that there should be 'specialist' lawyers for children: they should be selected for their skills in the law with respect to children and for their knowledge about children. Given the vulnerability of children and the recognition of their distinctive status, consideration should be given to the provision of legal advice, if not legal representation, at all stages of any proceedings against children, as the UNROC suggests. Given the resources of the children and parents most likely to come into the juvenile justice system, this should be provided at state expense. There are, of course, cost implications here, but a dramatic reduction in the use of custody (as every jurisdiction wishes to achieve) should lead to the release of funds that could be used to offset the cost of legal advice (if the cost of legal representation is not viable).

3.9 Time taken to process cases

12. This review has shown that most jurisdictions examined accepted the importance of dealing with young offenders in a time-frame which is consistent with their sense of time. It also showed a range of ways of trying to achieve this.

3.10 Preventing discrimination

13. Research has consistently shown that different ethnic groups and sexes experience different outcomes in many juvenile justice systems though it is less clear-cut that this is explained by discrimination on the grounds of ethnicity and sex. Sometimes these differences are explained by different patterns of offending. However, the possibility of discrimination remains and steps can be taken to safeguard against this: for example, by setting out criteria for and reviewing decisions. Of

special note here is the provision of custody for girls. In many of the Commonwealth countries reviewed, girls are held with adult female prisoners. Holding girls with adults is in breach of Article 37 of the UNROC that children should be held separately from adults unless it is in their best interest not to do so. It would be difficult to argue that holding girls with adult female offenders is in their best interests.

3.11 Recognition of cultural diversity

14. The inclusion of indigenous processes in juvenile justice systems where possible reflects good practice as it ensures greater legitimacy to these systems and is consistent with the endorsement of restorative justice procedures. At the very least, jurisdictions should demonstrate in the practice of juvenile justice some awareness of and sensitivity to cultural differences.

3.12 Encouraging parental responsibility

15. There is little to suggest that there are significant benefits to be gained from the penalisation of parents for the wrongdoing of their children. Measures to support parents and to encourage them to accept responsibility in a constructive way is preferable.

3.13 Dealing with serious or persistent offenders

16. Given the rarity of serious offending by juvenile offenders and given the difficulty of identifying persistent offenders, care needs to be taken against excessive penalisation of such children to meet media and popular demands. Questions have been raised about the need to deal with these children in the adult criminal justice system. Where a wide range of sanctions are available in the juvenile courts and guidelines are adopted it should be possible to accommodate both the needs of most such children and the need to protect society.

3.14 Risk assessment

17. There are dangers in risk assessment tools. Put crudely, prediction techniques usually get it wrong twice as often as they get in right and there are problems with both over- and under-predicting. Thus, children may be selected for special measures who do not require them and children who may require them remain unselected. If such tools are to be developed, they must be age appropriate and culturally specific and they need to be carefully monitored to ensure their effectiveness.

3.15 Other issues

18. There are a number of other issues that are pertinent to the identification and development of good practice. One of these concerns **multi-agency juvenile justice structures.** It is important, however, to pose questions about which agencies should be involved in such structures and what impact they might have; for example, there may be variation in their aims and in the delivery of services, depending on which is the 'lead' agency. There are also questions about the optimum size for multi-agency teams, how best to establish protocols in relation to the exchange of information, and how best to promote team work when staff from different agencies may well be operating under different terms and conditions and have received training which leads to very different perspectives on how best to proceed.

19. A further key issue concerns **monitoring and evaluation.** Increasingly, monitoring and evaluation is cited as an important way of informing policy-makers on the outcomes of initiatives. An evidence-based approach to effective interventions would involve a conscientious and judicious analysis of interventions (policies, programmes and practices) to achieve positive outcomes with

regard to juvenile justice, but this would also require political, organisational and professional commitment to ensure that legislation, policy and practice reflect the best available evidence. Whilst this remains an ideal, it is not yet clear that all Commonwealth countries have usable data sets. The establishment of comprehensive data sets in terms of offences, prosecutions and other interventions, and their outcomes and impact on offending is a critical step towards evidence-based practice.

4. Concluding comments

20. This review has identified a diversity of juvenile justice policy and practice in the Commonwealth jurisdictions reviewed with respect to a number of key issues. While some of this is understandable in light of the different social, economic, political and cultural systems that exist therein, there is also a case for Commonwealth juvenile justice policy to reflect good practice, so far as this is possible. It is recognised also that some Commonwealth countries are only now developing juvenile justice systems and it may be helpful for them to learn from the experience of other jurisdictions. All Commonwealth countries have ratified the UNROC. As such, they are required to prepare compliance reports and to take heed of any resulting comments from the UN. Law Ministers may wish to consider the role the Commonwealth Secretariat could play in:

- critically examining the issues identified within this short review in more depth;
- critically examining the juvenile justice policy of all Commonwealth countries;
- reviewing compliance reports from Commonwealth countries to assess the extent of compliance with the UNROC and to offer advice where appropriate.

21. The Commonwealth Secretariat is strategically poised to play a critical role both in further advancing progress towards good practice and in aiding those jurisdictions which are at the early stages in their development of juvenile justice policy.

TOWARDS GOOD PRACTICE IN JUVENILE JUSTICE POLICY IN THE COMMONWEALTH

1. Introduction

1. The purpose of this review is to examine juvenile justice policy in different Commonwealth countries to help identify what might constitute good practice. Traditionally, juvenile justice systems have reflected an empirical amalgam of justice, welfare, crime control (punishment) and diversion. However, because these approaches have rather different philosophic bases, the resulting tensions may be resolved differently in different countries. As a result, there is a diversity of juvenile justice policy within Commonwealth countries. There is little consensus on what their juvenile justice systems are trying to achieve or on their core values. This review does not suggest that there is, or should be, only one way of 'doing' juvenile justice. Rather it seeks to identify a number of key issues which all juvenile justice systems have to address, and to review, through legislation and practice, the range of options available within a small number of Commonwealth countries. Also 'good practice' itself is not self-evident, value-free or unequivocal. Thus, this review represents only the beginning of debates about what this might constitute within the Commonwealth.

2. Methodology

2. In identifying the key issues for juvenile justice policy we examined, first, various United Nations documents: the Standard Minimum Rules for the Administration of Justice (United Nations, 1986); the Convention on the Rights of the Child (United Nations, 1989); the Rules for the Protection of Juveniles Deprived of their Liberty (United Nations, 1990); and Guidelines for the Prevention of Delinquency (United Nations, 1990). For the purposes of this Report, we have focused on the Standard Minimum Rules for the Administration of Justice (the Beijing Rules) and the Convention on the Rights of the Child (UNROC). While these United Nations documents can provide a useful starting point, they are, in some respects, dated: juvenile justice policy in the Commonwealth countries reviewed has changed over the past 15 or so years. We next examined the resolution of the Economic and Social Council of the United Nations on Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (www.restorativejustice.org/rj3/Undocuments). Although its primary focus is on adult offenders, it seems highly relevant for future directions in juvenile justice policy given, as we will see, that some Commonwealth countries have taken the lead in developing restorative justice processes for juvenile offenders.

3. The number of jurisdictions discussed is necessarily limited within the time-frame available to us. We chose jurisdictions we were relatively familiar with and/or which had relatively recently reviewed their legislative provision for juvenile offenders. Specifically, we examined legislation (listed in Appendix 1) in Australia, Canada, England, Ghana, New Zealand, Northern Ireland and Scotland and draft legislation in South Africa.[1]. Juvenile justice legislation in some Commonwealth jurisdictions is long, complex and covers a wide range of topics: for example, the objectives and principles of juvenile justice, the rights of children in their interactions with the police and in courts, custody and bail, standard of proof, restorative conferences, the establishment of juvenile courts and its procedures and powers, sentencing orders, dealing with young offenders as adults, and appeals. At this stage of our work, we have been necessarily selective in what we discuss.

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[1] We tried to find out the current status of this Bill. In an email on 31 May 2005 from the Parliamentary Office of the South African Government to the Librarian at the Institute of Criminology, Cambridge, we were informed that the Bill is still going through the parliamentary process. We received no response to follow-up emails on 5 July 2005.

4. Because juvenile justice in action may differ from juvenile justice legislation in some respects, we have also consulted literature that reviewed practice and recent empirical research in these jurisdictions, where available. In some jurisdictions, too, there are recent policy documents relating to juvenile justice. We used these to indicate current concerns and future trends. However, in this task, we were limited by the amount of time we had and by what was readily available to us at the library of the Institute of Criminology, University of Cambridge, in our personal libraries and through internet sources.

5. Within the framework of a short paper, we have chosen not to describe the detail of the juvenile justice systems of the various Commonwealth jurisdictions reviewed, but to provide examples of how they have addressed certain key issues. This review is designed to explore the merit (or otherwise) of examining Commonwealth juvenile justice policy in more depth in the future with a view to drafting model legislation that reflects good practice.

6. One further introductory comment: we have used the terms 'child' or 'children' throughout this paper (except when citing legislation) to be consistent with the Convention, though some legal systems differentiate in their legal provisions between children and young persons or young people in terms of age. Also, some jurisdictions have preferred to describe their systems as 'youth' justice rather than 'juvenile' justice (reflecting the fact that many of the children who come into the system are older). However, we have used the term 'juvenile justice' throughout, except where the context demands otherwise.

3. Key Issues

3.1 Ages of criminal responsibility, prosecution and adulthood

7. Paragraph 2 of the Beijing Rules defines a juvenile as 'a child or young person who under the respective legal system may be dealt with for an offence which is different from an adult'. Thus the Beijing Rules do not apply where children are treated as adults (as, in most Commonwealth jurisdictions reviewed, when they have committed serious offences). As Van Bueren (1995, 171) points out, this is both circular and runs counter to 'logic and common sense' as 'the reason for the special protections and entitlements of children is because of their age and vulnerability not because of the system of trial.' Paragraph 4.1 of the Beijing Rules advocates setting an age of criminal responsibility that is not 'too low ... bearing in mind the facts of emotional, mental and intellectual maturity'. For the purposes of the UNROC, a child 'means every human being under the age of eighteen...unless majority is attained earlier' (Article 1) and Article 40.3 (a) calls for 'the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'

8. There is within Commonwealth countries considerable variation in the age of criminal responsibility, the age of prosecution and the age at which juvenile justice jurisdiction ends. Table 1 in Appendix 2 presents these ages for the countries reviewed. However, it is important to acknowledge that these ages have changed over time to reflect 'modern' considerations and can, no doubt, change again if appropriate. All the Commonwealth countries reviewed have now moved (or intend to move) from the common law age of criminal responsibility of 7 yrs (though it still remains 7 yrs in other Commonwealth countries). However, there is another trend apparent in some of the Commonwealth jurisdictions reviewed to which attention should be drawn: mechanisms for dealing with offences by children under the age of criminal responsibility. Two examples are: in England and Wales, under section 11 of the Crime and Disorder Act 1998, a child under 10 yrs who has committed an act for which s/he might have been prosecuted if over the age of 10 can be made the subject of a 'child safety order' (imposed by a magistrates' family proceedings court). In the Australian Capital Territory (ACT), the police may apprehend children under 10 yrs whose behaviour has the 'physical elements' of an offence (section 72, Children and Young People Act

1999). It has always been possible in some jurisdictions to deal with offending by children under the age of criminal responsibility as a 'care and protection' matter. However, these provisions seek to go further: in effect, they diminish the age of criminal responsibility and in doing so they breach the UNROC.

9. The age of criminal responsibility in Scotland - at 8 yrs - is the lowest in the Commonwealth jurisdictions reviewed.[2] In both Ghana and Canada, the age of criminal responsibility is now 12 yrs – the highest in the Commonwealth jurisdictions reviewed. The most common age of criminal responsibility seems to be 10 yrs (as in England and Wales and all Australian jurisdictions). However, this can be modified by the use of a (rebuttable) presumption that children between the ages of 10 and 14 are not criminally liable since they do not have the capacity to distinguish between right and wrong (doli incapax). This rebuttable presumption used to be applied in England and Wales, but was repealed by section 34 of the Crime and Disorder Act 1998. However, it is still entrenched in common law in some Australian jurisdictions and in statute in others. Generally speaking, the prosecution has to show that the child can distinguish between what is 'right' and 'wrong. The courts decide this on a case-by-case basis since a child's level of understanding will vary according to his or her background, education and maturity. Case law has said that there must be evidence that the child knew that what s/he was doing was 'seriously' wrong or that the act was wrong 'according to the ordinary standards of reasonable people'. The most common form of evidence used by prosecutors to rebut the presumption is statements made by the child to the police. It cannot be presumed from the mere commission of the act. However, there are slight differences in the statutory formulations between Australian jurisdictions: in some, there must be evidence that the child actually knows that his or her conduct is wrong. In others, the presumption is phrased in terms of the child's 'capacity to know' – a broader evidentiary test (e-mail communication, Director, Children/s and Youth Law Centre, Sydney, Australia, 31.08.5).

10. The Child Justice Bill 2002 in South Africa (which will raise the age of criminal responsibility from 7 to 10 yrs) introduces the presumption and seems to go further than the previous practice in England and Wales and the current practice in Australia by insisting that, if the prosecutor intends to prosecute a child below the age of 14 yrs, defence counsel must be appointed and s/he can have the child tested (at state expense) to assess his or her state of emotional, cognitive, social or psychological development.

11. New Zealand takes a slightly different approach to achieve the same aim: it distinguishes between the age of criminal responsibility (10 yrs) and the age of prosecution (14 yrs). As a result, those aged 10 to 14 who commit offences cannot be prosecuted (except for murder or manslaughter) though, from 10 yrs, they are viewed as criminally responsible for their offending (and can be dealt with through care and protection proceedings, police warning and police diversion and, in certain circumstances, youth justice family group conferences).

12. Juvenile justice jurisdiction ends in Scotland at 16 yrs – again the lowest in the Commonwealth countries reviewed. Children who come into the system before this age may remain until the age of 18. In practice, however, most offenders after the age of 16 are dealt with in the adult criminal courts (McAra, 2002, 454-456). Offenders in New Zealand are treated as adults at 17 yrs. In most jurisdictions in Australia, juvenile justice jurisdiction also ends at 17 yrs, except in Victoria and Queensland where jurisdiction ends at 16 yrs. The juvenile justice systems of these jurisdictions, arguably, breach the UNROC. In line with the UNROC, juvenile justice jurisdiction normally ends in Canada, England and Wales, Ghana and South Africa when the offender reaches 18 yrs.

13. These differences in the age of criminal responsibility and the age at which juvenile justice jurisdiction ends are only to be expected: Commonwealth countries reflect diverse social, economic,

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[2] The Advisory Group on Youth Crime has recommended that this be increased to 12 yrs (Scottish Executive, 2000).

cultural and political systems. However, there is also merit in some common standards and, at the very least, it seems appropriate, in line with the UNROC, for offenders to be treated as 'juveniles' until the age of 18 yrs.[3] The age of criminal responsibility was traditionally viewed as the age at which societies were willing to punish child offenders and so 'higher' ages were seen as protective. Given the shifts in emphasis in the aims of juvenile justice (discussed in section 3.3), there may be less reason to protect children from restorative or rehabilitative intervention and so 'lower' ages of criminal responsibility may be more acceptable. A good compromise is offered by distinguishing between the age of criminal responsibility (which could be low) and the age of prosecution (which could be high).

14. Because of public and media concerns in some of the Commonwealth countries reviewed, serious offenders can be dealt with as adults. We deal with this further in section 3.13. However, we want to make a particular point here: we need to distinguish between trial procedures and penalties. Young children are unlikely to be capable of understanding and participating in court proceedings. This was the test used by the European Court of Human Rights in T v. United Kingdom (2000) 30 EHRR 121 which held that two boys convicted of the abduction and murder of a small boy had been denied a fair trial. It held that procedures put in place to aid their understanding and participation were inadequate. Changes to procedures are possible, as has been done in some countries with respect to child victims (to make trial processes more bearable). But the issues are perceived somewhat differently with respect to child offenders; they do not receive the same sympathy or understanding. However, trials in adult courts for children are relatively rare and questions can be raised about their value. Consideration could, therefore, be given to legislating for a higher age of prosecution, even for offences of murder and manslaughter (children below this age who committed serious or persistent offences could still be dealt with under care and protection mechanisms). An alternative approach is to treat all individuals under the age of 18 yrs as juveniles for criminal justice matters, as the UNROC suggests. With respect to the imposition of 'adult' penalties, age should continue to be a major mitigating factor. Treating only child offenders who commit certain offences as vulnerable and in need of special protection has little logic. The reason for introducing exceptions to the juvenile justice system and for treating child offenders as adults is the re-assertion of public protection as a priority in juvenile justice policy. We consider this further in section 3.3 where we discuss the aims of the juvenile justice. But first we want to elaborate on the point made above about new ways of dealing with anti-social, but non-criminal, behaviour.

3.2 Dealing with antisocial behaviour

15. Paragraph 3 of the Beijing Rules states that the Rule should apply not only to children who have committed criminal offences, but also to children who have committed what would conventionally be described as 'status offences' – acts which would not be punishable if committed by an adult. Many jurisdictions took steps in the 1970s to remove the regulation of status offences from their juvenile justice systems. However, there has been a revival of sorts in some of the Commonwealth jurisdictions reviewed and we provide one example here.

16. Under section 14 of the Crime and Disorder Act 1998, children under 10 yrs in England and Wales can be made the subject of a 'local child curfew' which involves placing a ban on unsupervised children between 9 pm and 6 am within specified public areas for up to 90 days. This power was extended in the Criminal Justice and Police Act 2001 to children under 16 yrs. Also, in England and Wales, the local authority and police in consultation with each other can apply for a civil court order - an anti-social behaviour order - against an individual (aged 10 yrs and above) whose behaviour is

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[3] In countries where records of birth are not always kept, a child's age can be an issue and guidance should be provided to help juvenile justice agencies determine this: see, for example, section 19 of the Juvenile Justice Act 2003 (Ghana), section 24 of the Child Justice Bill (South Africa), section 57 of the Young Offenders Act 1993 (South Australia) and section 6 of the Youth Justice Act 1997 (Tasmania).

anti-social (section 1(1), Crime and Disorder Act 1998).[4] It has effect for a minimum of two years (with breach being punishable by imprisonment or age-related alternatives). However, restrictive orders such as these, which need only be proved to the civil standard of proof, and breach of which may result in significant sanctions, have been challenged both in principle and in practice: for example, they blur the boundaries between criminal and civil proceedings, their scope is wide and their penalties are disproportionate to the behaviour (Burney, 1999; Padfield, 1998). Because of this failure to provide adequate safeguards, such orders are in breach of the Beijing Rules. Steps should be taken either to ensure compliance with these Rules or to abolish these orders.

3.3 The aims of juvenile justice

17. As noted in the introduction, most juvenile justice systems are an empirical amalgam of justice, welfare, crime control and diversion. The emphasis given to these different approaches can vary from jurisdiction to jurisdiction and across time in particular jurisdictions. Paragraph 5.1 of the Beijing Rules emphasises the well-being of the juvenile and also refers to 'any reaction' being 'in proportion to the circumstances of both the offenders and the offences.' Paragraph 17 expands on these statements and refers to reactions being in proportion 'not only to the circumstances and gravity of the offence but also to the circumstances and needs of the juvenile as well as the needs of society.' Article 3 of the UNROC echoes these sentiments: it states that in all actions concerning children, the best interests of the child should be a primary consideration; and Article 40 states, among other requirements, that children who have committed offences should be treated with dignity, should be reintegrated into society, and should be dealt with so far as possible without resorting to judicial proceedings provided their rights are safeguarded.[5] It also states that children should be dealt with 'in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.' The United Nations Guidelines for the Prevention of Delinquency (the Riyadh Guidelines) further promote ways in which children can be integrated into society.

18. There are three main problems with these international documents. First, the Beijing Rules complicate matters by introducing ideas about public protection without clear guidance about how to prioritise competing claims (though it does assert that the well-being of the juvenile should be the 'guiding factor'). Second, proportionality of sentences with respect to offences is a recognised component of a justice or just deserts approach (see, for example, von Hirsch and Ashworth, 1998; von Hirsch, 2001). However, coupling this with proportionality with respect to the circumstances of the offender is a further complication and it is difficult to see how this can be translated into practice (if, for example, the offence is minor but the offender's circumstances are grave). Third, the primacy of 'best interests' of the child is now widely questioned. Indeed, some years prior to the UNROC, commentators (Allen, 1964; Goldstein et al., 1973) were already questioning the objectivity of this notion and described it rather as hypocritical and as concealing the real reasons for state intervention. It seems to mean that, under the UNROC, children who offend could be dealt with (including being placed in custody) for welfare reasons. Some of the Commonwealth countries reviewed (for example, New Zealand and Canada) explicitly prohibit this (although other jurisdictions - for example, Scotland and Ghana – continue to see 'best interests as a primary consideration in matters relating to juvenile offenders.

19. The Commonwealth jurisdictions reviewed all pay some regard to the content of these UN documents with respect to the aims of juvenile justice policy, but language and emphases have also changed over the last 15 years so that reconciliation, reparation and restoration are stressed now, as

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4 Scotland has also expressed the intention to introduce anti-social behaviour orders.

5 In addition, it states that all children should be presumed innocent until proven guilty, should be informed of the charges against them, should appear before competent authorities, should not be compelled to incriminate themselves, should be able to have decisions involving them reviewed, should have free access to interpreters and should have their privacy respected. We have not commented on these as they are not contentious and, in the main, the Commonwealth jurisdictions reviewed endorsed them.

well. Most Commonwealth jurisdictions reviewed have also now separated procedures for dealing with abused and neglected children and children who offend (some have quite separate legislation dealing with the two groups while others deal with them in different parts of the same legislation). Scotland is an exception here. Scotland has taken a completely different direction from juvenile justice policy elsewhere: it introduced a welfare-based juvenile justice system in the Social Work (Scotland) Act 1968 and this was implemented in 1971. This involved abolishing the existing juvenile courts and creating children's hearings which deal not only with children who offend, but also abused or neglected children, and children who have truanted or are beyond parental control. The critical test is whether or not the child is in need of compulsory measures of care. The juvenile justice system in Scotland has remained largely unchanged since then, but it was given a new statutory framework in the Children (Scotland) Act 1995. Section 16[1] affirmed that hearings and courts are to deal with the child who offends in such as way that 'the welfare of that child throughout his childhood shall be...[the] paramount consideration' (though it also said that the primary role of welfare could be reduced if it was necessary for the protection of the public from serious harm). Other jurisdictions, as noted earlier, have also continued to assert the best interests of the child as the paramount consideration (for example, the ACT and Ghana).

20. Taking some steps to set out what the juvenile justice system is trying to accomplish is an important preliminary task for legislatures as these objectives and principles can then be relied on to guide practice and to measure the system's effectiveness in meeting its objectives. Most of the Commonwealth jurisdictions reviewed have done this. A few examples are provided here.

21. The Children, Young Persons and Their Families Act 1989 in New Zealand was the first example of legislation which set out a number of general objects and principles for dealing with children. Section 4, for example, refers to promoting the well-being of children by having culturally sensitive and appropriate procedures and services and to assisting families and specifically states that young offenders should be dealt with in a way that 'acknowledges their needs' and that gives them the opportunity to develop in 'responsible, beneficial and socially acceptable ways'; and section 5 refers to the principle that consideration should be given to the wishes of the child. The Act also sets out, in section 208, a number of principles that relate specifically to youth justice: it refers to the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child if there is an alternative means of dealing with the matter; it refers to the principle that a child who commits an offence should be kept in the community as far as practicable; it refers to having due regard to the interests of any victims; and it states that any sanctions imposed should take the least restrictive form that is appropriate in the circumstances.

22. The Youth Criminal Justice Act 2002 in Canada states that its aims are: to prevent crime by addressing the circumstances underlying offending; to rehabilitate and reintegrate the offender and to ensure the young offender is subject to meaningful consequences 'in order to promote the protection of the public' (section 3[1]). These sentiments, as we will see, are echoed in the sections relating to the purposes of sentencing. Section 3[1] also distinguishes between the treatment of young and adult offenders by emphasising the importance of rehabilitation and reintegration, fair and proportionate accountability, young offenders' rights and timely interventions; it advocates measures which reinforce respect for social values, which encourage the repair of harm to victims and the community and which respect gender, ethnic and other differences; it stresses that victims should be treated with dignity and compassion, provided with information and given the opportunity to participate; and it advocates encouraging parents to support their children in addressing their offending.

23. As Doob and Sprott (2004, 226) note, although the words 'protection of the public' appear in the Canadian legislation, the emphasis is not on incapacitation and deterrence, but on rehabilitation, reintegration and accountability. This is an important change as setting out objectives does not necessarily make practice easier if these objectives themselves reflect different directions. We take some examples here from Australian legislation which generally endorses many of the

'restorative' principles already mentioned but include other conflicting values too: for example, section 3 of the Young Offenders Act 1993 (South Australia) refers to public protection and deterrence as well as 'the care, correction and guidance necessary for their development into responsible and useful members of the community.' Section 4 of the Youth Justice Act 1997 in Tasmania includes among its main objectives ensuring that young offenders are given 'appropriate treatment, punishment and rehabilitation'. Section 5 then includes as 'general principles of youth justice' protecting the public and punishment appropriate to the offender's previous offence history alongside encouraging acceptance of responsibility, involving victims and offenders' families, and the use of custody as a last resort. In Western Australia, section 6 of the Young Offenders Act 1994 refers to the main objectives of the Act as rehabilitating, punishing and managing young offenders; section 7 lists the general principles of juvenile justice and this includes protecting the community. Unless restricted in meaning, references to public protection and punishment allow traditional criminal justice values to retain their hold.

24. In England and Wales, section 37 of the Crime and Disorder Act 1998 provides that the principal aim of the youth justice system is to prevent offending by children and that, in addition to any other duty to which they are subject, 'it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to that aim'. However, this was introduced without section 44 of the Children and Young Persons Act 1933 being repealed and, in that legislation, it is stated that the 'courts should have regard to the welfare of the child or young person, and [they] shall in a proper case take steps...for securing that proper provision is made for his education and training.' Thus those sentencing must now have regard to the new aim, but they are given no guidance as to how, in individual cases, they should balance the potentially conflicting aims of having regard to the welfare of the child and the prevention of offending. To help resolve this matter, the Government has outlined the need for a single main sentencing purpose of 'preventing offending' (Home Office, 2004). This has not been settled yet, but the debate around this serves to highlight both the difficulty of identifying the main aims of juvenile justice and the problem of legislating conflicting aims. The notion of 'preventing offending' as a sole aim is problematic as it does not provide guidance on how this is to be achieved: whether through rehabilitation, punishment, reconciliation or some other mechanism.

25. Setting out in legislation the juvenile justice system's aims, values and principles is good practice.[6] These can then be relied on to guide practice and to measure the system's effectiveness in meeting its objectives. However, these aims, values and principles should be tied together in a coherent framework and should not lead decision makers in conflicting directions. Examples of the values and principles which could be endorsed are: recognition of children's vulnerability and developmental stages; restoration and reintegration; diversion from court and custody; fairness; due process; and the accommodation of diversity. They should be clear in their purpose and transparent.

3.4 Restorative justice processes and juvenile justice

26. The resolution of the Economic and Social Council of the United Nations says that restorative justice should be available at all stages of the criminal justice process (Principle 6); they should be used only with consent of the parties, parties should be able to withdraw consent at any time during the process, the agreements arrived at should be voluntary and agreements should

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[6] For other example, see also, in the ACT, sections 10-14 and 68 of Children and Young People Act 1999; in Queensland, section 2 of the Juvenile Justice Act sets out the principal objectives of the Act; and Schedule 1 sets out a charter of juvenile justice principles; in South Australia, section 3 of the Young Offenders Act 1993 sets out the objects of the Act; in Tasmania section 4 of the Youth Justice Act 1997 sets out the main objectives of the Act and section 5 then sets out 'general principles of youth justice'; in Western Australia, section 6 of the Young Offenders Act 1994 sets out the main objectives of the Act and section 7 sets out the general principles of juvenile justice; in NSW, section 3 of the Young Offenders Act 1997 sets out the objects of the Act, section 7 sets out the principles underlying warning, cautions and youth justice conferences and section 34 sets out the principles and purposes of conferences. For South Africa, see sections 2 and 3 of Child Justice Bill.

contain only reasonable and proportionate obligations (Principle 7); all parties should acknowledge the basic facts of a case as a basis for participation and participation should not be used as evidence of admission of guilt in subsequent legal proceedings (Principle 8); disparities with respect to power imbalances, age, maturity or intellectual capacity should be taken into consideration in referring a case to and in conducting a restorative process (Principle 9); the parties should have the right to legal advice before and after the restorative process and to translation and/or interpretation, minors should have the right to parental assistance, before agreeing to participate, the parties should be fully informed of their rights, the nature of the process, and the possible consequences of their decision and neither the victim nor the offender should be induced to participate in restorative processes or outcomes (Principle 12); discussions in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties (Principle 13); where no agreement, case should be referred back and decision as to how to proceed taken without delay; a lack of agreement should not be used as justification for a more severe sentence in subsequent criminal justice proceedings (Principle 15); failure to implement an agreement made should be referred back and a decision as to how to proceed should be taken without delay and failure to implement the agreement should not be used as justification for a more severe sentence in subsequent criminal justice proceedings (Principle 16).

27. Most of these principles are not controversial (though some commentators question the relevance of proportionality in restorative agreements), but, perhaps surprisingly, the principles seem to advocate against using restorative processes for young offenders who have adult victims because of potential power imbalances (Principle 9 above). However, some of the Commonwealth countries reviewed have taken the lead here and have now incorporated restorative justice processes into their juvenile justice systems. These processes also give good effect to another requirement of the UNROC. Article 12 advocates taking account of children's views in any judicial or administrative hearing affecting them.

28. Van Ness et al. (2001, 6) described as the 'hallmarks' of restorative justice practice victim-offender mediation, conferencing, and sentencing circles. Only restorative conferencing is discussed here as this is the most common example of restorative justice processes in the Commonwealth countries reviewed.[7] Such processes share the values of empowering young offenders, families, and victims by giving them a role in the decisions about how best to respond to offending and thereby reducing the powers of professionals who must take these parties' views into account. However, not all examples of restorative conferencing operate the same way. For example, in some jurisdictions, variants of restorative conferencing are primarily managed by the police (as in parts of England); in some, they are managed by the youth courts (as in South Australia); in some, they are managed by social welfare agencies (as in New Zealand); and, in some, they are managed by organisations which rely on facilitators or convenors recruited from the community (as in Queensland). In some jurisdictions, restorative conferencing has a statutory basis (as in New Zealand and most Australian states and territories); in others, it does not (as in Victoria and the ACT).[8] In some jurisdictions, restorative conferencing deals with minor to medium serious and/or first offenders (in Western Australia, for example, Schedules 1 and 2 of the Young Offenders Act 1994 lists offences which cannot be cautioned or referred to a juvenile justice team (for consideration of a conference). These are the more serious offences.); in other jurisdictions, restorative conferencing deals with the more serious and repeat offenders (as in New Zealand and South Australia). In some jurisdictions, restorative conferencing can be used to restrict the police referring cases directly to court (as in New Zealand), as part of police diversion (as in most Australian states and Canada) or as an aid to judges' decision making (as in New Zealand, most Australian states and Canada though only in New Zealand is it mandatory to do so). In Victoria, restorative conferences are only used as an alternative to a supervised order for more serious offenders with prior offences. Restorative conferences also differ

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7 For more information on sentencing circles in Canada, see Lilles, 2001; and for information on victim-offender mediation, see Marshall and Merry, 1990 and Umbreit et al., 1998.

8 There is provision in the ACT legislation for family group conferences in care and protection matters.

in various jurisdictions in the limits on the types of outcomes permitted[9] and in who has to agree to the outcome.[10]

29. Having highlighted some differences, restorative conferences nevertheless tend to operate in similar ways. The young offender (who must admit the offence), his or her parents or other supporters, any victim who wishes to attend and his or her supporters, a police officer (s/he need not be present in some jurisdictions) and a conference convenor meet to discuss the reasons for the offence, its impact and how best to deal with it. These agreements may involve apologies, reparation, and community work or service for the victim. Where the conference is used as a diversion from court, this agreement is a legally binding document. Where the conference has resulted from a referral by a judge, the agreements are advisory only, but (certainly in New Zealand) are usually followed.[11]

30. Research on restorative conferencing shows that, to a large extent, it has achieved the key restorative aims of involving offenders, victims and supporters, achieving agreement about a co-operative and constructive response to offending, healing victims' hurt and holding offenders accountable (Weitekamp and Kerner, 2003). Research also shows that offenders, their victims and their supporters generally have positive experiences in conferences. Compared to offenders and victims dealt with solely in juvenile courts, those who participated in restorative conferences tend to perceive the processes as fair and they are generally more satisfied with their outcomes (Maxwell et al., 2004).

31. Included here is a brief discussion of attempts to introduce restorative justice in England and Wales. First, the Crime and Disorder Act 1998 introduced local multi-agency youth offending teams (YOTS) where young offenders could be offered a range of restorative interventions including direct or indirect mediation, family group conferences or restorative conferencing. Holdaway et al.'s (2001) evaluation of these teams found that not all were offering the full range of restorative interventions; consultation with victims was sometimes overridden by the need for speedy justice; and the compulsory nature of reparation under the 1998 Act means that reparation had become 'routine' rather than 'meaningful'. The nature of some of the activities organised as part of reparation orders has also raised some disquiet. Holdaway et al. (2001) found a strong emphasis on practical tasks such as litter collection or conservation work. Some of those interviewed for the evaluation of the pilot reparation projects described such activities as 'a form of junior community service with minimal reparative benefits' (Dignan 2000, 24).[12]

32. Second, referral orders, introduced in the Youth Justice and Criminal Evidence Act 1999 were a further attempt to provide elements of restorative justice as a mainstream response to offending in England and Wales. Young offenders coming before the youth court for the first time and who plead guilty to their offence have to be referred by magistrates to youth offender panels (YOPs) unless either an absolute discharge or a custodial sentence is considered appropriate. The purpose of these panels is to agree a contract (designed to emphasise responsibility for offending. to prevent re-offending, to achieve reintegration and to make reparation). The panels, established by

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9 For example, outcomes are fairly limited in Western Australia whereas, in South Australia, the conference can impose up to 300 hours of community service.

10 For example, in South Australia, the young person and the police officer must, at a minimum, agree; in NSW, the young person and victim (if present) must agree and in Queensland, the young person, the police officer and the victim (if present) must agree.

11 There seems to be a shift occurring with respect to the role of family group conferences in New Zealand. The youth offending strategy states that family group conferences "are particularly appropriate for those youth who need to be held accountable for their offending, but who are succeeding in other parts of their lives and have few other problems that require any intervention" (Ministry of Justice and Ministry of Social Development 2002, 35). Only time will tell whether or not this, in reality, signifies a return to reliance on decision-making by professionals on how to deal with offending and a change in the role and influence of family group conferences.

12 See also the critical comments of Morris and Gelsthorpe (2000) and Gelsthorpe and Morris (2002).

YOTs, consist of three members - one from the YOT and two from a pool of community volunteers, as well as a parent or guardian, the young offender and the victim. The referral to the panel (the referral order) is the only sentence imposed by the magistrates and the offender can only be taken back to court if s/he fails to comply with the agreed contract. Most panel meetings end in agreements with reparative elements and most contracts are successfully completed (Newburn et al. 2001). The referral orders were piloted in 11 areas, but became nationwide in 2002. However, some commentators continue to question the extent to which these orders fully reflect restorative justice values (Ball, 2000; Morris and Gelsthorpe, 2000).

33. According to Bottoms and Dignan (2004, 164), restorative justice initiatives have barely taken off in Scotland (though there are plans to encourage the police to administer restorative cautions). Even though some commentators have suggested that children's hearings could be adapted to meet restorative objectives, the system would, in our view, need considerable changes: the ethos is strongly oriented to the welfare of the child, there is no right for victims to attend children's hearings and current dispositions are limited and do not encompass restorative outcomes.

34. In Ghana, Mensa-Bonsu (2005) writes that there were attempts to replicate traditional victim/offender mediation practices by setting up a system of child panels to operate in both civil and criminal matters in an extra-judicial manner. However, according to her (2005, 17) 'no firm steps have been taken to actualise the legal intent'. The main reasons given for this were a lack of funding and restrictive statutory requirements (for example, that the panels meet once in three months). This example can serve as a cautionary tale.

35. This review of restorative practice suggests that there is merit in exploring ways in which restorative justice processes can be made a major part of juvenile justice systems though different jurisdictions may well have different motivations for doing this. Receptivity to restorative justice ideas may be contingent on other political developments. In South Africa, for example, it is arguably the context of political transition and the strong theme of reconciliation that has fuelled the desire to include restorative justice principles in the proposed new system of dealing with child offenders (Skelton, 2002). A similar point can be made about the interest in restorative justice in Northern Ireland (McEvoy and Mika, 2002). In England and Wales, it seems that it was the growing emphasis on victims' interests that provided a fertile ground for debates about and moves towards the incorporation of elements of restorative justice (Zedner, 2004). Restorative justice processes are, of course, not without their critics. However, many of their concerns can be addressed (see Morris, 2002, Weitekamp and Kerner, 2003 and Zehr and Toews, 2004 for more information). There will also continue to be debate about the best mechanisms for translating restorative justice values into practice,[13] but research will be a helpful tool here.

3.5 Diversion from court

36. Paragraph 11 of the Beijing Rules advocates that consideration should be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal hearings and, in particular, identifies the importance of the role of the police and prosecutors in disposing of cases in this way. It also alerts us to the dangers of such agencies putting undue pressure or coercion on children to consent to diversion and the need to have procedures to prevent this (for example, a review of the decisions made). Article 37 of the UNROC states that children should be arrested only as a measure of last resort and Article 40.3(b) advocates, wherever appropriate and desirable, dealing with children without resorting to judicial proceedings provided their legal rights are fully respected. The documents are premised on the need to protect children from stigma and contamination and

[13] It appears, for example, that restorative conferences in some jurisdictions are relatively successful at reflecting a victims' perspective (see, for example, Strang, 2001; Maxwell et al., 2004). In contrast, Newburn et al. (2001) noted the very low level of attendance by victims at youth offender panels (only 6 per cent had victims present) and that, in a significant minority of panel meetings (25 per cent), no mention was made at all of the victim's perspective.

diversion is widely accepted as a key part of modern juvenile justice policy generally and in the Commonwealth jurisdictions reviewed in particular. However, there are concerns: for example, net-widening, discriminatory practices, a lack of procedural safeguards (Pratt,1986; Davis et al., 1989; Skelton, 2001; Muncie, 2004). Legislation can attempt to address these.

37. The potential role of restorative conferences, in the Commonwealth jurisdictions reviewed, in keeping young offenders out of courts has already been mentioned. The Commonwealth jurisdictions reviewed have also encouraged the use of police warnings (both formal and informal) to keep young offenders out of courts though their approach to achieving this differs somewhat. Some jurisdictions have allowed the police simply to exercise their discretion in this matter; other jurisdictions have set out the requirements for a police caution or warning in legislation, but, even there, the language and criteria referred to differ, as do the mechanisms for controlling this discretion.

38. For example, in Ghana, the police may caution or warn a juvenile if it is in the best interests of the juvenile to do so (section 12 of the Juvenile Justice Act 2003). Section 25 also provides that juveniles can be dealt with outside the criminal justice system if it is in the best interests of the child to do so, but, significantly here, it is the courts that make this decision. Section 26 specifies the purposes of diversion and these include: encouraging the offender's accountability, promoting the offender's reintegration, providing the person or community affected by the harm with the opportunity to express their views on the impact of the harm, promoting reconciliation between the offender and the person or community harmed and preventing stigmatisation. These purposes are clearly as much restorative in intent as diversionary. Section 27 sets out minimum standards for diversion programmes. They should not be harmful or interfere with schooling and they should give the offender useful skills, be age appropriate and promote the offender's well-being.

39. In the ACT, under section 81 of the Children and Young People Act 1999, a police officer cannot institute a prosecution unless an 'authorised officer' (an officer not involved in the investigation of the alleged offence) has consented in writing and, in deciding whether or not to consent to a prosecution, s/he must take into account a range of factors, for example, the seriousness of the offence, any previous court findings or police warnings, the child's age, maturity and mental capacity, parental attitudes, and the prevalence of such offences. In New South Wales, section 14 of the Young Offenders Act 1997 says that children may be entitled to be dealt with by a police warning, but not if the offence is a violent one and the police officer feels it more appropriate, 'in the interests of justice', to deal with the offence in a different way. Section 20 refers to the entitlement to a police caution in similar terms, but, this time, the police officer must consider: the seriousness of the offence, the degree of violence involved, the harm to the victim, the child's previous offence history, and any other matter thought appropriate. If a warning or caution is not considered appropriate, the officer must refer the child to a specialist police officer for consideration of a restorative conference. Section 37 sets out similar conditions for entitlement to be dealt with by a restorative conference. Police in Queensland must also consider dealing with children in ways other than by starting proceedings if it is 'more appropriate' and if the offence is not 'serious' (section 11 of Juvenile Justice Act 1992). The officer must consider here the circumstances of the offence and the child's prior history.

40. In Canada, though the Young Offenders Act had encouraged the police to keep young offenders out of the courts, in practice this did not always happen. As a result, the Youth Criminal Justice Act 2002 introduces much firmer guidelines that have to be followed. Section 4[d] states that measures outside of formal referral to court such as warnings and referrals to community programmes are presumed adequate to hold young offenders accountable for their offending if they have committed a non-violent offence and have not previously been found guilty of an offence; it also states that having been found guilty before or having experienced extra-judicial measures before should not preclude such measures again if they are adequate to hold the young offender accountable.

Thus the police are required to consider non-court approaches to holding young offenders accountable for their offences in all cases before starting judicial proceedings (section 6[1]).

41. In New Zealand, police actions are also controlled, in part by guidelines, but also through the family group conference which restricts direct access to courts. Frontline police there determine whether to deal with the young offender informally, by warning, by arrest,[14] or by referral to police youth aid (a branch of the police who specialise in working with children) who will in turn decide whether to warn, to divert (this involves some action in addition to a warning), or to refer the young offender to a family group conference. This means that the police cannot refer young offenders who have not been arrested to the youth court without first having a family group conference; most of these conferences end in an agreement that does not involve a court appearance.

42. The Child Justice Bill 2002 in South Africa introduces the notion of a preliminary inquiry to establish whether or not the child can be diverted and, if so, which diversion option should be followed (section 25).[15] Prior to this inquiry, a probation officer will assess the young offender and s/he may recommend that the child should be diverted (sections 19-24). The preliminary inquiry involves a discussion presided over by a magistrate and the child, his or her parents and the probation officer must attend. The police and the child's legal representative may attend the inquiry. It is, however, the prosecutor who has the final say on whether or not the matter can be diverted (section 39). The purposes of and criteria for diversion are covered in Chapter 6 of the Bill (sections 43 and 44). Section 45 sets out the minimum standards applicable to diversion (such as it should promote the child's dignity and well-being, impart useful skills, contain restorative justice elements and not be harmful); and section 47 introduces a range of innovative diversion options. These options include: apology, compensation, a formal caution, a compulsory school attendance order, a family time order (which requires the child to spend a specified number of hours with his or her family), a positive peer association order, and a good behaviour order. Options are set out in three levels (level one is the least onerous and level three is the most onerous) and this determines also the length of time the order is in force. Referral to appear at a family group conference or victim-offender mediation is a level two diversion option (sections 42 and 43 provide the detail here). Level three diversion options are only available for children over 14 where the court is likely to impose a sentence of imprisonment not exceeding six months and, consequently, are more 'severe' than diversionary outcomes possible in any other Commonwealth jurisdiction reviewed: for example, referral to a programme for a period not exceeding six months including a residential element which does not exceed 35 days in total and 21 consecutive days during the operation of the programme is a level 3 diversion option.

43. In England and Wales, although the police make the preliminary decisions about how to proceed, there is an attempt there now to involve others. Formal police action results either in a reprimand or a final warning (section 65 (1) of the Crime and Disorder Act 1998). A final warning initiates a referral to the local YOT for an assessment of what intervention may be required to reduce the likelihood of offending. The YOT (comprising of at least a social worker, a probation officer, a police officer, a person nominated by the local health authority, a person nominated by the local education authority and a YOT manager) then provides such programmes of rehabilitative intervention as are required. The Criminal Justice Act 2000 removed the requirement that a police reprimand or warning had to be given at a police station and this opened up the possibility of 'restorative conferences' at which parents, victims and others could attend (Young and Goold, 1999). However, to date there is little conclusive evidence to suggest either that the new system is

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[14] A child or young person may only be arrested in New Zealand in certain statutorily defined situations: to ensure their appearance at the youth court, to prevent the commission of other offences, to prevent the loss or destruction of evidence or interference with witnesses, when it is required in the public interest, and when the offence is "purely indictable." Only juvenile offenders who are arrested will appear in the youth court and this is usually under a fifth of those who come to police attention.

[15] It also enables the prosecutor to assess whether or not the case should process to trial and determines the release or placement of the child prior to the court hearing.

experienced as more participative by young offenders (Holdaway et al., 2001), that it is functioning in a systematic fashion or that it is having a major impact on the number of cases referred to court. There is still evidence of relatively minor cases being sent to court there (Audit Commission, 2004).[16]

44. Every jurisdiction examined accepts the value of diversion from court and so the issue is how best to achieve this. This review suggests that it is necessary to restrict police discretion though there are different ways of doing this. Also, despite legislative (or other policy) intentions, diversion does not always occur and so attempts to encourage it require careful monitoring (discussed in section 3.15) to ensure that this objective is realised.

3.6 Diversion from custody

45. Paragraphs 13 and 19 of the Beijing Rules state that children should be detained or imprisoned only as a measure of last resort and for the shortest period of time. Article 37 of the UNROC also states this. Both documents further refer to alternatives to custody, holding young offenders separately from adults and providing constructive activities within custodial regimes. The reasons for encouraging diversion from custody (both pre-trial and as a sentence) are widely accepted: for example, custody is expensive (the annual cost of a place in a youth offender institution in England is over £50,000 (National Audit Office, 2004)) and it is viewed as largely ineffective (Social Exclusion Unit, 2002; NACRO, 2003; Committee of Public Accounts, 2004; Muncie, 2004). Legislation can aid efforts to reduce the number of children in custody. For example, it can set out the situations in which custody is warranted; it can impose time limits to custody; and it can demand that reasons should be given where custody is used. The Commonwealth jurisdictions reviewed provide some examples of these.

46. Canada's legislation has placed restrictions on the pre-trial detention of juvenile offenders. Courts are expected to presume that such detention is not necessary if it is unlikely that, on being found guilty, the young offender would not, in fact, be committed to custody (Youth Criminal Justice Act, section 29[2]). Section 29[1] explicitly prevents pre-trial detention on the grounds of welfare.[17] In Ghana, section 23 of the Juvenile Justice Act 2003 imposes a seven-day limit on a remand warrant and the total period of remand cannot exceed three months or six months in the case of a capital offence.

47. To restrict the use of custody as a sentence, the Canadian Youth Criminal Justice Act, section 39[1] makes it clear that custody can be imposed only if certain conditions are met: if the young offender has committed a violent offence; if the young offender has previously failed to comply with more than one non-custodial sentence; if the offence is moderately serious; and if the young offender has a history of findings of guilt. In 'exceptional' cases, however, custodial sentences would also be appropriate if the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purposes and principles of sentencing. The maximum amount of custody set out in the Act is two or three years of custody and supervision for all offences except murder. Where custody is imposed, judges must give their reasons. The overall intent of these provisions, therefore, is clear: to limit the use of custody. In addition, to accomplish the aim of reintegration, one third of any custodial sentence is normally to be served in the community and the Act provides possibilities for additional non-custodial sanctions (though it will be up to provinces which of these, if any, they provide).

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[16] See also Young and Hoyle's (2002) critical evaluation of the restorative cautions and conferences in the Thames Valley Police Authority.

[17] However, judges can refer a young offender to a child welfare agency to determine whether or not s/he is in need of their services (section 35).

48. Legislative directives, however, are not always successful. In England and Wales, for example, despite an initial decrease in the use of custody following the reform of the juvenile justice system in 1998 and the existence of criteria which magistrates (and judges) had to refer to to justify custody (basically, these were the seriousness or persistence of offending), the use of custody has risen again there (Audit Commission, 2004).[18] There have also been concerns about geographical variations in the use of custody[19] and about the overuse of custody for young black offenders (NACRO, 2003). Indeed, the Youth Justice Board published figures in 2002 which showed that, if there was greater consistency in sentencing practices from area to area in England and Wales, as many as 2,500 young offenders would be diverted from custodial to community sentences.[20]

49. Again, this review shows that all of the jurisdictions examined wished to reduce the use of custody for juvenile offenders. However, jurisdictions differed in the extent to which they had been able to achieve this. It appears that, in some jurisdictions, whilst there is political will to reduce the use of custody, the independence of those sentencing can still undermine these intentions. This alerts us to the importance of the commitment of all juvenile justice professionals to the values underlying whatever legislation is implemented and of the need for tight and rigidly applied criteria to restrict the use of custody.

3.7 The range of dispositions available

50. Paragraph 18 of the Beijing Rules advocates having 'a large variety of disposition measures' available to allow flexibility and to avoid custody. Most Commonwealth jurisdictions reviewed have a wide range of sentences available for juvenile offenders.[21] These included reprimands, discharges, bind-overs, fines, compensation, restitution, community service, probation, supervision, attendance at non-residential programmes, and custody. A major focus in most jurisdictions has been to reduce the number in custody, as mentioned in the previous section. It needs to be noted here, however, that research has consistently shown that increasing the number of alternatives to custody does not necessarily reduce the number in custody (Audit Commission, 2004). Rather, there is a tendency for alternatives to custody to become alternatives to each other. The introduction of guidelines to restrict the use of custody (discussed in the previous section) is a better approach (though this is not to suggest here any restriction in the development of non–custodial measures). Sentencing guidelines also help and a couple of examples follow.

51. Section 38[1] of the Youth Criminal Justice Act in Canada states that the purpose of sentencing is to hold the young offender accountable for an offence 'through the imposition of just sanctions that have meaningful consequences for the young offender and that promotes his or her

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18 Indeed, Bateman (2001, 38) argues that practice in England and Wales is in breach of Article 37 of the UNROC. He refers to 'an explosion in the number of children locked up through the judicial process'.

19 Bateman (2001, 38) claims that, in some areas, more than one in four cases dealt with in the youth court result in a custodial outcome.

20 This jurisdiction also demonstrates continuing ambiguities in thinking about the use of custody. In the document entitled Youth Justice – The Next Steps (Home Office, 2004), for example, there are proposals to remove the present restriction which prevents the youth court imposing custody on 12 to 14 year old children unless they are deemed persistent offenders, yet, at the same time, it proposes to impose a limit of 12 months custody, in the youth court, for this age group.

21 The exception here is Scotland. The children's hearings have much more limited powers – in part because the basis of their decision is whether or not compulsory measures of care are necessary and, as noted above, the welfare of the child is the paramount consideration here. The powers of the hearing are: to discharge the child, to place the child on non-residential supervision (here the child remains at home and may participate in some type of programme), or to place the child on residential supervision (here the child must be placed away from home, either in foster care or an institution, including a secure institution). The hearing should not make a supervision order unless it feels that it is better for the child than making no such order. The hearings have no power to fine the juvenile or his/her parents, to impose a custodial penalty, or to remit the juvenile to the Sheriff Court for sentence (Kearney, 2000; Young, 1997; Lockyer and Stone, 1998). However, the Health and Social Services and Social Security Adjudications Act (1983) enabled the children's hearings to place a child in secure accommodation if it was thought likely that s/he would '... injure other persons'.

rehabilitation and reintegration into society, thereby contributing to the long-term protection of society'. It then goes on (in section 38[2]) to say that the sentence must be 'proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.' This section further states that the sentence must be the least restrictive sentence that is capable of holding the young offender accountable and must be the one most likely to rehabilitate the young offender and to reintegrate him or her into society and to promote a sense of responsibility and acknowledgement of the harm done. Section 38[2][b] states that the sentence must be similar to the sentences imposed in the region 'on similar young offenders found guilty of the same offence committed in similar circumstances'.

52. Section 150 of the Juvenile Justice Act 1992 in Queensland also sets out a number of sentencing principles and incorporates the juvenile justice principles contained in Schedule 1 of the Act. The sentencing principles refer, amongst other considerations, to the nature and seriousness of the offence, the child's previous offending history, any cultural considerations, the impact of the offences on the victims, the use of custody as a last resort and 'the fitting proportion between the sentence and the offence'. The juvenile justice principles include: safeguarding children's rights, promoting their well-being, accountability and responsibility, and reintegration.

53. The approach in Victoria is somewhat different. Section 137 of the Children and Young Persons Act 1989 lists the sentences available to the court and section 138 then imposes a 'sentencing hierarchy' which means that those sentencing cannot impose a sentence unless they are satisfied that it is not appropriate to impose a sentence referred to in any preceding paragraph of that section. Section 139 sets out the matters that can be taken into account. These include strengthening families, the desirability of allowing children to live at home, minimising stigma, encouraging the offender's responsibility as well as the need to protect the public and the suitability of the sentence for the child.

54. This review has shown that most jurisdictions examined have a range of dispositions available to the courts from discharges to custody. However, as section 3.10 later suggests, those sentencing may need guidance to prevent idiosyncratic, inconsistent and discriminatory sentencing. The jurisdictions reviewed offer a number of alternative ways of achieving this. Clear and consistent guidelines that reflect the overall objectives and principles of the jurisdiction's juvenile justice system are an important staring point in the achievement of fair and non-discriminatory sentencing which is consistent in its approach.

3.8 Protecting young offenders' rights

55. Paragraph 7.1 of the Beijing Rules and Article 40 of the UNROC advocate the protection of children's rights and paragraph 15.1 of the Beijing Rules and Articles 12 and 37 of the UNROC refer to the provision of legal representation (including free legal aid where it is available) to children in any judicial or administrative proceedings. In addition, paragraph 15.2 of the Beijing Rules refers to ensuring the participation of parents. In all of the Commonwealth jurisdictions reviewed, steps are taken to inform parents of police action and to interview children in the presence of a parent, guardian or other appropriate adult (for example, a social worker or probation officer). Steps are also taken to encourage parents to attend any judicial or administrative hearings (including the possibility of fining them if they do not attend). Parents, however, are not always knowledgeable enough to advise their children of their rights and may themselves be under pressure to accept certain procedures (for example, to agree to diversion rather than a court hearing) and so children's best safeguard for their rights has to be the provision of legal advice. However, the provision of legal representation in the Commonwealth jurisdictions reviewed is variable.

56. Some of the Commonwealth jurisdictions reviewed provide the right to counsel at all stages (for example, section 25 of the Youth Criminal Justice Act in Canada). Most Commonwealth

jurisdictions reviewed offer legal representation in a more modified way (for example, during interviews with the police and/or at court hearings). However, the key issue here is the extent to which this representation is funded by the state. In New Zealand, youth advocates are appointed, at state expense if need be, for all children appearing in the youth court and, in England and Wales, Bottoms and Dignan (2004, 83) state that legal representation in the youth court is normally paid for through legal aid though they note also that there are no national statistics on this point. Section 22 of the Juvenile Justice Act 2003 states that courts in Ghana must inform juvenile offenders of their right to legal representation and to legal aid. In the South African Bill, children are entitled to representation at state expense only if they are remanded in detention pending plea and trial, when there is a likelihood that a sentence involving a residential requirement will be imposed on conviction and, as stated earlier, the child is aged between 10 and 14 and the matter is to be tried in court (section 75). These rights to state funded legal representation in South Africa cannot be waived. If the child indicates that s/he does not wish legal representation, then the court must appoint a legal representative to assist (rather than represent) the child.

57. In contrast, although children appearing before the children's hearings in Scotland could have a lawyer present, until relatively recently, it was not funded by the state and so occurred quite rarely.[22] However, changes were introduced in 2002. Statutory regulations then set out situations in which the children's hearings could appoint a legal representative: namely, if it appears that such representation is required to enable the child to effectively participate in the hearing or if it appears likely that a supervision with residence requirement in a secure facility will be made. These legal representatives must be drawn from a limited range of lawyers (in essence, those familiar with the ethos of the children's hearings). It remains to be seen whether or not this change withstands future challenge. In New Zealand, in court-referred conferences, the offender's legal representative (the youth advocate) can attend the family group conference and ensure the protection of his or her rights there. However, legal aid is not provided routinely for offenders in non court-referred family group conferences.[23] The same is true of restorative conferences in Australia. In response to criticisms about this, some states introduced some protections: for example, at one point South Australia introduced a free legal advice telephone hotline to provide young offenders with legal advice and New South Wales also introduced an advisory service to young offenders before agreeing to a conference and to its outcomes (though we have been unable to ascertain from relevant personnel there whether or not these services are still offered). Legal aid is also not provided for appearances at YOPs in England and Wales. It seems likely that neither restorative conferences nor YOPs are compliant with the Beijing Rules or the UNROC with respect to legal representation.

58. In recognition of the special nature of juvenile justice, it is clear that there should be 'specialist' lawyers for children who offend. That is to say, they should be selected for their skills on the law with respect to children and for their knowledge about children. This is so in New Zealand and, as noted above, in Scotland. Given the vulnerability of children and the recognition of their distinctive status, consideration should be given to the provision of legal advice, if not legal representation, at all stages of any proceedings against children, as the UNROC suggests. Given the resources of the children and parents most likely to come into the juvenile justice system, this should be provided at state expense. There are, of course, cost implications here, but a dramatic reduction in the use of custody (as every jurisdiction seems to wish to achieve) should lead to the release of funds that could be used to offset the cost of legal advice (if the cost of legal representation is not viable).

3.9 Time taken to process cases

59. Paragraph 20 of the Beijing Rules advocates that cases involving children should be handled without unnecessary delay. Most of the Commonwealth jurisdictions reviewed which specified

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22 They are entitled to legal aid if they wish to deny the grounds of referral or appeal against the hearing's disposition in the sheriff's court.

23 It may be provided on a discretionary basis if the conference facilitator feels that a legal issue is likely to arise.

objectives and principles, mentioned the importance of having time-frames for young offenders which reflected their perceptions of time. This has resulted in some jurisdictions introducing times by which certain actions have to be taken. For example, time limits may be imposed on police decisions whether or not to deal with the offence by means of a conference (as in some Australian jurisdictions) and on conference administrators to convene a conference within a certain number of days after receiving the referral (as in some Australian jurisdictions and New Zealand). Similarly, time limits may be imposed on the length of time children can be held in custody pre-trial (as in Ghana) and on the time between the child's first appearance in court and the completion of the case (again, as in Ghana). There are recent efforts in England and Wales and Scotland to fast track persistent offenders that are discussed in section 3.13. Scotland has also introduced National Standards for Scotland's Youth Justice Services (Scottish Youth Justice System Working Group, 2002) and one of these relates to reducing the time taken from the initial report on the offender to the implementation of a hearing's decision to 80 working days by 2006. Within this time-frame, there is a series of shorter time frames for actions by the police and reporters (the managers of the children's hearings' process).

60. A different approach was adopted in England and Wales. In 1997, the Government there pledged to halve the time from arrest to sentence for all persistent young offenders. This was achieved by setting staged targets and experimenting with different fast-tracking mechanisms to encourage greater speed in processing: the average time was reduced from 142 days in 1997 to 71 days by August 2001. This achievement partly reflects changes in the production of pre-sentence reports. Having identified this as the main cause for delays occurring, the Government set about encouraging the use of stand-down reports and updates, instead of adjournments for a full pre-sentence report (Audit Commission, 2004).

61. This review has shown that the jurisdictions examined accepted the importance of dealing with young offenders in a time-frame which is consistent with their sense of time. It also showed a range of ways of trying to achieve this.

3.10 Preventing discrimination

62. Paragraph 2 of the Beijing Rules states that the Standard Minimum Rules should be applied to juvenile offenders without distinction of any kind and Article 2 of the UNROC calls on states to ensure the rights set out in the Convention are applied without discrimination of any kind. Paragraph 6 of the Beijing Rules further suggests that efforts should be made to ensure the accountability of those who make decisions within the juvenile justice system. Research has consistently shown that different ethnic groups and sexes experience different outcomes in many juvenile justice systems (Kalunta-Crompton, 2005; Audit Commission, 2004; Doob and Sprott, 2004; Feilzer and Hood, 2004; Van Bueren, 1995). What this means is not clear-cut. Differential outcomes may be due to both discrimination and to different patterns of offending (Gelsthorpe, 2005; Feilzer and Hood, 2004). However, the possibility of discrimination remains and steps can be taken to safeguard against this: for example, by setting out criteria for and reviewing decisions. There is one situation that requires comment here: the provision of custody for girls. In many of the Commonwealth countries reviewed, girls are held with adult female prisoners. The reasons for this are understandable: the small number of girls who need to be held in custody and the cost of providing separate accommodation. However, the dangers of contamination must outweigh this. Holding girls with adults is in breach of Article 37 of the UNROC that children should be held separately from adults unless it is in their best interest not to do so. It would be difficult to argue that holding girls with adult female offenders is in their best interests (see, for example, the report of HM Chief Inspector of Prisons (2003) on the conditions of girls in Holloway prison in London).

3.11 Recognition of cultural diversity

63. Article 4 of the UNROC recognises children's cultural rights and the rights of indigenous peoples are recognised more generally in the work of the United Nations (see, for example, www.ohchr.org/english/issues/indigenous/declaration.htm). Some of the Commonwealth countries reviewed have included references to the provision of culturally appropriate service in their legislation. For example, one of the aims of the 1989 Children, Young Persons and Their Families Act in New Zealand was to encourage responses to young offenders to be more culturally appropriate and sensitive. Although Maxwell and Morris (1993, 186) suggested that family group conferences in the early 1990s 'often failed to respond to the spirit of Maori or to enable outcomes to be reached which are in accordance with Maori philosophy and values', they went on to say that, at times, conferences did transcend tokenism and embodied Maori kaupapa (spirit and values) and that there was 'at least, the potential for FGCs [conferences] to be more able to cope with cultural diversity than other types of tribunals' (1993, 187, emphasis in the original). Despite some critical comments, Love (2000), a respected and influential Maori commentator, agrees.

64. In Canada, the Youth Criminal Justice Act makes specific reference to the special situation of aboriginal offenders. Section 3[1][c] states 'within the limits of fair and proportionate accountability, the measures taken against young people who commit offences should...(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young people with special requirements.' Later, section 38[2][d] states 'all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons'. The ACT also explicitly mentions the needs of indigenous children (section 14 of the Children and Young People Act 1999), but section 15 of the Act, which refers to the placement of aboriginal children, expressly excludes decisions about the disposition of young offenders. Principles 13 and 14 in Schedule 1 of the Juvenile Justice Act 1992 in Queensland refers to involving the community of Aboriginal and Torres Strait Islander children and to having culturally appropriate services and programmes. Further, if an Aboriginal and Torres Strait Islander is to be cautioned, section 17 encourages the police to use a respected community member to administer the caution. Section 11 of the Youth Justice Act 1997 in Tasmania encourages this too and section 12 extends this to community representatives of other ethnic or religious groups.

65. Some Commonwealth countries have gone further and have sought to include indigenous justice processes within their juvenile justice system. For example, family group conferences in New Zealand owe their origins, at least in part, to traditional Maori methods of conflict resolution. The Child Justice Bill, 2002 in South Africa also gives weight to indigenous concepts of justice (ubuntu). The inclusion of indigenous processes in juvenile justice systems where possible reflects good practice as it ensures greater legitimacy to these processes and is consistent with the endorsement of restorative justice processes. At the very least, jurisdictions should demonstrate in the practice of juvenile justice some awareness of and sensitivity to cultural differences.

3.12 Encouraging parental responsibility

66. Article 5 of the UNROC endorses respect for the responsibilities, rights and duties of parents in the care of their children. Parental responsibility seems to have been interpreted in quite different ways within the Commonwealth jurisdictions reviewed.

67. Families clearly play a large role in restorative conferences. There, all the participants contribute to the discussions and to decisions about the eventual outcome. However, one feature - relatively distinctive to New Zealand - is that the family and the young offender are meant to be given the opportunity to discuss privately at some point how they think the offending should be dealt with. When the conference reconvenes with all the participants present, this plan is then discussed,

and everyone's agreement to it is sought, and amendments made where necessary. The Children, Young Persons and their Families Act 1989 in New Zealand also refers to providing assistance and support to parents.

68. In contrast, in some other jurisdictions, parental responsibility is encouraged through provisions that parents give security to the court when a juvenile is charged with an offence (as in section 28 of the Juvenile Justice Act 2003 in Ghana) or after conviction (as in section 29 of the Juvenile Justice Act 2003, Ghana). Parents there may also be ordered to contribute to the cost of detaining their child (section 58 of the Juvenile Justice Act 2003). In England and Wales, parents can be bound over to prevent further offending by their child. They may be required to take proper care of their child and to exercise proper control over him/her, to ensure that the child complies with the requirements of any sentence (with forfeiture of a sum of money if the young offender re-offends or does not comply with the requirements of the sentence). Parents or guardians in England and Wales can also be ordered to pay any fines and compensation imposed upon their child. Furthermore, parenting orders in England and Wales require a parent or guardian of a child who has been convicted of an offence to attend counselling or guidance sessions and to comply with certain specified requirements. The parent can be required to attend counselling sessions once a week and for up to three months. The specified requirements (for example, ensuring that the child is accompanied to school each day and is indoors by a certain hour in the evening) may remain in force for up to 12 months. Research suggests that, while a centrally funded programme of 42 parenting projects was greatly appreciated by those involved, most participants took part on a voluntary basis; only one in six were there as a result of a court order. One in three participants were also referred by a non criminal justice system agency (Ghate and Ramella, 2002). Moreover, in some YOTs, voluntary programmes and parenting orders are little used or are not supported by adequate resources. The Government recognised that parenting orders had not been used as much as they could have been and has passed further legislation to encourage their greater use. The Antisocial Behaviour Act 2003 introduces, for example, fixed penalty notices for the parents of offenders aged 10 to 16 and also increases the circumstances in which parenting orders can be made.

69. Goldson and Jamieson (2002) are highly critical of such moves in England and Wales and ground them in 'populist punitiveness' (2002, 95). That is to say, such measures are popular with the public (see the survey reported in Mattinson and Mirrlees-Black, 2000, 23-4), but the 'reasoning [behind them] is flawed' and these measures are, rather, 'graphic expressions of punitive intent'. Arthur (2005, 241-245) goes further and implies that measures to penalise parents breach the UNROC and the Beijing Rules which expect states to help and support families. He writes: 'Instead of penalising families, the state should strive to create the conditions in which families can flourish and all children have the chance to succeed' (2005, 244). Arthur also argues that such measures conflict with criminological research on youth crime (2005, 237-241). He proposes instead that resources need to be made available to fully support the provisions of the Children Act 1989 which was intended to help families to meet their responsibilities to their children and to support children at risk of offending.

70. There is little to suggest that there are significant benefits to be gained from the penalisation of parents for the wrongdoing of their children. Measures to support parents and to encourage them to accept responsibility in a constructive way are preferable.

3.13 Dealing with serious or persistent offenders

71. As we suggested earlier, the UNROC advocates dealing with all children under the age of 18 who commit offences as juveniles and within special administrative or judicial proceedings. However, there is within the Commonwealth countries reviewed a number of situations in which those under 18 are dealt with as adults, both in terms of trial procedures and penalties. Mainly, these cover serious and/or persistent offenders.

72. For example, children in Scotland from the age of 8 yrs who commit rape, serious assaults or homicide are dealt with in the adult criminal courts and not in the children's hearings. Here the protection of the public is said to take precedence. According to McAra (2002, 448), Scottish juvenile justice policy has become 'bifurcated': 'considering public protection questions in high risk (to the public) cases and the welfare needs of the child in low risk...cases.' Much the same can be said of the situation in England and Wales (Smith, 2003). In New Zealand, in contrast, most serious offenders are dealt with in the youth court, at least initially (though children who commit murder or manslaughter are dealt with in the adult courts from the age of 10 yrs). However, the youth court can transfer cases involving serious offences to the high court. There is also provision for the youth court to transfer offenders to the district court, depending on the seriousness of the offence and the previous offending history of the offender. Transfer can occur when the young offender first appears in the youth court if he or she is at least 15 years of age and the offence is either purely indictable (the most serious offences) or is punishable by imprisonment for a term exceeding three months and the young offender elects trial by jury. Second, transfer can occur at sentencing when the nature or circumstances of the offence are such that, if the young offender were an adult, s/he would be sentenced to custody, and the court is satisfied that any order of a non-custodial nature would be inadequate. The Child Justice Bill in South Africa also addressed public concerns about serious juvenile crime by allowing, as a last resort, children charged with serious violent offences to be tried in the adult criminal courts and to be imprisoned, both pre-trial and as a sentence.

73. Canada has adopted a different solution to this issue. Under the Young Offenders Act, it was possible to transfer certain young offenders into the adult criminal justice system. Under the Youth Criminal Justice Act 2002, the young offender stays within the youth court, but, for serious offences, the prosecutor can invite the court to impose a sentence normally only available in the adult court. The test to be applied is whether or not a sentence imposed in accordance with the purposes and principles of the Youth Criminal Justice Act would be of sufficient length to hold the young offender accountable for their offending. If not, then the young offender could be sentenced as an adult. Young offenders over the age of 14 yrs found guilty of a 'presumptive offence' (murder, manslaughter, attempted murder or aggravated sexual assault) or who have a history of serious violent offences can also be dealt with under adult sentencing provisions. Provinces can decide whether these provisions should come in at the age of 14, 15 or 16. Doob and Sprott (2004, 185) call these 'symbolically tough but practically inconsequential measures'. In this way, public and media concerns about youth crime (which are often unfounded anyway) appear to be addressed while continuing to protect young offenders and recognise their special status.

74. It is widely recognised that a small proportion of young offenders are responsible for a large proportion of juvenile offending (Audit Commission 1996). As a result, some of the Commonwealth jurisdictions reviewed have also begun to plan special measures for persistent offenders. For example, in late 1998, the New Zealand Government made funding available to the Department of Child, Youth and Family Services to develop a strategy (the youth services strategy) aimed at providing better ways of recognising and meeting the needs of young offenders who continue to offend and who are viewed as being at high risk of developing criminal lifestyles. There are no data, as yet, on the effectiveness of the youth services strategy in either meeting the needs of young offenders or reducing their re-offending. Also, as a result of some criticisms, the Government there published, in 2002, the youth offending strategy aimed at preventing and reducing offending and re-offending by children (Ministry of Justice and Ministry of Social Development 2002).[24] It made four key recommendations: a new delivery mechanism to achieve this goal of reducing offending and re-offending,[25] a range of measures to improve the delivery of services, the development of new comprehensive and intensive interventions for serious young offenders (such as day reporting centres that will rely on 'multi-

[24] This strategy should be read alongside the report of the Ministerial Taskforce on Youth Offending (2002) and The Youth Justice Plan for Child, Youth and Family Services (Department of Child, Youth and Family Services 2002).

[25] This will rely on local youth offending teams (comprised of key practitioners from the police, social services, health, and education), oversight by Ministers and senior public servants, and an independent advisory council.

systemic therapy') and measures to improve the quality and robustness of information about offending by children (Ministry of Justice and Ministry of Social Development 2002, pp. 38–40). This strategy also endorses the use of risk identification and assessment tools which are discussed below. The impact of the youth offending strategy will take some time to emerge.

75. Scotland has also taken special measures to deal with persistent offenders and has set a target of reducing the number of persistent offenders by 10 per cent by 2006 (Scottish Youth Justice System Working Group, 2002). Earlier, the Advisory Group on Youth Crime had identified the need for the improved handling of persistent offenders by an expansion of 'the range and availability of effective quality assessed, community-based interventions and programmes' (The Scottish Executive, 2000, 3). It also advocated a national strategic framework to define the objectives needed to address youth crime and the establishment of multidisciplinary teams (youth justice teams) to draw up and implement youth crime plans covering those under the age of 20) in each local area. A 10-point action plan to reduce youth crime was launched in June 2002 reflecting the recommendations of an ad hoc Ministerial Group on Youth Crime.[26] Since then, a pilot of fast-track children's hearings for persistent offenders under 16 has begun in a number of areas in Scotland and a youth court feasibility project for persistent offenders aged 16 and 17, with the flexibility to deal with 15 year olds, was also introduced in two areas of Scotland. There are also plans to introduce anti-social behaviour orders (discussed in section 3.3) and electronic monitoring for those under the age of 16 (in the Anti-social Behaviour (Scotland) Bill 2004). Bottoms and Dignan (2004, 76) describe these various measures as the politicisation of juvenile justice debates in Scotland due to devolution. That is to say, they have been introduced as a result of public and media concerns rather than empirical information indicating the need for change. Whyte (2003) describes these developments as the beginning of a shift away from the welfare principles which have determined practice in Scotland for so long.

76. In England and Wales, detention and training orders for offenders aged 12 or over but under 15 are available to courts if they are of the opinion either that the offence is so serious that only a custodial sentence is justified or, in the case of a violent or sexual offence, that only a custodial sentence will be adequate to protect the public from serious harm from the offender and unless the court is of the opinion that the child is a persistent offender. Stone (2001, 55) argues that the absence of a statutory definition of persistent (for example, a certain number of prior offences, a period over which such offences have been committed or continued offending despite some form of non-custodial penalty) has left those sentencing with 'considerable freedom and no clear basis for restraint'. He reminds us also of Hagell and Newburn's (1994) finding that, applying various definitions of persistence, 'different young offenders met their criteria at different quarters of the same year.' The Youth Justice Board there has invested £45 million into programmes involving intensive supervision and surveillance for persistent offenders. However, the same problem of identification exists.[27] This is an important point and is relevant for the other jurisdictions discussed here. Important too is the criminological research which indicates that many serious and persistent offenders are among the most disadvantaged children (Maxwell and Robertson, 1995; Audit Commission 1996) and this must raise questions about both dealing with them as adults and punitively.

77. Given the rarity of serious offending by juvenile offenders and given the difficulty of identifying persistent offenders, care needs to be taken against excessive penalisation of such children to meet media and popular demands. Questions have been raised earlier about the need to deal with

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[26] It recommended: special fast tracking of persistent offenders; the possibility of youth courts for some 15 and all 16/17 year olds; restorative conferencing by the police; and national standards on reporting, timescales, the quality of intervention programmes to reduce re-offending and follow-ups on hearings' decisions.

[27] The Audit Commission (2004) expressed concern that these programmes had failed to reduce the use of custody and, therefore, speculated that they were likely to be drawing in young offenders who would otherwise have received less intensive community measures.

such offenders in the adult criminal justice system.[28] Having a wide range of sanctions available in the juvenile courts and the adoption of guidelines, as mentioned previously in section 3.7, means that jurisdictions, as well as societies should be able to accommodate the needs of most such children. It is important to stress here too the importance of the Riyadh Guidelines on the prevention of juvenile delinquency.

3.14 Risk assessment

78. In line with the broad culture of control that some jurisdictions have witnessed in the last two decades, a number of the Commonwealth juvenile justice systems reviewed have developed risk assessment strategies. Two examples follow. In England and Wales, a particular tool, Asset, was introduced in 1998.[29] to provide a common framework for assessment practice within the new multi-agency YOTs. It is designed to reflect the particular risks and needs of young offenders. There were concerns when the tool was first introduced, partly because it was introduced in a hurry and staff were not adequately trained to use it (Eadie and Canton (2002)) and YOT staff are said to remain somewhat confused about it. Indeed, Eadie and Canton (2002) view risk assessment more generally as a somewhat technical approach somewhat removed from the realities and difficulties of working with children. However, Asset has been shown to be useful in predicting some patterns of re-offending (though not the gravity of those offences) (Baker, 2004).

79. The youth offending strategy in New Zealand, mentioned above, seems, at least in part, to also have been captured by the promises of risk identification and assessment tools 'as a way of targeting interventions and scarce resources in the most effective and efficient manner' (Ministry of Justice and Ministry of Social Development 2002, 16). Social workers are now meant to use three screening tools. These are: CAGE - a short screen for alcohol and drug use which focuses on the negative effects of usage; the six item Kessler screening tool which is aimed at identifying psychological distress; and a suicide screen. The CAGE and Kessler screens were both developed overseas and not for this age group. However, the Department of Child, Youth and Family Services maintains that they are relevant tools. If the young offender appears suicidal, the suicide risk assessment framework is applied. If any other risks are identified, referrals are made for specialist assessment and, once the young offender's immediate needs are addressed, the well-being assessment tool is applied and a well-being plan is formulated. Depending on the results of this assessment, the social worker may access specialist family homes, one-to-one care, or specialist rehabilitation programmes. These screening and assessment tools are meant to inform discussions at family group conferences and conferences' outcomes are meant to reflect the well-being plan. This, of course, impacts on many of the aims of family group conferences and, in particular, impacts on attempts to empower families and victims.

80. There are dangers in risk assessment tools. Put crudely, prediction techniques usually get it wrong twice as often as they get in right and there are problems with both over- and under-predicting. Thus, children may be selected for special measures who do not require them and children who may require them remain unselected. If such tools are to be developed, they must be age appropriate and culturally specific and they need to be carefully monitored to ensure their effectiveness.

3.15 Other issues

81. There are a number of other issues that are pertinent to the identification and development of good practice. One of these concerns multi-agency juvenile justice structures. It is important, however, to pose questions about which agencies should be involved in such structures and what

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[28] We also have concerns about so-called 'incorrigible' juvenile offenders being transferred from juvenile to adult institutions, as is possible in Ghana under section 50 of the Juvenile Justice Act 2003.

[29] An increasing number of youth justice teams in Scotland have chosen to use this instrument too.

impact they might have; for example, there may be variation in their aims and in the delivery of services, depending on which is the 'lead' agency. There are also questions about the optimum size for multi-agency teams, how best to establish protocols in relation to the exchange of information, and how best to promote team work when staff from different agencies may well be operating under different terms and conditions and have received training which leads to very different perspectives on children and their offending. We have too little detail to systematically comment on such matters in respect of most of the Commonwealth countries reviewed, but it is worth referring here to the situation in England and Wales by way of example.

82. Whilst multi-agency work with regard to juvenile offenders was not uncommon prior to the reforms of 1998 in England and Wales, the Crime and Disorder Act 1998 introduced statutory requirements regarding multi-agency partnerships that link criminal justice and children's services (such as education and health) within the context of a national framework. Thus early intervention to prevent crime was meant to be linked to later interventions to reduce crime. But an overview of these developments (Audit Commission, 2004) suggests that there is considerable variation still in the extent to which partnerships have been formed amongst agencies.[30] Some YOTs have chosen to combine with local crime prevention initiatives to form a single crime reduction service. While such unification has positive potential in terms of economies of scale, it risks losing the specific focus on youth offending. It is clear that in some other Commonwealth jurisdictions where there is an increasing focus on early intervention, commentators are alert to the possibility that the strategies could lead to a replay of the welfare model (and all that is associated in terms of coercive individually targeted interventions).[31]

83 A further key issue concerns monitoring and evaluation. Increasingly, monitoring and evaluation is cited as an important way of informing policy-makers on the outcomes of initiatives. The implications of the Crime and Disorder Act 1998 in England and Wales, for example, have been monitored and evaluated since their inception, not least through the national Youth Justice Board which serves as a centralising policy directorate. Monitoring continues both within and without such bodies and further monitoring of the impact of the reforms is proposed (Audit Commission, 2004). The Child Justice Bill 2002 in South Africa is to be monitored (at district, provincial and national levels) to ensure that it is workable and to identify any difficulties or loopholes, as is the Canadian Youth Criminal Justice Act in a sample of communities. But with respect to Australian juvenile justice systems, commentators suggest that there is only limited evidence that a systematic approach to 'evidence-based' practice is in place (O'Connor and Cameron, 2002). An evidence-based approach to effective interventions would, of course, involve a conscientious and judicious analysis of interventions (policies, programmes and practices) to achieve positive outcomes with regard to juvenile justice, but this would also require political, organisational and professional commitment to ensure that legislation, policy and practice reflect the best available evidence. Whilst this remains an ideal, it is not yet clear that all Commonwealth countries have usable data sets. The establishment of comprehensive data sets in terms of offences, prosecutions and other interventions, and their outcomes and impact on offending is a critical step towards evidence-based practice, although, as highlighted below, the issue of 'what works' is not straightforward and cannot be divorced from the social, political and economic context of each country.

4. Concluding comments

84. This review has identified a diversity of juvenile justice policy and practice in the Commonwealth jurisdictions reviewed with respect to a number of key issues. While some of this is understandable in light of the different social, economic, political and cultural systems that exist therein, there is also a case for Commonwealth juvenile justice policy to reflect good practice, so far as this is possible. It is recognised also that some Commonwealth countries are only now developing

30 See also Holdaway et al., 2001, on the organisational difficulties of youth justice teams.

31 See O'Connor and Cameron, 2002, for example, who write about Australia.

juvenile justice systems and it may be helpful for them to learn from the experience of other jurisdictions.

86. Muncie (2002) offers some advice about what he calls 'policy transfers'. He argues, for example, that borrowing elements of restorative justice from Australasia has not worked in England and Wales because its implementation is 'partial and piecemeal' and that 'the dominant recurrent influence' on policy there has been 'American inspired punitive justice' (2002, 27). He challenges the agenda of identifying 'what works?' on the grounds that, for 'what works pragmatically', we need also to read 'what works politically, institutionally and economically' (2002, 33). Muncie goes on to argue that 'any serious attempt to reform youth justice...cannot afford to be seduced in to a 'what works?' ethic. The more fundamental issue is 'what principles do we want youth justice to operate within?' and 'with what desirable effects?[32] We agree with this to some extent. Jurisdictions can learn from each others' successes and failures. But care always needs to be taken to ensure that any ideas adopted are consistent with the already established core principles and objectives of the jurisdiction's juvenile justice policy. We came across many references in our research for this review to the politicisation of juvenile crime and hence to the politicisation of juvenile justice policy. As a result, some changes appear to have been made to satisfy public and media perceptions and concerns about juvenile crime rather reflecting the reality of juvenile crime. This is surely something to be resisted.

87. Finally, good practice in juvenile justice policy cannot by itself prevent offending or reduce re-offending. This requires 'good practice' in, for example, social, economic, health and education policy. However, juvenile justice policy can, as we have demonstrated, reflect certain key values such as the recognition of children's vulnerability and developmental stages, restoration and reintegration, diversion from court and custody, fairness, due process, and the accommodation of diversity. We must remember here that we are dealing with children. And not only this: research shows that so many juvenile offenders (particularly serious and persistent offenders) have experienced high levels of victimisation and deprivation. This must always be at the forefront of our minds in the development of good practice in juvenile justice policy.

88. All Commonwealth countries have ratified the UNROC. As such, they are required to prepare compliance reports and to take heed of any resulting comments from the United Nations. Law Ministers may wish to consider the role the Commonwealth Secretariat could play in:

- critically examining the issues identified within this short review in more depth;
- critically examining the juvenile justice policy of all Commonwealth countries;
- reviewing compliance reports from Commonwealth countries to assess the extent of compliance with the UNROC and to offer advice where appropriate.

The Commonwealth Secretariat is strategically poised to play a critical role both in further advancing progress towards good practice and in aiding those jurisdictions which are at the early stages in their development of juvenile justice policy.

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[32] Contrast here the views of Earle et al. (2003, 141) who describe the introduction of the referral order in England and Wales as a 'positive example of policy transfer'.

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APPENDIX 1

Legislation examined

Australia

Children (Criminal Proceedings) Act 1989 (New South Wales)
Children and Young Persons Act 1989 (Victoria, Sections 16A, B, C and D)
Juvenile Justice Act 1992 (Queensland)
Young Offenders Act 1993 (South Australia)
Young Offenders Act 1994 (Western Australia)
Young Offenders Act 1997 (New South Wales)
Youth Justice Act 1997 (Tasmania)
Children and Young People Act 1999 (ACT)

Canada

Youth Criminal Justice Act 2002

England and Wales

Children and Young Persons Act 1933
Children Act 1989
Crime and Disorder Act 1998
Criminal Justice Act 2000
Criminal Justice and Police Act 2001
Anti-Social Behaviour Act 2003

Ghana

Juvenile Justice Act 2003

New Zealand

Children, Young Persons and Their Families Act 1989

Scotland

Social work (Scotland) Act 1968

Children (Scotland) Act 1995
Anti-Social Behaviour (Scotland) Bill 2004

South Africa

Child Justice Bill 2002

TABLE 1: AGE DIFFERENCES IN SELECTED COMMONWEALTH JURISDICTIONS

	Canada	England and Wales	Ghana	Scotland	South Africa	New Zealand	Australian States & Territories
Age of criminal responsibility	12	10	12	8	10	10	10
Age of prosecution	12	10	12	8	14[33]	14	14[34]
Age of termination of juvenile jurisdiction	18	18	18	16 (18)	18	17	17[35]

[33] The presumption of doli incapax applies from the age of 10 to 14 and so capacity must be proved.
[34] The presumption of doli incapax applies from the age of 10 to 14 and so capacity must be proved
[35] In Victoria and Queensland, it is 16.

LAW REFORM AGENCIES: THEIR ROLE AND EFFECTIVENESS

Paper by the Commonwealth Secretariat

EXECUTIVE SUMMARY

1. Increasingly, law reform is vital to any legal system and to any nation. Law reform is also a key leader and participant in ensuring the practical application of the Commonwealth's agreed fundamental values. Independent law reform has particularly significant benefits. Independent Law Reform Agencies (LRAs) have been established in many jurisdictions, mostly in the Commonwealth and often with success.

2. Key features of LRAs are their independence, their expertise, their focus on law reform, and their continuity. Other important characteristics are their commitment to full consultation and public participation and their ability to handle new and complex problems, together with their thoroughness, use of outside volunteer experts, openness and accountability. Rightly, they vary greatly according to local circumstances. Especially in smaller jurisdictions, they do not need to be large to be worthwhile.

3. While independent law reform often works well, there is still considerable need for improvement.

- LRAs need to be established in more Commonwealth countries.
- LRAs need high quality personnel, organisational structures, methodology and resources.
- LRAs need projects of real importance, in appropriate numbers and with practicable timetables.
- There needs to be even more co-operative working across the Commonwealth, with special regard to LRAs in smaller jurisdictions.
- Governments need to give full and prompt consideration to LRA recommendations – and to avoid unnecessary delay in any implementation.

4. This paper invites Law Ministers to consider a set of recommendations to help meet these needs.

LAW REFORM AGENCIES: THEIR ROLE AND EFFECTIVENESS

BACKGROUND

The number and types of Law Reform Agencies

1. A major innovation in the legal world over the last 40 years has been the establishment and development of Law Reform Agencies (LRAs). They have a variety of names such as Law Reform Commission, Law Reform Committee, Law Commission and Law Reform Institute. They have brought whole new features to the legal landscape. They can provide principled and imaginative new law, and can be catalysts of change, responsive to the world around and to the public they serve. Even on a conservative basis, there are some 60 LRAs across the world, with responsibilities to many millions of people. The great majority are in the Commonwealth. The most typical LRA covers a country or state, is substantially autonomous and has authority to review a wide range of areas of law. However, LRAs come in many shapes and sizes. For example:

(a) Some cover countries with populations of well over a hundred million people (for example, India, Pakistan and Bangladesh) while others are for jurisdictions with populations well under a million (for example, British Virgin Islands and the Northern Territory of Australia), and for many more there are populations in between those numbers.

(b) The countries concerned vary greatly in other ways. Their Gross Domestic Product varies immensely. Some are heavily industrialised, and others are much more agricultural. Some have high-density populations, and in others the populations are very scattered.

(c) The LRAs vary greatly in their size and capacity. For example, while one may have one very part-time Commissioner (such as Mauritius), another may have several full-time Commissioners (such as Australia, with 3 full-time and 3 part-time).[1] Some have very few staff, and others have large teams.

(d) The responsibilities of LRAs most typically concentrate on straightforward reform of the law but that field can be viewed broadly or narrowly. Some also have other responsibilities - for example, taking measures to harness law and the legal process in the service of the poor and keeping under review the system of judicial administration (India).

(e) While most are in countries with a long common law heritage, others are in countries with very different legal environments and traditions.

(f) While the majority cover a complete country, a significant minority cover a single state, territory or province (for example, in Australia, Canada and Nigeria) with other LRAs often covering the remainder.

(g) While most are statutory, some are not, for example in India, Alberta (Canada) and Northern Ireland.[2]

(h) LRAs vary greatly in how long they have been established, as demonstrated immediately below.

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1 (For convenience, "Commissioner" is used to identify those who formally constitute an LRA. In some jurisdictions, other titles are used.)

2 The Law Reform Advisory Committee for Northern Ireland is to be replaced under 2002 legislation by a statutory Northern Ireland Law Commission.

2. It is clear that, rightly, LRAs may work differently from each other, for all those reasons. In addition, while law reform is the core activity of virtually all LRAs, many are also involved in other work that is closely related to reform, including codification, revision, consolidation and repeals. A generous definition would include, among LRAs, those standing bodies which are established to keep certain limited areas of law under review, for example, criminal law, company law or criminal codification.

Their Growth

3. The number of LRAs has grown considerably over the last 50 years. Some LRAs have been established now for many years: for example, India (55 years, apart from earlier origins since 1834), England and Wales and Scotland (40 years), the Australian Law Reform Commission (30 years) and Sri Lanka and Pakistan (over 25 years). Others have been formed far more recently or are being established. The following are just a few very recent examples:

- Canada (established in 1971) – abolished in 1992 and replaced by the Law Commission of Canada in 1997;
- Malawi established in 1998;
- Northern Ireland – being established, to replace an Advisory Committee; and
- Victoria (Australia) – several different bodies succeeded each other since 1974 – new LRA established in 2001.

4. This growth has been intermittent, has sometimes stalled badly, and has a long way still to go. A few LRAs have been abolished, and others have been replaced: for example Canada, as well as for two Canadian provinces (British Columbia and Nova Scotia) and two Australian States (Tasmania and Victoria).

5. Apart from numerical growth, there seems to be, very broadly and with exceptions, a sense of confidence about independent law reform. Many LRAs are working to capacity, or even beyond it. Several have more, or more important, work than for several years, with government support steady or increasing. There is often bipartisan political support for the work of independent law reform. There are several jurisdictions where steps are currently being taken towards the establishment of a new LRA – for example, Northern Ireland and South Australia. At the same time, there are parts of the Commonwealth where there is little independent law reform or where LRAs are not as active or well supported as they would wish.

The number of Commonwealth countries with and without national LRAs

6. Independent national LRAs exist in approximately half of all Commonwealth countries.

LAW REFORM AGENCIES

What they are

7. LRAs are expert, advisory law reform bodies, independent of government. They are established to review a variety of areas of law and to recommend any changes needed. Their programmes of work need to be agreed with government, and they are normally accountable to government. They have lawyers of considerable ability. They are standing bodies, ready to take on new work quickly.

8. Until an LRA is established, law reform is usually undertaken by government ministries, governmental committees, parliamentary committees and other committees and bodies established for one-off reviews and inquiries constituted especially to consider a particular aspect of the law. This is generally done on a part-time and temporary basis. Such alternative mechanisms are worthwhile but very far from ideal. An LRA is established to overcome the disadvantages of transient bodies.

What they do

9. Some areas of law are relatively standard or core subjects for law reformers. They include substantive law in areas such as criminal law, civil law, family law, commercial law, and public and administrative law. In fact, LRAs frequently review key areas of law which affect large sections of society. The criminal law is clearly central in any country, providing justice as well as seeking to safeguard victims. LRAs are also accustomed to investigating the law which covers all "life events", ranging through birth, marriage, children and death.

10. The following are just a few examples of important recent projects by LRAs:

- a whole justice system (New Zealand, South Africa and Western Australia);
- sentencing powers (Uganda, Nigeria and South Africa, and New South Wales and Tasmania in Australia);
- transformative justice (Canada);
- security legislation (South Africa);
- anti-terrorism legislation (India and Pakistan);
- bribery and corruption (Fiji);
- domestic violence (South Africa);
- electoral laws (Canada and India);
- harmonisation of laws with neighbouring states (Kenya);
- money laundering (South Africa); and
- establishing a family court (Mauritius).

11. Different jurisdictions use different methods for identifying topics for review by LRAs. However, it is important that LRAs have a role in identifying them, often with government. Indeed, in some jurisdictions LRAs take by far the major part in identifying and deciding about their future work. This process is clearly of central importance because it not only dictates the work of the LRA over the period of the project but it is also closely connected with the ultimate "success" of the LRA's work.

12. Suggestions for new reform projects may come from different sources in different jurisdictions, apart from the LRA and the government. For example, the courts, the legal profession, academic lawyers, and professional associations may from time to time comment, with varying degrees of vigour, that particular areas of law merit review by the LRA. Many LRAs consult widely before settling on their programmes of work

THE ADVANTAGES OF INDEPENDENT LAW REFORM AGENCIES

Independence

13. An essential feature and a key advantage of an LRA is its independence, especially from government but also from all others. This independence has a particular value as it demonstrates that the LRA's views are objective and impartial and are not dependent on others' views. The Executive and the Legislature frequently need and value specialist advice in the planning and formulation of law reform. This advice is best provided by an independent body. An LRA is independent in the recommendations it makes as to the reform of any particular area of law. An LRA should have no

preconceptions and no in-built bias. It should therefore be composed of Commissioners and staff who do not have strong allegiances, who have open minds and who are sufficiently resilient not to be persuaded by any pressure other than sound argument. It is a body that has nothing to fear from expressing its views, after a sound law reform process.

14. An LRA's independence, together with its practice of wide public consultation, enhances the credibility of its work with everyone, including politicians of all parties. It sets an LRA apart and enables it to be more vibrant, innovative and authoritative.

Aspects of Independence

15. An important aspect of this independence is the LRA's intellectual independence:

> "the willingness to make findings and offer advice and recommendations to government without fear or favour... [The LRA must] be, and must be perceived to be, scrupulously free of political partisanship or association with private or special interests. It also means that the culture must be sufficiently robust to weather strong criticism at times, at all stages of the process. Few other institutions in our society are as accustomed as [LRAs] to sharing openly their work in progress. ...Sadly, our immature media and political cultures make it very difficult for governments to formulate and refine policy in this way....Institutional law reform provides an outlet for this more considered policy development process, without attracting so much heat" (Weisbrot, p 38).

16. An LRA's independence should be subject to checks and balances in certain areas. First, an LRA's work programme is generally agreed between the LRA and the government. Secondly, an LRA is publicly accountable, in reporting to the Minister at least annually, in having all its reports and programmes of work placed before parliament and published, and in complying with public sector requirements regarding, for example, openness, management and finances. Besides, an LRA only makes recommendations as to the reform of the law. Rightly, it is only parliament that can change the statute law.

Safeguarding Independence

17. Key ways in which governments have to honour this independence include ensuring that appointments of Commissioners are non-political and free from conflicts of interest, that the terms of reference for law reform projects are not designed to produce any particular outcome and that there is no improper governmental or other external pressure upon the LRA to produce any particular recommendations. The great majority of LRAs are established by statute. Apart from the stability and stature that this tends to provide, the statute often ensures that the LRA has a separate existence from government.

18. When there is a mature and public balance between independence and accountability, an LRA should establish strong, constructive and open links with others. They include government ministers, ministries and departments, politicians, the Civil Service, the judiciary, legal and other academics, the media and all areas of the legal profession, NGOs and other groups and individuals with an interest in law reform and in the particular areas of law under review at a particular time. An LRA may need to be relatively ambitious and assertive to ensure, for example, that it obtains consultation responses from all the key experts in a field; on the other hand, an LRA needs to be humble in how it projects itself and its work and recommendations.

Volunteer Input

19. "Another major benefit of an independent [LRA] is its ability to generate and harness an extraordinary volunteer effort in the course of its work, to supplement in-house research and expertise. The direct government expenditure on [an LRA] may be seen as a form of "pump-priming", providing the focus and co-ordination that enables much greater public participation and the unleashing of volunteer effort in the public interest" (Weisbrot, p 39). Many LRAs obtain the assistance and involvement of the leading experts in the topics that they are reviewing - whom the LRA could not afford to pay what they are worth or could easily command as consultants in the private market.

20. It is vital to create and maintain confidence in the body carrying out the work of law reform. That confidence is needed by the government, which is the ultimate recipient of the LRA's recommendations. It is also needed by key participants in the law reform process, including members of the public, community groups, minority groups, NGOs, interest groups, professional associations, academics, the legal profession, the judiciary and the government. They must be sure that they are participating in a project of real significance if they are going to take the time and make the effort to provide evidence and views, respond to consultation papers and discussion papers and take a real part in the process of law reform.

Expertise

21. An LRA builds up a fund of expertise, knowledge and specialist contacts in both the law and law reform. This is vital for successful law reform. It increases the likelihood of consistently high quality work. The LRAs reputation and independence also attract to it over the years Commissioners, staff and consultants of great ability.

22. An LRA's methods should ensure that its recommendations are thoroughly worked through before they reach the government and parliament. Where each Commissioner contributes to the overall work, including projects led by other Commissioners, this enables collegiate decisions. It ensures recommendations are from a wider focus than would be possible if they were based on the work of a single specialist.

23. Because of the great variety of circumstances in which they operate, LRAs vary greatly in their composition. However, many LRAs have at least some full-time element among their Commissioners, in addition to legal research staff. The difficulties involved in undertaking law reform on a temporary basis, and the unsatisfactory results produced, have not escaped comment. Referring to the Law Reform Committee and the Criminal Law Revision Committee, for England and Wales, Professor Gower said:

> "Each is a body of part-timers who meet for short periods at regular and irregular intervals, and neither has an adequate infrastructure of full-time research staff. In consequence their results have been unspectacular, desperately slow in achievement, and sometimes downright unsatisfactory" (Gower, p 259).

24. LRAs are normally intended to be capable of undertaking work in the great majority of areas of law (substantive, evidential and procedural). Their ability and willingness to accept such a variety also has the advantage of providing a standing body ready to undertake work in most areas of law. While the Commissioners and staff will often have relatively broad previous experience, it can be supplemented crucially by assistance from experts and others outside the LRA. The consultants are mainly legal experts who assist with aspects of particular projects or conduct the empirical research that is sometimes needed. LRAs often also appoint working parties of experts, representatives of NGOs and other interested parties.

25. Open, thorough, imaginative and responsive consultation procedures assist an LRA in capturing the attention of additional expertise from a wide range of public consultees who may respond to a consultation document. Best practice would include acknowledgement of consultees' contributions, recognition in the final report and referencing where consultees' responses have influenced final recommendations.

26. In many countries, there is general acceptance of the need to ensure true public participation in major decisions affecting significant sections of the general public. Institutional law reform, which emphasises public consultation and participation, is a particularly good mechanism for restoring community confidence in the law and legal institutions. This is very welcome wherever a legal system has basic problems with legitimacy. A good example was South Africa at the end of the apartheid era.

27. An LRA gains the skills to undertake in-depth and sustained research, including legal, practical, social and empirical research. However, the strong links that an LRA forges with others enable it to benefit from the pooled knowledge and skills available and from a multidisciplinary approach. An LRA cultivates this dynamic relationship and the resulting interplay of legal ideas and arguments bear fruit, for example, in creativity and discussion of specific issues within law reform projects.

28. A distinctive feature of several LRAs is the availability of legislative drafters to the LRA. They draft all the LRA's law reform legislation, which saves the government's legislative drafters a substantial task at a more pressurised time later. The process of drafting the legislation also helps the LRA with its thinking and recommendations.

FOCUS

29. An LRA has the great advantage of having a central focus and purpose: law reform. As a result, it can concentrate its energy and resources on this single purpose and is saved from the distractions, interruptions and trouble-shooting faced by many other bodies, not least by government and ministers and their ministries all over the world. Glanville Williams began "The Reform of the Law" by stating:

> "Like everything else the law needs to be kept up to date; indeed, a great deal of it needs to be brought up to date in the first place. The problem is of course largely one of machinery; and the reason why so much of our English law is out of date, some of it indeed quite antediluvian, is that nobody has ever been entrusted with the job of looking after it" (Glanville Williams, p 9).

30. Law reform tends to lag behind other priorities unless there is an LRA. Lord Gardiner noted: "It may be your Lordships' experience that things in life do not get done unless it is somebody's job to do them. It has never been anybody's job in England, who could do it, to see that our law is in good working order and kept up-to-date". An LRA is able to devote its resources, time and energy to this purpose.

31. There is great benefit in having Commissioners and staff whose work is devoted to improving the law. A body established for the purpose of law reform is able to undertake reviews of subjects that are broader and more closely interlinked than would be feasible for others.

Continuity

32. There is enormous advantage in having law reform undertaken by a body which is continuing in existence. Continuity enables an LRA to acquire and apply the great expertise and the

resources that have been mentioned above. It also gains considerable experience in the processes that are most useful for the complex task of law reform. It avoids successive bodies each having to learn the skills. It can help productivity and provide opportunity to establish a sound reputation. It also increases the justification for investing properly in modern technology, accommodation and library facilities.

33. In addition, projects are often linked by their subject matter, so that the knowledge and experience gained in one project benefits those working, often later, on another; and the LRA's continuity ensures a consistent approach both to particular areas of law and to the law reform process -- which is otherwise most unlikely. A permanent body makes it more possible to engage in a systematic review of the law, a statutory requirement for many LRAs. As a standing body, an LRA is able to discuss the reasons for its recommendations, and its strengths and any weaknesses with the government of the day. Continuity enables the LRA to have discussions with, and give responses and make submissions to, other bodies which consider similar issues some years later.

ROLE AND EFFECTIVENESS OF LAW REFORM AGENCIES IN THE COMMONWEALTH

34. LRAs are agents of change. They may have the opportunity to be at the forefront of legal development. For example, they may be able to lead the way nationally in identifying areas where there is a need for new law, in reviewing areas of law which are being affected by new features of life and in recommending imaginative new legislation. Examples of such fields of law are: environmental law; globalisation; internet law; e-commerce; HIV/AIDS; genetics-patenting; human rights; computer crime; rights of indigenous people; new family relationships; international trade; international aid; poverty; and ethics.

35. LRAs may also be able to use initiative and innovation in methods of law reform. For example, they may be able to lead the way in responsiveness to the needs of the public, as in many places such as Australia, Canada and East Africa – which are all jurisdictions where they seek to capture the attention of outsiders; and their consultation processes are open, thorough, imaginative and responsive. For example, they may use public meetings (both general and focused on target groups), consultation forums, the media and websites – both for assistance in particular law reform projects and for advice about the areas of law which cause greatest concern and which might therefore be reviewed by the LRA. In addition, opinions are not only obtained from all relevant quarters but are also taken fully and seriously into account. Another example is that they may be able to publish their work with an eye to capturing the attention and imagination of their readership, with part-reports geared to special interests or special needs of language, culture, disability etc. - on the internet, or on CD as well as in printed text, with a range of summaries for different readerships. An LRA saves government ministries considerable resources in actually conducting the law reform process and producing recommendations

Standards and Values

36. As purely advisory bodies, LRAs need to combine, on the one hand, the dynamic and innovative approach which can lead to ground-breaking work and radical ideas and, on the other hand, the high standards which are needed to gain the respect of those with whom they deal. Those high standards are demonstrated by the high quality of its work, the importance of the areas in which it works, and the wisdom of its recommendations.

37. When considering whether to review an area of law, LRAs will not shrink from topics which involve particular values. They could be issues concerning individuals, for example respect for the dignity of the individual (and his or her fallibility), respect for the rights and liberties of the citizen, and fair and equal treatment for everyone. They could be issues about changes in society -- for example, changes in formal and informal relationships, changes to community and cultural attitudes

and expectations, and keeping pace with scientific and technological developments. They could be issues about the effectiveness of the law -- for example, its accessibility to the citizen, its cost-effectiveness, and the speedy resolution of disputes without unnecessary confrontation and litigation.

38. The Commonwealth's long-accepted fundamental values relate to human rights and the rule of law, gender equality, democracy and good governance, and sustainable economic and social development (Singapore and Harare). The law has a vital role to play in ensuring the practical application of these values. Law reform is a key leader and participant in that process.

Successes

39. The following are just a few samples of many particular successes in the last ten years or so.

- Since 1994 the South African Law Reform Commission has submitted 62 reports to the Government and published 57 discussion papers and 25 issues papers, contributing significantly to the fundamental transformation of the country into one that is non-racial and non-sexist. It has earned the respect of the new democratic Government for its work and independence.

- The Uganda Law Reform Commission in 2003 published a Revised Edition of the Laws of Uganda, containing 350 revised Acts from 1964 to 2000, with the subsidiary legislation; it was brought into force by Statutory Instrument No 69 of 2003.

- In Scotland there was constitutional change, resulting in the establishment of a new Parliament; the Scottish Law Commission contributed 6 statutes to the next 5 years' legislation. These ranged from the Abolition of the Feudal Tenure etc (Scotland) Act 2000 to the Tenements (Scotland) Act 2004.

- The Malawi Law Commission reviewed the country's constitution in 1998.

- The Law Commission of India reviewed the law on corrupt public servants' forfeiture of property (166th Report, 1999).

- Following reports by the respective LRAs in relation to dealing with mentally incapacitated people, new legislation has been introduced in England and Wales (the Mental Capacity Act 2005), and separately in Scotland (the Adults with Incapacity (Scotland) Act 2000).

Problems

40. Despite the many advances made, significant improvement is needed.

- Half of all Commonwealth countries do not have independent national LRAs. There is considerable value in an LRA, including in a smaller jurisdiction. The LRA need not be large to be thoroughly worthwhile. Several smaller jurisdictions have LRAs, such as the British Virgin Islands and Mauritius.

- A common problem is great delay in obtaining a clear governmental response to an LRA's reports: for example, over 25 per cent of one LRA's 180 reports are still under consideration; some LRAs often have some reports awaiting governmental decisions for 10 years; and one LRA has 27 (44 per cent) of its last 10 years' reports under consideration by government or parliament.

- Some LRA's reports face long delays before they are implemented, even when they have been agreed by government: for example, one LRA has 50 reports awaiting consideration or implementation, out of its 190 reports; and another has 16 such reports awaiting implementation, which is the number of reports the LRA publishes in about 3 years.

- Some LRAs periodically receive too few significant projects or with too short a timetable: for example, one experienced LRA has needed extensions to the timetables set for the great majority of its recent projects.

- Some LRAs sometimes have staffing shortfalls or significant delays in Commissioner appointments – for example, one LRA has less than 2/3 of its permitted personnel.

- Some LRAs are from time to time poorly funded, either generally or in particular respects (for example, for modern technology or for their accommodation or library).

THE IMPACT AND IMPLEMENTATION OF LAW REFORM AGENCIES' RECOMMENDATIONS

41. LRAs have the task of making law reform recommendations. Law reform has far better prospects of genuine widespread acceptance if it is produced independently of the government and others, or at least where an LRA has functional autonomy from the executive and other arms of government. LRA's should fully recognise that it is the responsibility of government to decide the outcome of their recommendations, and whether to implement them by legislation or alternative means, or not at all. However, the nature of their recommendations should not be influenced by political receptivity to their approach or the likelihood of implementation by the government of the day. This level of independence can be difficult to achieve in practice. Real independence may be compromised where, for example, Commissioners may be reticent to suggest reforms which are not politically expedient where this may damage their chances of agreeing suitable terms of reference with the government for dependent or subsequent projects.

42. The great majority of experienced observers recognise that, while an LRA's implementation rate may be one of many ways of measuring success, it can never be a key indicator as it may bear little relationship to the quality and usefulness of the LRA's work and as so many factors about implementation are far beyond the control of the LRA. While implementation rates themselves are often commendable, they are sometimes surprisingly low.

(a) Legislation

43. New legislation is the most typical impact of LRA recommendations. Experiences of law reform legislation undoubtedly differ between LRAs. The rate of legislative implementation varies between LRAs and over different times in their histories.[3] Some of the highest implementation rates are:

- the Scottish Law Commission has an 80 per cent rate over its 40 years;

- the Australian Law Reform Commission has an 84 per cent rate of implementation (substantial or partial), with some 60 reports implemented;

- the Manitoba (Canada) Law Reform Commission has published over 100 papers, of which over 75 per cent have been implemented;
- the Law Commission for England and Wales has a 2/3 rate over its 40 years, with well over 100 reports implemented, fully or partly; and

[3] "Truly strait is the gate, and narrow the path which, so far as law reform is concerned, leads to the statute book " (Lord Hailsham, p 283).

- the South African Law Reform Commission has a 48 per cent rate so far, for its 62 reports in the last 10 years.

(b) Alternatives to Legislative Implementation

44. LRA work has important alternative uses. Many LRAs occasionally publish reports which do not call for legislation at all. This may be because they do not recommend any change in the law, because their recommendations can be implemented without legislation or because they are intended purely as guidance, as advice or as vehicles for discussion rather than for law reform.

45. In addition, legislation is not the only way in which some recommendations can take effect. Some can in effect be implemented by the courts.[3]

46. LRA reports should be authoritative and have a significant effect in changing views and shaping attitudes, and in providing guidance to the courts on particular subjects. This can lead to a gradual change in the law by developments through the courts. In reported cases in England in a recent two-year period, over 40 referred to the work of the Law Commission for England and Wales.

Co-operative Working among LRA's

47. Some of the current co-operative activities between LRAs need to be developed much further. The following are examples:

(i) Law Reform Methods

48. One of the largest areas for pooling ideas is about methods of law reform. It is invariably helpful to share experience on methods and good practice for carrying out law reform, for example:

Planning	Planning and project management for law reform work.
Public participation and expertise	- Engagement with the general public and with particular interest groups; - Approaches to diverse populations, such as those which are large, small, indigenous, ethnic minorities, scattered, disabled, illiterate or ill-educated; - Consultation methods and timing and use of consultation responses; - The use of consultants, working parties and advisory groups, seminars and public meetings.
Research and publications	- Legal research, writing skills; - Socio-legal, economic and other empirical research; - Discussion papers and consultation papers, reports and draft legislation.
Communications	Presentation of material, e.g. length and style of writing, use of graphics, supplementary material such as separate summaries and publicity, websites, media contacts and IT systems.
Post-report work	Whether, and how, to engage with government and others to ensure proper consideration of a final report.

Lessons can also be learnt from the different existing models for the constitution, organisation and establishment of LRAs themselves.[4]

49. Many LRAs would also find it valuable to know where other LRAs have obtained financial resources. Some may receive all theirs from their sponsor government ministry. Others may have obtained significant sums from other ministries. Some may also have obtained small but significant sums of money, or other assistance with their work, from other sources. Some countries often provide assistance in a range of fields to developing countries. They are sometimes sympathetic to helping either by means of expertise, technical assistance or finance. Canada and several European countries are examples. Some international institutions can also be sources, such as the World Bank.

50. There may be scope for LRAs to share their own resources rather further – ranging from legal textbooks to technological expertise or equipment.

(ii) Providing Information about Each Other's Projects

51. It clearly makes sense for an LRA which is reviewing an area of law to consider reviews of that area which have been conducted elsewhere – rather as the courts are well used to looking at authoritative decisions in the courts in other jurisdictions. Having made due allowance for all the differences between the jurisdictions and the factors surrounding the area of law, an LRA can often find extremely useful ideas in the reports of another LRA. Frequently, LRA reports cite reviews in other countries – ideally with an evaluation of how implemented recommendations have worked in practice. LRAs are increasingly exchanging their publications with each other, or alerting each other to their new publications.

52. Some LRAs may have additional common interests. For example, some may need to be mindful of legal agreements in their region -- for example, international or regional Treaties and Conventions on human rights, on business, on trade, or on the treatment of women, of children or of minorities. It is useful for LRAs within a region to pool information and ideas about the effects of those agreements.

(iii) Co-operative Work on Particular Reviews

53. The number of law reform tasks with international significance has grown commensurately with the advance of global technology. There can be opportunities for LRAs to co-operate on reviews of particular areas of law. This would most likely arise where either there are similar problems with an area of law in different jurisdictions or where an area of law has strong cross-border importance. The co-operation can consist of mutual exchange of papers, or be as full as joint working: this is difficult but, if successful, can provide an even better and more acceptable outcome. The two LRAs for England and Wales and for Scotland conduct a number of projects jointly. Some of the Australian LRAs have also done so, and the Western Canadian LRAs currently have such a review.

(iv) Mutual Support and Smaller or Newer Law Reform Agencies

54. Mutual support can be particularly helpful for LRAs which are newly established or in smaller jurisdictions – and therefore probably smaller themselves. The deliberately independent and separate position which most LRAs have tends to make them lonely and isolated places to work – even more so if they are small. Besides practical inter-action and support, many LRAs therefore greatly value encouragement and moral support from others across the world with the same role in their jurisdictions – so that they do not become weary in well doing. Some LRAs have especially

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[4] See, for example, Dickson and Hamilton, Re-forming Law in Northern Ireland, Research Report for the Criminal Justice Group in Northern Ireland.

close relationships, perhaps because of geographical proximity or for historical reasons. There would also be advantages in twinning arrangements being formed between certain LRAs, most obviously between larger and smaller LRAs.

(v) Visits, Exchanges, Secondments and Internships

55. A good deal of interaction between LRAs already takes place by way of individual visits, which generally prove extremely valuable. These opportunities should be expanded, both in number and sometimes in duration. More LRAs might be prepared to have a Commissioner or staff member seconded to them, or to participate in internships or exchanges of personnel.

(vi) Regionally

56. There are several regional arrangements in place.

- An Australasian Law Reform Agencies Conference has been a regular feature since 1973.
- The Federation of LRAs of Canada covers the six LRAs across Canada.
- The Association of Law Reform Agencies of Eastern and Southern Africa was formed in 2000 and covers some 13 countries.
- There have been meetings of the LRAs of the Indian subcontinent.

(vii) Across the Commonwealth

57. The Commonwealth Association of Law Reform Agencies (CALRAs) has recently been formed to foster and promote international co-operation on law reform. CALRAs has the potential to take forward initiatives to strengthen independent law reform in the Commonwealth.

58. For many years there has been strong and widespread informal support for establishing a Commonwealth Association to encourage, facilitate and take forward co-operative initiatives in law reform. CALRAs' website (www.calras.org) includes information about CALRAs and has links to the websites of LRAs and others across the world.

59. CALRAs has been granted accreditation to the Commonwealth. It has been established with the strong support of the Commonwealth Secretariat. The establishment of such an association is particularly appropriate at this time. Most existing LRAs are now well established, many are in a time of change – both in the law, in legal systems and in public sector management – and it is a time of particular pressure on many.

CONCLUSION AND RECOMMENDATIONS

60. Law Ministers are invited to note:

- the benefits brought by independent Law Reform Agencies;
- both the advances made and the difficulties faced by many such Law Reform Agencies;
- that about half of all Commonwealth countries have independent Law Reform Agencies but about half do not;
- the need for differences between Law Reform Agencies and between law reform processes in different jurisdictions, according to local circumstances; and
- the need for work to advance independent law reform further in the Commonwealth.

61. Law Ministers are accordingly invited to examine the strategy of mandating the Legal and Constitutional Affairs Division of the Commonwealth Secretariat in co-operation, as appropriate, with the Commonwealth Association of Law Reform Agencies, Commonwealth governments, Law Reform Agencies and others, to encourage:

1) more governments to consider establishing independent Law Reform Agencies;

2) governments to use the most appropriate organisational structures for independent law reform;

3) governments to support and co-operate with existing Law Reform Agencies, while ensuring their independence from government and others, especially their independence in writing their reports and recommendations;

4) governments and Law Reform Agencies to ensure that Law Reform Agencies have law reform projects which are of real importance, which are in appropriate numbers (neither too few nor too many at any one time) and which have practicable timetables for completion;

5) Law Reform Agencies to observe best modern practice for law reform – for example, the highest quality legal scholarship (including international and comparative perspectives), a deep commitment to community consultation and, where appropriate, empirical and multidisciplinary work;

6) governments and Law Reform Agencies to support co-operative working across and beyond the Commonwealth, in such matters as information-sharing, advice, training and capacity-building – making use of regional and other organisations such as the Commonwealth Association of Law Reform Agencies;

7) governments to have special regard to the position of Law Reform Agencies in small jurisdictions;

8) governments to ensure that their Law Reform Agencies are provided with satisfactory resources, such as:-

   - personnel (with high-quality Commissioners and legal, research and other staff),
   - funding and
   - modern technology, accommodation and library facilities.

9) governments to give serious and prompt consideration to enacting and implementing the recommendations of Law Reform Agencies.

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DEVELOPING LEGAL EDUCATION IN THE COMMONWEALTH: SOME CURRENT ISSUES

Paper by the Commonwealth Secretariat

INTRODUCTION

1. In his inaugural address, the then President of the Commonwealth Legal Education Association (The Association) Professor N.R. Menon of the National Law School of India University drew attention to the need to make legal education in the Commonwealth socially relevant and professionally useful and for law schools and vocational training providers to prepare themselves for the demands of the profession in the context of the information revolution and other global challenges. He also drew attention to the need for a fresh look at law curricula and teaching methods and to support continuing legal education and distance learning programmes.

2. Against this background, this paper will:

- provide an overview of legal education in the Commonwealth;
- consider how the Commonwealth might better support the delivery of high-quality legal education that meets the needs of all member states and supports the basic principles of the Commonwealth;
- consider how the Commonwealth might contribute to encouraging research and publishing, especially on legal issues of particular importance to Commonwealth member states;
- consider ways in which Commonwealth law schools and law students might assist law ministries on law reform issues and in the provision of legal services.

LEGAL EDUCATION IN THE COMMONWEALTH: THE CURRENT POSITION

3. The majority of Commonwealth member states have established law programmes so that today there are in excess of 400 law schools and other institutions providing legal education in the Commonwealth.[1] The continued popularity of legal studies means that there are thousands of students studying law at any one time.

4. The variety of such programmes indicates the range of needs that must be addressed. These include:

- undergraduate law programmes;
- postgraduate law programmes;
- inter-disciplinary programmes (such as a Law and Business Studies joint degree);
- non-law programmes that require students to take some law courses (e.g. accountancy courses);
- professional legal training programmes;
- continuing legal education programmes for legal practitioners;
- specialist law training programmes for public officials; and
- judicial studies.

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1 Full details of Commonwealth law schools can be found in the *CLEA Directory of Commonwealth Law Schools* (edited by John Hatchard), copies of which will be available at the Law Ministers Meeting.

Current constraints on the provision of legal education

5. Law schools in the Commonwealth vary considerably in resources, staffing and facilities. Even so, most are faced with at least some of the following constraints:

- cost of legal education;
- limited numbers of places available to study law (this may apply at undergraduate and/or professional legal training levels);
- resource constraints;
- staffing constraints;
- teacher retention;
- lack of local legal materials;
- lack of access to electronic resources; and
- outdated law curricula.

DEVELOPING STRATEGIES FOR STRENGTHENING LEGAL EDUCATION

6. When considering the development of strategies to strengthen legal education, there are also several other issues to consider.

- Access to electronic resources is still limited in many law schools, thus the use of more "traditional" teaching methods must also be explored.
- Significant numbers of law graduates do not enter the legal profession. How can (or should) law programmes cater for such persons?
- Should/can law programmes be developed to address those who may wish to enter the government legal service? (e.g. by providing training in areas that directly address the needs of government legal advisors, such as international criminal matters).

A. Exploring additional methods for delivering high quality legal education

7. Given the above, Law Ministers may wish to consider alternative methods for delivering high quality legal education. These include:

- ***Examining alternatives to full-time law programmes:*** for example, the use of evening and part-time law courses as well as reducing the length of law programmes through extending the number of teaching weeks in a year.

- ***Development of distance learning programmes:*** there are a number of possibilities, including:

- ***Supported open learning programmes:*** for example, the Open University Centre for Law (UK) offers a full LLB degree through "supported open learning": i.e. students study in their own time using (hard copy) course materials, working on course activities and writing tutor-marked assignments. They are supported by a tutor based in their area who holds regular face-to-face tutorials with students and regionally-based student services staff as well as enjoying access to an on-line law library. The popularity of such a programme is illustrated by the fact that the OU law degree is now the largest taught law undergraduate programme in the UK. The development of similar law programmes is also being examined in India amongst other countries.

- ***Electronic/paperless courses:*** such courses are resource intensive in that computer access and broadband connection is essential, but if these resources are to hand, the law teachers do

not even have to be in the same country. Internet video links allow for an interactive session across thousands of kilometres.

- *Offering short intensive courses:* this approach offers the prospect of legal academics and practitioners from other institutions (not necessarily located in that jurisdiction) providing short courses at alternative law schools. Running intensives in different Commonwealth countries can help forge closer links between academics, and provide students with access to different courses and exposure to different styles and experiences in teaching and research.

  This already happens in, for example, Australia. Here lecturers run courses in other law schools, because it is not feasible (for a number of reasons, only one of which is financial) for a particular law school to run that course. The resulting courses are usually intensives – run over a week or two weeks, with assessment some time later.

  Such courses could also be provided as part of continuing legal education for members of the legal profession and judges/magistrates.

B. Establishing new law schools and expanding access to law studies

8. An additional issue is the development of new law schools. At present, there are several Commonwealth jurisdictions that have no law school: for example, The Gambia.

9. Further the issue of access to law studies for females and members of minority groups might also be considered, as well as possible ways of dealing with any disadvantages. For example, the Akitsiraq Law School (Canadian Arctic) offers an LLB degree for Inuit students only, in collaboration with the University of Victoria.

C. Ensuring adequate access to legal information

10. Making appropriate legal resources available to legal educators remains a priority. Two aspects are particularly relevant:

- Firstly, access to electronic legal resources. Today a wealth of legal materials is available free of charge on the Internet, for example, through the World Legal Information Institute (WorldLII) and related web sites. Some material relating to law in the Commonwealth is also available on the CLEA website (www.cleaonline.org).

- Secondly, some Commonwealth states suffer from an absence of publications on local laws. One way to address this problem is through the print on demand programme of the CLEA. This offers the possibility of producing law books and materials on any subject cheaply and speedily with the print run being as large or small as demand requires. Additional copies can be ordered as and when required. The challenge is to examine ways of ensuring adequate access to materials for all Commonwealth law schools and legal practitioners.

D. Curriculum development

11. The rapidly developing legal landscape in the Commonwealth (and beyond) is well illustrated by the range of cutting-edge issues for discussion at successive Meetings of Commonwealth Law Ministers.

12. Law schools need to respond to these changes by developing new courses/modules and/or revising existing courses to reflect:

- the importance of Commonwealth jurisprudence;
- the need to equip students, both in their academic and vocational law studies, to meet the demands on the 21st Century lawyer;
- the fact that significant numbers of law graduates do not enter the profession;
- the growing importance of continuing legal education to assist members of the profession develop their knowledge and skills.

13. In practice, staffing and resource constraints and difficulties in gaining access to appropriate materials often make this exercise problematic. Some work has already been undertaken to address this situation. For example the Association is developing a curriculum development project designed to assist Commonwealth legal educators in updating existing law courses and in developing new ones.

14. To date a model human rights curriculum for the Commonwealth has been developed which has been adapted for use by both law schools and a range of other institutions: most recently for a number of tertiary institutions in India.

15. The Association has also worked with the Criminal Law Unit (CLU) of the Commonwealth Secretariat to develop a course for use in law schools and professional training institutions on transnational crime. Further, in partnership with the CLU, the Association has held four regional "training the trainer" workshops on the transnational crime course for Commonwealth law teachers. Subject to funding, it is hoped to expand this course to include further topics such as money laundering and anti-terrorism laws. The Secretariat also intends to develop new courses, including Environmental Justice, an Introduction to Islamic Law, and Land and Development.

16. In order to ensure that they meet the needs of law teachers in different regions of the Commonwealth, it is suggested that the development of the curricula be drawn up by an expert group broadly representative of the Commonwealth and that regional workshops be held along the lines of those mentioned above.

17. Another initiative is the recently established Public Integrity Education Network whose basic objective is to develop and facilitate the introduction of effective, policy-oriented training and teaching programmes on corruption control and organisational integrity at universities around the world. In this regard Law Ministers may also find the project proposal attached as an **Annex** to this paper of interest.

E. Professional legal training

18. Whilst many of the issues raised in this paper also relate to professional legal training, there are other specific issues that might be discussed. These include:

- organisation of professional legal training: e.g. the benefits or otherwise of an integrated law programme (i.e. combining the academic and practical stages); who should be responsible for providing professional legal training? (This is currently an issue of particular concern in England and Wales.);

- facilitating access to such programmes: for example, Cameroon annually produces a large number of law graduates but only a very small percentage are able to gain entry into the professional legal training programme.

19. A comparative study of professional legal training in the Commonwealth might assist member states to review their existing arrangements.

SUPPORTING LAW STUDENTS

20. Given the significant number of young people studying law, it is important to provide them with opportunities both to develop an interest in the Commonwealth and to meet fellow students from other jurisdictions.

21. Two opportunities offered by the CLEA provide useful examples.

- Developing Student Chapters on a regional basis. This has started in the South Asia region where law students from Bangladesh, India, Pakistan, and Sri Lanka have held two conferences on law and legal education in the region.

- Commonwealth Law Moot. This is held biennially with the last three competitions being held in Colombo, Melbourne and London. A South Asia CLEA Moot competition is also organised regularly. The competition is particularly noteworthy in that it brings together teams of law students from around the Commonwealth to deal with a problem of particular contemporary importance to Commonwealth states.

22. Law Ministers may wish to express support for these strategies and consider how they might be further developed.

CONTRIBUTION OF LAW SCHOOLS AND LAW STUDENTS TO LAW REFORM AND THE DEVELOPMENT OF LEGAL SERVICES

23. There is a range of opportunities that law schools and law students offer here. These include:

- *Provision of legal advice and support for legal aid:* for example, through the development of university and community legal aid clinics.

- *Law student participation in volunteer schemes:* for example, the Pro Bono Students of Canada programme matches volunteer law students with government agencies, tribunals, courts, national and local public interest organisations and lawyers doing *pro bono* work.

  This is a potentially very worthwhile exercise at a number of levels. The students learn about the workings of government in a practical sense; they are a well-educated resource; and such internships provide excellent employment opportunities post-graduation. They are also less resource intensive as far as academic supervision and time are concerned.

- *Developing links between law school and law reform agencies:* such links already exist between local law schools and the Alberta Law Reform Institute, Tasmanian Law Commission, British Columbia Law Reform Commission and Uniform Law Commission respectively.

- *Assisting government ministries with legal research and advice.*

- *Developing courses for public officials*: for example, providing specialist courses on recent legal developments in the Commonwealth.

Building Strategic Partnerships

24. The contribution that other agencies might make towards the development of high quality legal education should be examined. It may be useful to consider the possibilities offered by building strategic partnerships between governments, law schools, business and industry.

25. This is an area that has not been adequately explored and Law Ministers may wish to consider the feasibility of developing such partnerships.

CONCLUSION

26. The provision of high-quality legal education is a pre-requisite to high-quality legal practitioners, judges, magistrates and government law officers. However, in examining ways of developing legal education it is essential to recognise that although many Commonwealth law schools face common problems, there is a wide diversity of needs and concerns that must be addressed.

27. This paper has sought to raise a series of issues and challenges for Law Ministers with a view to assisting them in considering and developing policy on how the Commonwealth might contribute to the delivery of high-quality legal education which takes into account the diversity of member states and the establishment of strategic partnerships.

28. Law Ministers may wish to consider how the CLEA can work with the Secretariat to promote and develop the issues outlined in this paper, including:

- assisting member countries who wish to develop their own law schools;
- developing new ways of delivering legal education including long distance learning and short term intensive courses;
- ensuring access to adequate legal information across Commonwealth law schools;
- supporting curriculum development, including identifying further areas and topics for development and assisting in the revision, development and updating of the law curriculum to ensure it remains relevant to the needs of all member states;
- developing links between governments, law schools, business and industry.

CURRICULUM DEVELOPMENT IN COMMONWEALTH LAW SCHOOLS

A project proposal by the Commonwealth Legal Education Association

Objective of the project

There are well over 400 law schools in the Commonwealth with a total law student population running into many thousands. Most Commonwealth law schools have much in common:

- the legal system being studied is based on the common law and Commonwealth countries have adopted common approaches to tackling constitutional and legal problems;
- they teach in a common language; and
- the "core subjects" in the law curriculum are very similar.

Many also face a common challenge: to develop new law courses/modules and/or to revise existing courses to reflect:

- the importance of Commonwealth jurisprudence;
- the need to equip students, both in academic and vocational legal studies, to meet the demands on the 21st Century lawyer;
- the growing importance of continuing legal education.

However, many Commonwealth law teachers experience difficulties meeting this challenge, not least because of time constraints that preclude the development of new courses, lack of research opportunities and the inaccessibility of relevant materials.

The objective of this project is to assist in the development of legal education in the Commonwealth by:

- identifying and developing new courses/modules relevant to Commonwealth law schools and lawyers;
- supporting Commonwealth law teachers in the updating of existing law courses;
- providing mechanisms for the regular updating of materials;
- organising regular regional "training the trainer" programmes and refresher courses for law teachers;
- encouraging legal research.

Scope of the project

1. Developing New Law Courses/Modules

The Association has compiled a provisional list of subject areas where assistance with course/module development is particularly appropriate. This is based on the views from Commonwealth law teachers and areas of particular interest to Commonwealth Law Ministers.

- Human Rights for the Commonwealth
- Transnational Crime
- Environmental Justice
- An Introduction to Islamic Law

- Medical Law
- International Trade Law
- Law and Technology
- Intellectual Property
- Land and Development

To date, work has commenced on the human rights and transnational crime courses. Some preliminary work has been done on Environmental Justice and Introduction to Islamic Law courses.

Human Rights for the Commonwealth

In 1998 the Association was commissioned by the Commonwealth Secretariat, Human Rights Unit to develop a model human rights curriculum for Commonwealth law schools and for others interested in offering a course on human rights law to their undergraduate students. The model pays particular attention to, and includes a significant amount of material on, the contribution made by the Commonwealth and Commonwealth countries to the protection and promotion of human rights. It also pays particular attention to the problems of small Commonwealth states.

It was made available in both hard copy and electronically. In recognition of the fact that it is difficult to fit new courses into an already crowded law programme, the course was designed to be flexible enough to enable law teachers to "pick and choose" particular aspects for use in existing courses.

The course proved of considerable interest and encouraged and enabled a number of Commonwealth law schools to introduce a human rights course into their undergraduate studies.

In 2004 the course was extensively revised and updated and is now available in both hard copy and electronic format.

Transnational Crime

In partnership with the Commonwealth Secretariat, Criminal Law Unit, the Association has organised four regional "training the trainer" sessions for law teachers in the area of international co-operation in criminal matters (extradition, mutual assistance and proceeds of crime). These were held for law teachers in the Caribbean; West Africa; East and Southern Africa; and the Pacific and Australasia.

The course will also be offered to law teachers in South Asia and will further be developed to include key topics such as money laundering and anti-terrorism laws.

Environmental Justice

Dr Ros Macdonald of the Queensland University of Technology will oversee the development of this course.

An Introduction to Islamic Law

The development of this course will be overseen by Professor Ibrahim Na'iya Sada, of the Centre for Islamic Studies, University of Ibadan, Nigeria.

Target audience

The courses/modules will be aimed at:

- law undergraduates;
- law postgraduates;
- law students attending the vocational stage of their legal training; and
- non-law students wishing to undertake specific law courses.

The courses will also enable law schools to mount effective and useful programmes on continuing legal education for legal practitioners.

2. Developing and Updating Existing Law Courses

In many Commonwealth law schools, the task of updating existing law courses to take into account both Commonwealth-wide and regional developments and jurisprudence remains problematic. Once again, this is due particularly to time constraints on the part of law teachers and their lack of access to appropriate materials.

To address this difficulty, the project will assist law teachers by providing updated materials on key areas. These will include:

- Criminal law, e.g.
- computer related crime;
- legal responses to terrorism;
- tackling corruption;
- evidence e.g. electronic evidence;
- constitutional law;
- administrative law;
- obligations e.g. impact of e-commerce.

3. Updating the materials

A key aspect of the project is to keep the courses and materials updated. This will be done by disseminating information obtained from, amongst other sources, the CLEA's extensive network of Commonwealth law teachers.

The materials will be disseminated both electronically and through hard copy using existing CLEA and Commonwealth channels (see below).

4. Holding regional training workshops

Support for the use of the new courses/modules will be provided by way of regional training workshops for law teachers. This will be based on the successful model developed for the Transnational Crime course noted earlier.

These will be organised through the CLEA Chapters and Committees.

5. Encouraging legal research

It is hoped that the assistance provided to law teachers will enable/encourage more of them to undertake significant research on topics related to law in the Commonwealth. The CLEA's *Journal of Commonwealth Law and Legal Education* will provide one suitable publishing outlet.

Methodology

- The CLEA will oversee the development/updating of the courses/modules, utilising its extensive links around the Commonwealth.

- The courses/modules and related materials will be developed by teams of experts from around the Commonwealth.
- The materials will be developed to address regional issues and concerns, as well as the concerns of small Commonwealth states.
- For each new course, a meeting of experts from around the Commonwealth will be convened to finalise the notes and materials.
- Each new course/module will include appropriate reference materials.
- Where appropriate, the Association will organise regional "training the trainer" sessions for law teachers on the new courses as well as on "new Commonwealth trends and developments" in relation to existing law courses.
- The CLEA will provide a regular update of materials.
- The new courses will also be made available for students to study in an on-line distance learning environment (see below).

Delivery of the courses/modules

Given the variation in the availability of, and accessibility to, electronic materials in Commonwealth law schools, the mode of delivery will be undertaken in a variety of ways.

- provision of hard copy;
- CDs;
- through the web site of the CLEA;
- delivery via an on-line distance learning environment.

Some courses/modules will be carried out by the CLEA in partnership with the School of Legal Studies, University of Wolverhampton (SLS) through the Wolverhampton Online Learning Framework (WOLF). This is a purpose-built computer-based learning environment developed to enable law students to access course notes, related resources and support materials quickly and easily.

Law schools will be able to have their students register for and undertake a course/module on-line with the assessment either being undertaken locally or marked and moderated by examiners selected by the SLS in partnership with the CLEA. This will also help address the acute shortage of law teachers in some universities.

Updating of the materials

A key part of the project is to regularly update the courses/modules and materials. This will be undertaken in the following ways:

(i) electronically via the web site of the CLEA;
(ii) providing updates by way of CD Roms;
(iii) providing updates by means of hard copy.

To facilitate the process, the Association proposes to make use of three existing publications:

(i) *Commonwealth Legal Education:* This Newsletter is published three times a year by the CLEA and is sent to all known Commonwealth law schools and law libraries.

(ii) *Journal of Commonwealth Law and Legal Education:* This is the CLEA's own journal and is published twice a year. It is designed to provide Commonwealth law academics with a ready vehicle for publishing their research.

(iii) *Commonwealth Law Bulletin (CLB):* The CLB is a potentially invaluable resource for this project as it carries a range of materials and information on law in the Commonwealth. Its format might be revisited with a view to enhancing its usefulness as a resource tool.

Other issues

(i) *Potential problems of incorporating the new courses/modules into the existing law curriculum:* It is recognised that undergraduate and vocational law programmes are often already overloaded. The new courses/modules will be designed to be as flexible as possible, so that, where necessary, key parts can be included in an existing course(s).

The courses/modules can also be included as part of a postgraduate or law diploma programme or for continuing legal education courses.

(ii) *Other initiatives:* A considerable amount of legal material is already available on the Internet, for example through the World Legal Information Institute and its related institutes. However, there is currently no systematic programme designed to provide the sort of assistance to Commonwealth law schools envisaged by this project.

GUIDELINES FOR AN INDEPENDENT REGULATORY FRAMEWORK FOR COMMONWEALTH BROADCASTING ORGANISATIONS

Paper by the Commonwealth Secretariat

EXECUTIVE SUMMARY

1. At the Meeting of Law Ministers from Small Jurisdictions in October 2004, Ministers discussed a paper (see **Annex 1)** setting out the basic principles of the regulation of broadcast services. It was decided at that Meeting to ask the Secretariat to bring forward proposals for a work programme to further develop those principles with a view to assisting the roll-out of best practice throughout the Commonwealth.

2. It was noted at that Meeting that there are several reasons for introducing regulation of broadcasting: democratic purposes, cultural and consumer protection reasons, and economic purposes.

3. Open and pluralistic broadcasting is a key component of a democratic society. The specific features of broadcasting regulation which go directly to the promotion of democracy are: having a right of appeal and a right of reply; an obligation for news to be accurate and impartial; and rules which prevent discrimination and incitement to crime, including religious or ethnic hatred.

4. It is vital for the application of these rules - as well as the full range of broadcasting regulation - to be done by a regulatory body that operates independently of political or industry influence and control. To be independent, the remit and the means of funding of the regulator should be set out in law. The appointment process must be managed in a way that avoids political interference, and individual regulators must not have any conflicts of interest which prevent them executing their duties in a clearly objective way.

5. A country's culture will affect the detail of rules that are intended to protect minors and avoid offence on grounds of taste and decency. Generally, the content of advertising is also regulated, at least to ensure it is legal, decent and true.

6. Broadcasting regulation can also have economic purposes such as the application of international trade agreements or promoting inward investment. Regulation can also be used as an incentive for domestic production sectors and to promote new technology such as digital broadcasting.

7. Although many Commonwealth states have sophisticated broadcasting legislation with dedicated, independent regulators and public service broadcasters, not all do. To further roll out best practice throughout the Commonwealth, in the support of the necessary separation of government from civil society, and in pursuance of democratic principles, Ministers are invited to take note of the guidelines below and endorse them with a view to the Secretariat assisting countries to draw up the necessary legal and regulatory infrastructures for requesting member states.

GUIDELINES FOR AN INDEPENDENT REGULATORY FRAMEWORK FOR COMMONWEALTH BROADCASTING ORGANISATIONS

INTRODUCTION

1. Following the Meeting of Law Ministers from Small Jurisdictions in October 2004 in which Ministers discussed a paper setting out the basic principles of the regulation of broadcast services, the Secretariat has developed these guidelines with a view to assisting the roll-out of best practice throughout the Commonwealth.

2. From initial desk research of a number of Commonwealth states (see **Annex 2**) it would appear that the majority have not yet established independent broadcast regulatory authorities, but still retain direct state control over issuing broadcast licences, and in many cases, the regulation of content and content-related issues.

3. The lack of independent regulatory bodies tends to be matched by the retention of state, rather than independent public service broadcasters (PSBs). Yet, the creation of independent regulators and PSBs is one of the ultimate tests of the establishment of a successful democracy.

4. This paper sets out the clear benefits of regulating broadcasting by means of an independent body, and of the provision of broadcasting in the public interest - in the famous words of Lord Reith of the BBC - to "inform, educate, and entertain" citizenry. Practical considerations of *how* to establish independent regulators and public service broadcasters are discussed.

INDEPENDENT REGULATION

5. It is accepted best practice throughout the world that as an independent broadcasting industry develops, so too must an independent regulatory system to licence and oversee this industry. The development of democracy requires the availability of a variety of sources of information and opinion so that the population can make informed decisions at times of elections. Throughout the world, television and radio are now the main sources of news and information. To enable open debate for the proper operation of democracy there needs to be a plurality of service providers to enable access of viewers and listeners to a wide range of sources of news and information.

6. If decisions on who shall hold a broadcast licence are left as the sole preserve of government, there is unlikely to be - or to be seen to be - a fair, equitable range of service provision. Indeed, in many countries where the government (or a government-controlled regulator) determines new licences, those broadcasters – unsurprisingly – all overtly support the government.

7. But if government control of broadcasting regulation provides a degree of political support, then why should a government give up this control? Last year, the government of a country in South East Europe that not only controlled the regulatory authority but also all the television broadcasters lost power in a general election. People said that "the voters were smarter than the viewers". Proper delegation of licensing responsibilities to an independent regulatory body set up by statute not only creates faith in the fairness of the licensing process, but can also remove governments from the potential political turmoil which can be associated with the grant of licences. In the last few years we have seen political unrest turn to protest and murder as a result of a government-sponsored broadcasting regulator in Armenia revoking the licence of a popular television station which was perceived to support the opposition party. Since then, Armenia has changed its law to enable the creation of a more independent regulator - putting more distance between the state and the regulator, and de-politicising broadcasting regulation.

8. Throughout the former Soviet bloc in Eastern Europe countries have struggled with the separation of media and the state. Now, it is only the most fervently dictatorial and still communist states such as Belarus and Moldova that retain strict state control over the regulation of broadcasting. Even so, newer democracies such as the Czech Republic and Poland still struggle with ensuring their broadcasting regulators are sufficiently independent to refute allegations of government interference and political pressure. Members of the Commonwealth, with a longer democratic tradition, should find the process easier. Commonwealth countries understand the separation - and interplay - between the executive and the legislature, and so are better placed to appreciate the clear benefits of releasing broadcasting from executive control, but still subjecting it to clear and proportionate legislative constraint. Yet, even within the Commonwealth, there is room for improvement. There are voices calling for the introduction of broadcasting institutions that are independent of political manipulation, and licensing regimes which encourage diversity, but not at the expense of quality.[1]

9. So, on a practical level, what are the considerations and practical obstacles to setting up an independent broadcasting regulator?

Creation and Remit

10. The first matters to decide are the scope of broadcasting regulation, those issues which will remain the preserve of the government, and those which will be the responsibility of the independent regulator. The paper at Annex 2 examines the range of issues which broadcasting regulation typically covers.

11. It is normal for governments to retain responsibility for broadcast frequency planning, within ITU and regional agreements, often within a single department which manages all allocated spectrum. However, the UK is an example where a single, converged regulator – Ofcom - has been created to cover broadcasting, telecommunications and spectrum management.

12. Beyond spectrum planning and management, it is also common for governments to retain certain powers in relation to competition issues, or at least to make them the preserve of a specialist competition regulator, rather than a dedicated broadcasting regulator. Again, the UK is an exception, but only in a limited sense. The UK communications regulator, Ofcom, has concurrent powers with the UK competition regulator on issues relating to anti-trust and cartel behaviour, although the competition regulator has sole responsibility for deciding whether mergers are anti-competitive.

13. Other broadcasting-related intellectual property issues are sometimes the preserve of a broadcasting regulator, although more often than not, countries leave disputes over copyright, trademarks, etc. to the general application of law.

14. Other than these issues, the dedicated broadcasting regulator is normally tasked with choosing who will be entitled to a broadcast licence, applying the licensing regime, and ensuring that licensees comply with content requirements. It is best practice for these matters, at least at the highest levels, to be enshrined in statute, although detailed standards are often left to secondary legislation or Codes and Guidelines to be issued by the regulator.

15. The clear advantage of having these matters set out in statute is to provide clarity, not only to the industry, but also to the general public, who will know what to expect with a degree of certainty.

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[1] See for example the Caribbean Broadcasting Union at http://www.caribunion.com/html/FromThePresident.html

Appointments and termination

16. Another key matter which – to comply with best practice – must be set out in legislation is the manner in which members of the regulatory authority are to be appointed, and the terms of their appointment, in such a way as to safeguard their independence.

17. There is no 'right' way to go about the appointment of members to a regulatory authority. There are many different models, all intended to ensure the creation of an independent board. Some examples are:

- to ensure that each major political party is equally represented on the authority's board;
- to allocate a number of places (typically 3) to each of the President, the Parliament, and Government;
- to allocate nominations to certain sectors of civil society (e.g. the judiciary, academics, trade unions, churches, the professions), with final selections voted on in Parliament;
- to publicly advertise for members, and applicants to be short-listed and selected by civil servants, for final approval by Parliament; or
- to apply strict qualifying criteria for applicants (e.g. business or legal experience, quotas based on ethnic minority, race or gender), with selection made by a representative group of senior politicians.

18. In each country, careful consideration has to be given to the mode of appointment – what process will deliver the best group of members who will be able to act independently, and will have the trust and respect of the industry, the general public, and politicians?

19. What helps in this process is setting a clear job specification: what set of skills and experience is needed on the authority? Selecting the right people not only ensures the authority is equipped to do its job, but avoids accusations of 'jobs for the boys'. Also, membership of the regulatory authority ought generally to reflect - or be capable of representing - the composition of the nation in terms of gender, ethnic make-up, religious orientation, etc. This is in line with one of the agreed principles on accountability agreed by Law Ministers in November 2002.[2]

20. The rules of appointment should also be defined to protect the authority members from interference from political or economic forces. It is fairly axiomatic that members (and their close family) should not hold political office, or have any financial interest in any part of the sector they will be regulating. Some countries believe that members should not be permitted to take any other work or have any other earned income during their tenure on the authority, in order to protect them from potential monetary influence. This clearly depends, though, on the size of the job to be done; if the job of the member is not full-time, then other safeguards need to be put in place to ensure that no conflicts of interest arise.

21. As well as defining the terms of appointment, the terms of dismissal should also be set out in statute to avoid an irate government using the threat of dismissal as a political lever. Dismissal should only be possible in limited circumstances, namely physical or mental incapacity, regular non-attendance, insolvency or bankruptcy, conviction of a serious criminal offence, or clearly breaking the rules of appointment (for example by not declaring a conflict of interest).

Funding

22. Another vital element to ensuring independence is providing a secure means of funding of the regulatory authority. In order to avoid government authorities applying political pressure on the

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[2] See Commonwealth Principles on the Accountability of and the Relationship Between The Three Branches of Government, April 2004.

regulator through funding mechanisms, arrangements for funding should be specified in law in accordance with a clearly defined plan, and with reference to a transparent budgeting process.

23. Internationally, the accepted best method for arranging funding of the broadcasting regulator is by having the regulator's costs paid by the industry it regulates through licence and other fees. However, this will only work in countries where the broadcasting industry is sufficiently large and profitable to be able to afford to pay for its regulator. In countries with a small or immature broadcasting market, at least a proportion of the costs of regulation must be met from the public budget. Any proposal to create a new regulatory authority will need carefully to consider the costs of the authority, and how those costs are to be met in the most efficient way; authorities need not be large – especially in smaller jurisdictions. There are an increasing number of jurisdictions which are merging existing regulatory bodies, or creating new ones, to regulate both broadcasting and telecommunications. This can also lead to significant cost efficiencies.

24. Especially where funding is, at least in part, directly from central state budgets, care must be taken to ensure funding is safeguarded against actual or potential political pressure. It is strongly advisable to set out in the founding statute of the regulatory authority how the annual budget of the regulator is to be assessed and approved.

Accountability

25. Independence from government requires clear mechanisms whereby the regulator can demonstrate accountability for its actions, and justify its receipt of public funds. This can include a requirement in law for the regulator to publish its annual report and accounts, and a means by which the authority must account for itself to Parliament – often by means of the Chairman and other Board members attending a special meeting or committee of Parliament to answer questions. This should not be taken as an opportunity for political pressure to be applied, but to ensure that the authority is managing itself properly with due efficiency and value for money.

26. The duties and powers of the broadcasting regulatory authority, as well as the ways of making the authority accountable, the procedures for the appointment of members, the criteria for the termination of their appointment, and the means of funding should all be clearly defined by law.

Secretariat Proposal

27 The Commonwealth Secretariat is proposing to offer help to those jurisdictions who either have not yet created an independent regulatory authority to cover broadcasting, or for those who are considering changing the nature of their regulation (either to modernise it in line with best international practice, or to merge their existing broadcasting and telecommunications regulators). The help will consist of arranging the necessary legal, structural and change management consultancy advice, calling on internationally acclaimed experts – wherever possible citizens of Commonwealth countries. There may also be scope for international experts with regulatory experience to act as an interim regulator – with other national members – on the regulatory board, to help to bed down best practice.

AN INDEPENDENT PUBLIC SERVICE BROADCASTER ("PSBs")

28. While fledgling states may have relied upon their own state broadcaster to keep the populace informed and entertained, as democracy develops, particularly in a multi-channel environment, this level of state control and intervention is no longer sustainable or justifiable. As citizens become able to access a range of television and radio services (both domestic, and transmitted by satellite), they are less likely to tolerate the bias of a traditional state broadcaster. Yet, it remains a clear public interest objective to provide citizens with a service which reflects their own culture and interests

them, and is supported by their domestic industries. No country wants to see its citizens able to access only international broadcasts. This is where the introduction of a public service - rather than a state - broadcaster adds value and plays an integral part in retaining and developing cultural identity.

29. The international model of public service broadcasting is the UK's BBC. However, it is unrealistic to expect to be able to create a new publicly-funded broadcaster with the resources and breadth of the BBC, which has been in existence since 1927 and still retains over half of the UK's radio listening, and a quarter of all television viewing. But the principles which inform the BBC remain relevant to PSBs worldwide:

- to sustain citizenship and civil society;
- to promote education and learning;
- to stimulate creativity and cultural excellence;
- to reflect the nation and its regions and communities;
- to bring the world to the UK, and the UK to the world.[3]

30. This is done through the provision of a universally receivable service, and diverse programming catering for minority, as well as popular interests.

31. UNESCO defines public service broadcasting as "broadcasting made, financed and controlled by the public, for the public. It is neither commercial nor state-owned, free from political interference and pressure from commercial forces. Through PSB citizens are informed, educated and also entertained. When guaranteed with pluralism, programming diversity, editorial independence, appropriate funding, accountability and transparency, public service broadcasting can serve as a cornerstone of democracy." [4]

32. The Asia-Pacific Institute for Broadcasting Development (AIBD) says, " Public service broadcasting features key components of universality, cultural diversity, creativity and editorial independence; it can stimulate the entire broadcasting landscape to improve quality and effective service to society."[5]

33. A meeting of Ministers on Information and Broadcasting in Asia and the Pacific region was held in Bangkok from 27-28 May 2003 to look at the challenges faced by public broadcasters in the region. A Declaration arising from the Conference states that:

> "Authorities are encouraged to:
>
> 1. Allow autonomy in content creation, management, finance and administration of public service broadcasters;
> 2. Study and consider the following funding mechanisms for public service broadcasting:
>
> i. One-time fee while buying a radio/television/electronic appliances/mobile phones
> ii. Introduction of a license fee either as a stand-alone or as an addition to the electricity bill
> iii. Government grants for infrastructure
> iv. Advertising/commercial revenue, but it should not undermine the mandate of public service broadcasting
> v. Sponsorship

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3 See the DCMS BBC Charter Review on the role of the BBC: www.bbccharterreview.org.uk.
4 See http://portal.unesco.org/ci/en/ev.php-URL_ID=1525&URL_DO=DO_TOPIC&URL_SECTION=201.html.
5 See http://www.aibd.org.my/page/www_activity_schedule/f2f/2652.html.

vi. Contribute to production of programs for clearly defined developmental needs;

3. Regularly review the mandate of public service broadcasting in view of national, regional and global events in order to foster mutual understanding, tolerance and trust;
4. Allocate preferential frequencies to public service broadcasters;
5. Create legal structures to allow independence of decision making to public broadcasters;
6. Ensure allocation of adequate time by private networks for public service programs and for pluralistic content for all groups of society;
7. Ensure complete editorial independence."[6]

34. Although set up with good intentions, many public broadcasters in the South Pacific region remain under state control. For example the Charter of Radio Televisyen Malaysia, which purports to be a PSB, says, " We pledge to ensure the standard of broadcasting is of the highest quality, *in line with the government's policies and aspirations*, to cater to the varied tastes of the society" (emphasis added).[7]

35. Similarly, the Pakistani Broadcasting Corporation, created by statute in 1972, sets out many admirable objectives including:

" - To provide broadcasting services in the fields of information, education and entertainment through programmes which maintain a proper balance in their subject matter and a high general standard of quality and morality;
- To broadcast programmes to promote Islamic Ideology, national unity and principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam;
- To reflect the urges and aspiration of the people of Pakistan and promote principles of democracy and culture of freedom and tolerance;
- To present news of events in as factual, accurate and impartial manner as possible and *to carry out instructions of Federal Government with regard to general pattern of policies in respect of programmes;*
- To broadcast programmes in the External Services to foreign countries with a view to promote friendship and project Pakistan's view point on international issues in true perceptive" (emphasis added).[8]

36. While many nations have sought to learn from international experience of 'best practice', there are accusations that - particularly in the emerging and newer democracies - public broadcasters remain the voice of government under strict political control. The Media Institute of Southern Africa, which seeks to promote a diverse, pluralistic and independent media sector, says:

"A public broadcasting system detached from state influence is absolutely essential to dissemination of impartial and diverse information. An independent and well-performing public broadcasting system examines public issues with an incisively critical eye by providing programmes that include public debate, cultural expressions and educational programming aside from entertainment. Public Service Broadcaster (PSB) should unfailingly render service to individuals, communities and societies in order to contribute to a shared political, social and cultural frame of reference and bring about social cohesion among different peoples. This form of PSB, which meets its audience not only as consumers but as citizens, binds democratic societies and develops national identity and cultural preservation...

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6 http://www.aibd.org.my/conferences/bangkok/declaration.html.
7 http://www.rtm.net.my/english/web/vision_mission.htm.
8 http://www.radio.gov.pk/Object.html.

> The Public Service Broadcasting obligation, in short, is to supply the public on a national level basis with diverse balanced programmes relevant to all groups of the population, including minorities, maintain integrity towards economic, social, cultural and political interests of the country."[9]

37. In September 2004, a workshop with participants from the African Commission, broadcasting regulators, broadcasters and parliamentarians from six Southern African Commonwealth states (plus Zimbabwe) concluded that most national broadcasting services in Southern Africa were still state broadcasters. This is contrary to Article 9 of the African Charter's "Declaration on Principles of Freedom of Expression in Africa", as interpreted by the African Commission on Human and Peoples' Rights. This binding interpretation says that state broadcasters are to be transformed into PSBs, which are accountable to the public through legislation, rather than through the government, with adequate funding to protect them from arbitrary interference. In Africa, it is generally considered that the only true PSB is in South Africa. While other countries, notably Ghana and Kenya, have ended overt state control of their broadcasters, they remain subject to out-dated legislation which means that structurally and legally the broadcasters remain state, rather than PSBs.

38. So how does a government go about creating a public broadcaster with a primary purpose to serve the public, belong to the public, and which is accountable to the public?

Creation and remit

39. First, as with an independent regulatory authority, the PSB must be set up by statute, with a clearly defined mandate which preserves the PSB's editorial independence. The remit of the PSB should clearly state that it is there to serve the public interest, taking into account ethnic, cultural, religious and other diversity.

Appointment and termination

40. The board which governs the PSB should be appointed by a process which is free from political control. Similar models of appointment to those of regulatory authorities are used for appointing PSB boards. However, another model should also be considered, drawing from international best practice in corporate governance. That is to have a mixed board of executive (i.e. senior staff who manage the PSB) and non-executive members, with the non-executives all bringing particular skills and experience to benefit the successful running of the broadcaster. This enables the non-executive Board members to share their strategic skills and their ability to represent the public interest, with the creative leadership of the executive.

41. To avoid the risk of political pressure being placed on individual board members, the terms of appointment should be fully spelled out in the founding statute, including the basis upon which appointments may be terminated.

Funding

42. It is vital for the PSB to benefit from adequate, independent funding that will enable the PSB to produce quality programming in line with its remit. To avoid the potential for political interference in editorial matters, the funding mechanism should be settled for a period of a number of years and be inflation-linked. This will provide certainty for funding to the PSB, which is necessary for proper long-term planning.

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[9] See www.misa.org/broadcasting.html

43. There are many different funding models for PSBs around the world. In some cases the PSB is funded completely through advertising, but in most cases, the PSB's funding is a mix of commercial revenue and public funding. The public money can come from licence fees charged to anyone who buys or owns a radio or television, or for example, an additional charge on electricity bills. In other cases, the funding can come straight from the general state budget, for example as a set percentage of gross national income. In the United States the PSB is funded by voluntary public subscription, but this is not considered to be a desirable model and is not used elsewhere. Deciding on the source of funding is a major decision which needs to take account of a number of factors including the overall size and strength of the broadcasting sector, the wealth of the population, the popularity of the PSB, and the likelihood of collection of the licence fee.

Accountability

44. As the recipient of public funding, there must be a mechanism by which the PSB can be accountable to the public. As with regulatory authorities, the PSB should publish annual reports and accounts, and be accountable to parliament for the delivery of its remit. However, the PSB ought also to find a way to be accountable to the public it serves. One way of doing this is through conducting regular research to discover how best to serve its audience. Another way is through finding a means of dialogue with listeners and viewers, perhaps by holding public meetings. In states which do not have a cultural history of public engagement with civic bodies, or broadcasters, thought should be given to conducting some sort of advocacy and training programme to inform citizens of the benefits of a PSB and their rights of access to fair and impartial information. In such circumstances, unless there is a proper dialogue between audiences/citizens and the PSB, the law will have little effect by itself in providing the public with a true service.

Secretariat Proposals

45. Although many Commonwealth states have sophisticated broadcasting legislation with dedicated, independent regulators and public service broadcasters, not all do. To further roll out best practice throughout the Commonwealth, in support of the necessary separation of government from civil society, and in pursuance of democratic principles, Ministers are invited to take note of the above guidelines and endorse them with a view to the Secretariat assisting countries to draw up the necessary legal and regulatory infrastructures for requesting member states.

ANNEX 1

BROADCASTING LEGISLATION AND REGULATIONS: ISSUES FOR DISCUSSION

Paper by Eve Salomon, Solicitor & Media Consultant

1. Background

1.1 Increasingly countries are introducing new, or revising existing legislation to regulate broadcasting services. This is a consequence of the increasing realisation that the broadcasting media is both a potentially highly profitable industry and a powerful means of effecting cultural change. These factors are magnified with transnational broadcasting, or when spectrum capacity becomes scarce. The paper will look at the key issues arising in broadcasting legislation, grouped into three categories: democratic principles (including the establishment of independent regulatory bodies), economic issues, and cultural and citizenship issues.

2. Recommendation

2.1 Commonwealth Ministers, particularly from Small Jurisdictions, may want to consider or may want to endorse the introduction of broadcasting legislation as a means of promoting and protecting freedom of expression in democratic societies

3. Background Discussion

3.1 Why should broadcasting be regulated at all? In part, because the broadcast media can affect people's thinking and behaviour to a remarkable extent, both for the good and for bad. For example, 'hate speech' broadcast on radio has been held responsible for inciting and inflaming genocide in Rwanda. But on the other hand, BBC radio broadcasting to the people of Romania is considered to have developed people's understanding of democracy and led to the overthrow of Ceaucescu. As a significant source of news, at times of insurgence broadcasting is often heavily controlled or even stopped. For example, the radio station at Sarajevo was a constant target during the break-up of the former Yugoslavia, and the Taliban forbade broadcasting altogether in Afghanistan. It is important to realise that for most of the world's population - despite increasing access to the internet - broadcasting remains the main source of information. Harnessing its power to work for the democratic process is one of the key purposes of broadcasting regulation.

3.2 In many ways linked to this democratic purpose is regulating broadcasting in order to enhance cultural promotion. Many countries consider that broadcasting can be used to increase indigenous language programme production and therefore to reinforce national cultures. Rather than seek, or even acquiesce to cultural globalisation, broadcasting legislation can be used to protect cultural independence.

3.3 This protection of national or cultural interests also connects to economic interest. To what extent do governments wish to allow inward investment into their broadcasting sectors, rather than retain national controls? Are there specific trade partnerships to be encouraged, or indeed discouraged? Should general competition law apply to broadcasting, or as a result of cultural considerations, should broadcasting be restricted from free market economics?

3.4 And to what extent do these limitations affect broadcast content? As well as the macroeconomic considerations of broadcasting, there are micro-economic elements of potential protection. Should there be limits on radio and television advertising? Given the undoubted power

of broadcasting, should advertisers be bound to tell the truth? And what about programmes? To what extent do children deserve special protection? These are all potential purposes for regulation of broadcasting and will be discussed below.

3.5 But what is the overriding rationale, the reason for regulation broadcasting as distinct from other media, say newspapers and magazines, or the internet? The main justification argued by governments is that broadcasting uses spectrum, and spectrum is a public resource, allocated to nations in accordance with complex international agreements. As such, it is a scarce resource: there is only so much spectrum available for broadcasting use in each country. In some countries, like the UK, all available UK spectrum for television has been allocated, and nearly all that available for radio. There is no more. And therefore, because it is a scarce resource, it is valuable. A licence to broadcast from even a small radio station in the UK is worth millions of pounds. It is therefore reasonable for the state, as the owner of spectrum, to place obligations on broadcasters who use that resource.

3.6 The mechanism used for placing obligations on broadcasters is generally through licensing. It is rare for the state to give away or sell broadcast spectrum in perpetuity; generally broadcasters are allowed to use it for limited set periods under a licence. Sometimes, licences are sold by the government; often they are free. Depending on the level of demand, they are either allocated on a first-come; first-served basis, or competitions are held. It is the licensing process through which governments introduce and enforce the other purposes of broadcasting regulation: the democratic, economic, cultural and consumer protection purposes, which will be discussed in more detail below.

3.7 The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law and the regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner.

4. Democratic Purposes

4.1 It is important for democratic societies to have a wide range of independent and autonomous means of communication, in order to be able to reflect a diversity of ideas and opinions. The Preamble to the European Convention on Transfrontier Television, a Convention agreed between Member States to the Council of Europe representing all countries in Greater Europe, states that freedom of expression and information constitutes one of the essential principles of a democratic society and acknowledges the importance of broadcasting in this regard.

4.2 A key principle to be embodied in any broadcasting regulation is ensuring freedom of speech, but this is not an unencumbered right. The European Convention on Human Rights also makes it clear that everyone has the right, "to receive and impart information and ideas without interference by public authority and regardless of frontiers." However, these freedoms may be subject to such conditions and restrictions as are prescribed by law and necessary in a democratic society. The exclusions cover: the prevention of disorder or crime, the protection of health or morals, the protection of the reputation and rights of others (including the right to privacy), preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. Therefore one of the key issues for legislators is determining where the balance lies between the potentially conflicting rights of the broadcaster, society as represented by the state, and the individual.

4.3 Totalitarian states generally make it an offence to broadcast material which may be critical of government. Unfortunately, there are still many such states, for example in Eastern Europe and Central Asia. Although these states may represent an extreme position, most countries are unlikely to tolerate broadcasting which encourages insurgence. A balance must be sought which on the one

hand allows freedom of expression of opinion, but does not go so far as to incite to crime, including political insurgence. Wherever the balance is drawn, it is vital that the rules are codified to enable broadcasters, viewers and listeners, and law makers to know where the boundaries of acceptability lie.

4.4 What is often helpful to regulators and broadcasters alike is to have the main principles set out in primary legislation, with more detailed rules contained in secondary legislation, or Codes, created by a regulatory body. This procedure enables rules to be varied more easily and quickly to meet changing circumstances, and allows for additional guidance to be offered, explaining the basic statutory requirements.

4.5 Key factors which touch on the democratic purposes of broadcasting legislation and which ought to be considered for inclusion in broadcasting law or Codes are:

- ***The Right of Appeal:*** Arrangements should be made to enable decisions taken on broadcasting matters to be appealed to a Court of Law. In some countries, like the UK, appeals are limited to points of procedure and law, rather than fact. In other countries, like Sweden, no sanctions can be applied unless they have been agreed by the Court.

- ***The Right to reply, and rules on fairness:*** Given the power of broadcasting, broadcasters should have an obligation to be fair. It is generally considered appropriate for broadcasters to be required to offer a prompt right of reply to any person or organisation who considers that a programme has been unfair. An apology might also be in order.

- ***Obligations for news to be accurate and impartial:*** Standards of good journalism require news to be accurate, howsoever published. This is perhaps particularly so in the broadcast media, given their persuasive power. Some countries, for example, those within Europe, require news to be impartial. This is not the case in others, for example the United States, where the editorial bias of the channel's owner can filter through to news.

- ***General obligations for impartiality:*** In many countries it is considered acceptable for a degree of editorial bias to affect general, non-news programming. However, in the UK, *all* broadcast programming must be impartial. This does not mean that points of view and opinions cannot be aired, but that it is incumbent upon the broadcaster to ensure that opposing views are heard and that the television or radio service is not partial itself to any particular view.

- ***Rules preventing discrimination:*** Given the power of the broadcast media, it is perhaps especially important to apply and enforce rules to ensure that programmes do not broadcast material - including the views of interviewees or programme guests - which discriminate against people, for example on the grounds of race, nationality, religion or sex.

- ***Special rules on religious broadcasting:*** Religious broadcasting is another sensitive area where perhaps special rules may be applied to ensure that due respect is given to all religious beliefs, and religious intolerance is not provoked.

4.6 The Council of Europe believes that in order to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector. This will serve to guarantee the freedom of the media while at the same time ensuring a balance between that freedom and other legitimate rights and interests. Perhaps most importantly in order to preserve broadcasting as part of the democratic process, governments should aim to create independent regulators for broadcasting.

- ***Means of appointment:*** It is vital for members of a broadcasting regulatory authority to be able to function free of any interference or pressure from political or economic forces. Therefore the means of appointment should be set out clearly in law and should be done in a democratic and transparent manner.

- ***Remit of regulatory authority:*** The duties and responsibilities of the independent authority should be set out in law, as should the means through which they will be held accountable.

- ***Terms for termination of appointment:*** One of the most invidious ways in which a regulatory authority can be subject to political pressure and influence is through the threat of dismissal. Therefore, the law should state clearly the factors which may lead to dismissal, for example, physical or mental incapacity, or a clear breach of the rules of propriety.

- ***Funding:*** Funding can also be used as a means of exerting political pressure; if the authority does not act in accordance with government wishes, funding could be withdrawn. Terms of funding should be set out in law, and wherever possible be kept separate from any potential political interference.

- ***Conflicts of interest:*** As well as being independent of political forces, members of the regulatory authority must be free of any potential conflict of interest with the broadcasting sector. It is usual for members and their families to be prohibited from having any financial interest in any broadcasting or associated company. A breach of this rule could lead to dismissal.

5. Cultural and Consumer Protection Reasons

5.1 Often linked to these democratic principles are issues related to cultural imperatives. Some governments are increasingly worried about the effects of globalisation on local culture, often citing the spread of American television as a cause of a loss of local identity. Some countries have therefore sought to impose language and original production quotas on their broadcasting (for example, Canada and France have both imposed quotas on French language programming. The quota in Canada has been widely held responsible for boosting the Canadian music industry.). This can have the added benefit of kick-starting local production, but care must be taken not to set artificially high quotas which cannot realistically be met (for example, Croatia has sought to set a 50 per cent original production quota in a country with virtually no indigenous television production sector).

5.2 Other ways in which broadcasting regulation can be used to further cultural objectives are through using a licensing system to make provision for a range of services, and for media pluralism. In addition, a core decision for governments is whether they will provide for public service broadcasting, that is broadcasters who are independent of government but which are obliged to provide certain programming in the public interest in return for a degree of state support. This support is usually in the form of funding, either in part, or in whole (as in the BBC which is funded entirely by a compulsory licence fee charged to all households with a television). However, public service broadcasters can also be supported by the state through the provision of universally accessible services using scarce spectrum. Again, in the UK, there are three commercially funded public service television channels, all of which are obliged to pay government a fee for using spectrum and are required to meet public service programming obligations. However, there are no non-PSB television services with universal, or near-universal access through the analogue spectrum.

5.3 Increasingly throughout the world where state broadcasters still exist, steps are being taken to transfer them to being independent public service broadcasters subject to an independent board, appointed by government. Wherever a public service broadcaster is being set up the key issues are determining the method of governance and accountability, deciding how it is to be funded, and what the key programming obligations are to be.

5.4 A country's culture will affect the way it deals with consumer protection issues, as standards are rarely universal but rather culturally subjective. These fall into three basic categories: standards to protect the quality of viewing and listening, protection of minors, and fairness in advertising. Many countries seek to set rules which limit the amount of advertising available on broadcast services.

Within the European Economic Area, there are strict rules on the amount of television advertising which is permitted, rules setting out the spacing of advertising breaks within programmes, and rules on the scheduling of advertising. While these rules have an effect on the advertising market (sometimes serving to increase the cost of television advertising by limiting its availability), the prime purpose is to ensure that viewers' enjoyment of television is not marred by too many or too frequent ad breaks. Similarly, European television is subject to strict rules maintaining a separation between advertising and programming. For example, product placement is not allowed. These rules are enforced in order to ensure that editorial integrity is not undermined by commercial interests, again at least in part to enhance enjoyment for viewers.

5.5 While many countries outside of Europe are not too bothered about setting rules on the amount and frequency of advertising, most are concerned to ensure that children are protected when accessing broadcast media. Generally, countries set rules to ensure that children are not harmed - either physically or morally, with regulations restricting violence, sexual portrayal and bad language. Many countries insist that warnings precede programmes which are not suitable for children, or that on-screen symbols are used to 'rate' programmes. Many countries also operate a 'watershed' system for television, for example in the UK where programmes that have more adult themes or content cannot be shown before 9 p.m.

5.6 It has long been a requirement in the UK for all broadcast advertising to be honest, decent, legal and true. Advertising is heavily regulated to ensure it is not misleading, does not lead to harm, and is not offensive. In addition, certain categories of advertising are prohibited, for example cigarette and tobacco products. This is not the case in all jurisdictions, as some countries take the attitude, *caveat emptor!* (or "buyer beware!") and do not apply advertising regulation at all.

6. Economic Purposes

6.1 As mentioned above, rules which limit advertising can act to inflate the price of advertising time. This is just one of many economic purposes to which broadcast regulation can be put. These include:

- ***The application of international trade agreements:*** For example, Members of the European Union are bound by a Directive (Television Without Frontiers) to allow free movement of broadcast services, provided they all meet the same basic minimum criteria of content regulation.

- ***As a means of balancing desires for inward investment, as against the promotion of national industries:*** A key decision many nations must make is whether or not to permit foreign investors into the national broadcasting industry. Recent UK legislation caused much debate by allowing United States companies to own UK broadcasters, despite the fact that the United States does not have a reciprocal arrangement for their broadcasters.

- ***The support of indigenous production sectors:*** Many countries set quotas for the amount of original production (that is programming made within the country, or within an agreed trade area) and also quotas for independent productions.

- ***The promotion of new technology:*** For example, UK legislation in 1996 set out incentives to broadcasters to invest in digital technology, resulting in the UK being at the forefront of both digital terrestrial television and digital audio broadcasting.

- ***The application of competition law:*** Given the high barriers to entry (cost and access to scarce spectrum, often through a competitive licensing process), governments may wish to apply industry-specific competition provisions to prevent abuses of monopoly, or near-monopoly positions, rather than relying on *post hoc* competition law.

ANNEX 2

Country	Do you have broadcasting legislation?	Who issues TV and radio licences?	Do you have an independent regulator?	Do you have a State broadcaster	Do you have a Public Service Broadcaster	Which government department is responsible for broadcasting?
Australia	Broadcasting Services Act 1992	Australian Broadcasting Authority/ Australian Communications and Media Authority	The ABA	No	Australian Broadcasting Corporation	
Barbados		The Broadcasting Authority	Broadcasting Authority	Caribbean Broadcasting Corporation	No	Home Affairs
Canada	Broadcasting Act 1991	Canadian Radio-Television and Telecommunications Commission	CRTC	No	Canadian Broadcasting Corporation	Department of Heritage and Department of Industry
Cyprus	Radio and Television Stations Law 1998	Cyprus Radio-Television Authority	Cyprus Radio-Television Authority		Cyprus Broadcasting Corporation	
Fiji	In hand	In hand			In hand	Solicitor General
Ghana	National Communications Authority Act 1996	National Communications Authority	NCA	Ghana Broadcasting Corporation	GBC operates within a State legal framework	
Jamaica	Broadcasting and Radio Diffusion Act 1986/Telecommunications Act	Broadcasting Commission of Jamaica	Minister of Information, on BCJ's advice	No	Public Broadcasting Commission of Jamaica, but not yet operating	Information Division of Office of Prime Minister
Kenya		Communications Communication, not independent	Ministry of Tourism and Information	Kenya Broadcasting Corporation	KBC operates within a State legal framework	Ministry of Broadcasting

ANNEX 2

Country	Do you have broadcasting legislation?	Who issues TV and radio licences?	Do you have an independent regulator?	Do you have a State broadcaster	Do you have a Public Service Broadcaster	Which government department is responsible for broadcasting?
Malaysia		The Malaysian Communications and Multimedia Commission		Radio Television Malaysia	No	
Malta	Broadcasting Act 1991	Malta Broadcasting Authority	MBA	Public Broadcasting Service Ltd		
Namibia	Communications Act	Namibian Communications Commission, but not independent	NCC	Namibian Broadcasting Corporation	No	Ministry of Broadcasting and Information
Nigeria	Yes	National Broadcasting Commission	Yes, the NBC	The Nigerian Television Authority, Federal Radio Corporation of Nigeria, and Voice of Nigeria	No. All publicly owned stations are State or Federal Government controlled.	Federal Ministry of Information and National Orientation
Singapore		The Media Development Authority				Ministry of Information Communication and the Arts
South Africa		Independent Communications Authority of South Africa	ICASA	South African Broadcasting Corporation	South African Broadcasting Corporation	

St. Lucia	Wireless Telegraphy Ordinance		No			Ministry of Broadcasting
UK	Communications Act 2003	Licenses issued by Ofcom	Ofcom	No	The BBC is publicly funded, ITV,Channels 4 and 5 are advertiser–funded	Culture, Media and Sport

CONSTITUTIONAL DEVELOPMENTS IN THE COMMONWEALTH

Paper by the Commonwealth Secretariat

Introduction

1. In its report to the Commonwealth Heads of Government Meeting (CHOGM) in Coolum 2002, the Commonwealth High Level Review Group noted that there was a need to intensify efforts to assist members in strengthening democracy and democratic institutions through the provision of constitutional, electoral and legal assistance.

2. The Group recommended that priority should be given to supporting member governments in the review and strengthening of democratic institutions including constitutions, judiciaries and judicial processes, the training of legislative drafters and public service reform.

3. Globalisation has transformed the political and economic dynamics in the world bringing with it new challenges. With a wide spectrum of stakeholders and interest groups rising to play a role in devising their own constitution there is an emerging focus on the process by which a country's constitution is made. There is a demand for the process to be inclusive, accessible, empowering, open and transparent.

Consideration by Senior Officials

4. Senior Officials had before them at their meeting in October 2004, a paper by the Commonwealth Secretariat on Constitutional Developments in the Commonwealth: **Annex A.**

5. In their discussion of the paper, Senior Officials made specific reference to mechanisms for constitutional reform and amendment, the 'basic structure' doctrine and the issue of ethnicity and minority rights.

6. Senior Officials asked the Legal and Constitutional Affairs Division (LCAD) to continue work on the topics covered in the paper.

Constitution-making process

7. LCAD, has, on request from countries, rendered assistance by reviewing draft constitutions in the light of the Commonwealth Harare principles or provided advice to proposed amendments to specific provisions of a Constitution. The Division has also sourced appropriate experts to advise on the constitution-making process and to draft constitutions.

8. In July 2005, the Division in collaboration with the Constitution Review Commission of Zambia, organised a workshop on the constitution-making process for Commonwealth SADC countries, which was held in Livingstone, Zambia. After identifying underlying principles, the workshop developed Guidelines for the constitution-making process and formulated strategies to implement those Guidelines. For the information of Law Ministers, the Guidelines from the workshop are at **Annex B.**

Action for Law Ministers

9. Law Ministers may wish to endorse the request by Senior Officials to LCAD to continue work on topics covered in the paper which include the following issues:

(a) the mode of making constitutions in the Commonwealth;

(b) the mode and effectiveness of mechanisms for amending constitutions;

(c) mechanisms for protecting constitutions against retrogressive amendment;

(d) monitoring and advising on the development of appellate court structures and systems;

(e) reviewing bills of rights in Commonwealth constitutions;

(f) capacity building in establishing sound constitutional structures.

ANNEX A

CONSTITUTIONAL DEVELOPMENTS IN THE COMMONWEALTH

Paper by the Commonwealth Secretariat

INTRODUCTION

1. The object of this paper is to identify key issues of constitutional governance for the purpose of providing a future agenda for Commonwealth Law Ministers, Senior Officials and the Legal and Constitutional Affairs Division of the Commonwealth Secretariat.

2. In Abuja in 2003, Heads of Government re-affirmed their commitment to the fundamental political values of the Commonwealth set out in the Singapore and Harare Declarations and elaborated on in subsequent CHOGM communiqués. Specifically, they adopted the *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government* (set out in the Appendix hereto) and the *Aso Rock Declaration on Development and Democracy*. The latter identifies key priorities for the promotion of democratic governance, including participatory democracy characterised by free and fair elections and representative legislatures, an independent judiciary, a well-trained public service, a transparent and accountable public accounts system, machinery to protect human rights and active participation of all elements of civil society. It is widely acknowledged that building democracy, in the words of the Aso Rock Declaration is a "constantly evolving process".

3. This process in terms of constitutional reform is in train in countries in many parts of the Commonwealth, both rich and poor, large and small, including those countries with a long-established tradition of constitutional governance and those where the foundations are still being laid. All however can learn from the shared experience of the 53 member states. We are also mindful of the situation in Zimbabwe, which was a central concern of the Abuja Meeting and remains a Commonwealth concern in the hope that Zimbabwe's return to membership will not be too long delayed.[1]

4. Most countries of the Commonwealth share in the "Westminster" constitutional tradition although the model exported at the time of de-colonisation has always differed in certain fundamental respects from the original United Kingdom version. The latter has been characterised by a unitary state structure with an unwritten constitution controlled by the conventions of responsible government based on the accountability of the executive to a sovereign parliament. The "export model" was based on the supremacy of a written constitution, with an entrenched bill of rights supported by judicial review and express provision for the separation of powers. In a number of countries, the model, following the pattern of Australia and Canada, took a federal form.

5. The survival rate of the export model has varied sharply across the regions of the Commonwealth. For example, the constitutions of the Caribbean are essentially unchanged since independence whilst most Commonwealth African countries have seen fundamental constitutional, and indeed in some cases unconstitutional, change.[2]

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1 *Cf* Commonwealth involvement in the transition in South Africa (particularly the Eminent Persons Mission: see Communiqué of *Commonwealth Heads of Government Review Meeting*, Commonwealth Secretariat, 1986). South Africa was absent from the Commonwealth from 1961 until 1994 but the situation there remained on the CHOGM agenda throughout that period.

2 Botswana and Mauritius are exceptions to the African pattern. Of course, as noted below, unconstitutional change has not been restricted to Commonwealth Africa.

6. Of particular interest today is the extent to which British constitutional reforms, the most far-reaching of their kind since the 19th Century development of responsible government, are now moving nearer to the export model - away from a unitary state with an unwritten constitution and a sovereign parliament. The "unwritten" constitution is thus increasingly being reduced to writing. Lord Bingham has counted 18 statutes of constitutional import since the election of the Labour administration in 1997[3]; the doctrine of parliamentary supremacy has been modified, some would say undermined, by the supremacy of European Union law in certain matters and by the incorporation of the European Convention on Human Rights into United Kingdom law, with a power of disallowance of incompatible legislation; moves towards the formal separation of executive, legislative and judicial powers are reflected in the prospective replacement of the Judicial Committee of the House of Lords by a supreme court, the removal of judges from legislature and the abolition of the venerable office of Lord Chancellor; the removal of the hereditary element from the upper house of the legislature removes one of the most startling, if equally venerable anomalies in a democratic constitution.

7. The creation of devolved government for Scotland, Wales and Northern Ireland[4], particularly the devolution of exclusive legislative power in devolved matters to a Scottish Parliament, while not formally affecting the unitary character of the United Kingdom state, is likely to create by convention a system which the sovereign Westminster parliament will be unable to undo in practice.[5] While the position of the Crown remains unchanged, and government is still carried on in the Queen's name by a Prime Minister and other ministers accountable to parliament, the old fabric of the British constitution has been transformed in the name of a modern perception of democratic governance, bringing government closer to the people and enhancing the transparency and accountability of government.

THE METHODOLOGY OF CONSTITUTIONAL CHANGE

8. Since 1990, a significant number of Commonwealth countries have introduced new, autochthonous constitutions. In some cases this has caused, and continues to cause, considerable controversy. For example, in Kenya the Constitutional Review Commission process has proved difficult and is still subject to challenge in the courts.

9. Thus there may be useful lessons to be learned from a comparative study of the various methodologies adopted for constitutional change.

Devising and adopting a new constitution

10. Since 1990, constitution-making efforts in many Commonwealth countries have focused on seeking to provide a consultative procedure that gives popular legitimacy to the new document. In many cases this was effected by the establishment of a constitutional commission whose function was to seek the views of the people. In some countries, the commission was then responsible for drafting the new constitution, whilst in others, the matter was left to a popularly elected constitutional/constituent assembly. This has raised several controversial issues.

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3 "An old constitution in a new world", lecture given to the Commonwealth Lawyers' Association, London, 10 June 2004.

4 In the Northern Irish case, currently in suspense.

5 Compare the constitutional history of the 'old' Commonwealth: the subordination of the national legislatures of Australia, Canada, New Zealand and South Africa to the "imperial" parliament, expressly asserted by the Colonial Laws Validity Act, 1865, was not formally removed until the Statute of Westminster, 1931. However, long before the 1931 enactment, the convention was well established that the Westminster parliament did not legislate for what became the self-governing dominions without their consent.

- How are commissioners appointed? By means of a popularly elected commission (e.g. Uganda) or a commission appointed by the Head of Government (e.g. Zambia).
- To whom is the commission answerable? For example, should the commission make its report to a popularly elected constitutional assembly that is tasked with drawing up the final document or should it report to the Head of Government?.

- How are the views of the people distilled into the new document? A recurring problem concerns the incorporation of the views of the "people" into the new constitution. Experience has shown that with thousands of submissions, it is possible to draft a number of versions of a constitution and still find justification in the submissions made to the commission for each one of them. Here there may be merit in considering the South African approach in which consultation took place following the building of a broad consensus between the various political players on the terms of the new constitution.
- Who approves the final document? There are several possible models here: (a) the legislature; (b) a specially elected constituent assembly; (c) the people in a national referendum.

11. In the United Kingdom, major constitutional changes are made by means of an ordinary Act of Parliament e.g. Human Rights Act 1998. As regards the process for the current Constitutional Reform Bill (see below), this has followed the traditional parliamentary route of discussion papers published by the relevant government department (of "Constitutional Affairs", itself an interesting innovation in the British ministerial pantheon) leading to a Bill currently subject to select committee scrutiny. It is worth noting, however, that the United Kingdom Government has now committed itself to holding a referendum regarding approval of the proposed European Constitution.

Constitutional amendment

12. Most Commonwealth constitutions contain a special procedure for their own amendment. Typically (and following the Westminster export model) this is the requirement for a two-thirds parliamentary majority. This procedure can raise concerns particularly when the, not uncommon, situation arises of the ruling party enjoying a two-thirds parliamentary majority. In South Africa, concern about the proposed amendment procedure for the new constitution was expressed by the Association of Law Societies. It noted in a submission to the Constitutional Court of 31 May 1996, that the inclusion of a two-thirds majority for constitutional amendment in the draft 1996 Constitution meant the provision left:

> "Parliament free the following day (by a mere two-thirds majority) to amend the new Constitution in a way which violated the Constitutional Principles and thus upset the compromises so carefully negotiated".

13. In the event, adverse comment by the Constitutional Court on the proposed constitutional amendment provision led to its being significantly strengthened.

14. Such concerns have led to some constitutions imposing additional requirements for amending the constitution. This is through the requirement for a referendum which, in some cases, has seen the new document rejected (e.g. in Seychelles).

15. The concern expressed by the Constitutional Court highlights the efforts needed to avoid a situation where a constitution can be "undermined" by means of a series of retrogressive constitutional amendments. Thus it may be useful to examine the various mechanisms employed in Commonwealth constitutions for constitutional amendment. It is also worth noting two other devices used to protect fundamental constitutional provisions against amendment:

- *Making constitutional provisions unalterable.* An unusual provision that appears in the Namibian Constitution expressly excludes any repeal or amendment "in so far as such repeal or amendment diminishes or detracts from" the fundamental rights provisions.

- *The basic structure doctrine.* In India in the 1973 case of *Kesavananda v State of Kerala*,[6] the Indian Supreme Court held that the legislature's power to amend the constitution was impliedly limited. Thus an amendment could not alter the "basic structure" of the Constitution. A series of cases have approved the doctrine and courts in other Commonwealth countries have acknowledged its importance.

16. Overall, it may be helpful to consider further work on the following issues:

- the mode of making constitutions in the Commonwealth;
- the mode and effectiveness of mechanisms for amending constitutions;
- mechanisms for protecting constitutions against retrogressive amendment.

SPECIAL FACTORS AFFECTING CONSTITUTIONAL REFORM

Ethnicity and communal tensions

17. To what extent should the constitution accommodate ethnicity or communal rivalries and tensions? This issue has bedeviled the search for a constitutional compromise in a number of Commonwealth countries, particularly where a minority asserts a claim to a distinct identity, as in Cyprus and in Sri Lanka. The constitutional arrangements have to seek to strike a balance between maintaining the integrity of the national state and providing an adequate "constitutional space" for the minority community. The Republic of the Fiji Islands illustrates the problem in a different way, where the indigenous community's fear of Indian "majority rule" led to the breakdown in 1987 of the original constitutional settlement of 1970.

Constitutional breakdown and the restoration of democracy

18. One of the most difficult problems that Commonwealth countries have had to face is created by the overthrow of the constitutional order itself by intervention of the military or otherwise by force. Beginning with Pakistan in 1958, constitutional breakdown has affected Bangladesh, Cyprus, The Republic of the Fiji Islands, The Gambia, Ghana, Grenada, Lesotho, Nigeria, Seychelles, Sierra Leone, Solomon Islands and Uganda.

19. The Millbrook process, a remarkable Commonwealth innovation, was originally created to assist Commonwealth countries particularly in circumstances of an unconstitutional overthrow of a democratic government. Currently the tidal wave of unconstitutional action has receded, but the lesson remains that bad governance provides a breeding ground for such intervention.

20. There are also useful lessons to be drawn from a comparative study of the manner in which constitutions seek to establish a suitable relationship between the civilian government and the military. This might be based on the view of the ANC in South Africa which declared in its seminal 1992 policy statement, *Ready to Govern*, that the security forces should be:

> "Bound by the principles of civil supremacy and subject to public scrutiny and open debate...[and] be accountable and answerable to the public through a democratically elected parliament" (at p.71).

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[6] AIR 1973 SC 1461.

Traditional Rulers

21. It has been often alleged that plural democracy, based on a competitive political culture, is alien to the traditional notions of governance in many Commonwealth countries, particularly in Africa and the Pacific. This argument was used particularly in the 1970s by those seeking to justify the imposition of one-party rule, but it has a long Commonwealth pedigree. Thus the leading practitioners of colonial rule in Africa in the 1930s advocated the nurturing of traditional rulership by a process of "indirect rule" rather than the introduction of parliamentary democracy. Of course constitutional monarchy based on the hereditary principle has a firm place in the Commonwealth constitutional framework, but such traditional rulers fulfil a role which does or should not affect the democratic accountability of elected ministers. However, at all levels of government, from the headship of state through representation in the central legislature to local government, there may be tensions between traditional rulership and democratically elected officials. The problem may be particularly acute where traditional leaders assert claims to title to, or powers of allocation over, land, e.g. in Swaziland and South Africa.

Small states and territories

22. The Commonwealth contains a high proportion of small states that have full membership of the world community. The problems of small states have therefore been a major focus of Commonwealth concern.[7] In terms of constitutional governance, small states have generally a good record. Yet as events in the Republic of the Fiji Islands, Grenada, Lesotho and Solomon Islands have shown, they are vulnerable to unconstitutional action and need support in sustaining democratic institutions.

23. That small states can make a significant contribution to just and honest government has been highlighted by the recent successful criminal prosecutions for corruption brought against several international corporations in Lesotho.

24. The constitutional position of territories which have not proceeded to full independence is a matter primarily for the territory concerned and the Commonwealth member internationally responsible for that territory. However, it may be that consideration should be given to enhancing the status of such territories in the councils of the Commonwealth and of providing support for the development of appropriate governance institutions.

Governance and poverty

25. The Commonwealth has long recognised the link between good governance and development. Thus the Harare Declaration and the Millbrook Action Programme link the advancement of Commonwealth fundamental political values with the promotion of sustainable development. The link between development and democracy as mutually reinforcing goals was recognised specifically in paragraph 6 of the Aso Rock Declaration. Poor countries often lack the resources to sustain the institutions of good governance. A programme of assistance, building on the work already undertaken by the Commonwealth Secretariat and bilateral aid programmes, are called for in this regard.

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[7] The Commonwealth Advisory Group's Report: *A Future for Small States: Overcoming Vulnerability* Commonwealth Secretariat, 1997, provides a detailed analysis.

SUBSTANTIVE ISSUES OF CONSTITUTIONAL REFORM

The Judiciary

26. The importance of the independence of the judiciary was recognised expressly in the Harare Declaration and was re-affirmed at Abuja in the context of the endorsement of the Commonwealth Principles. The latter acknowledges that -

> "An independent, impartial, honest and competent judiciary is integral to upholding the rule of law"

and identifies key factors in the securing of these aims in relation to mode of appointment, security of tenure and of remuneration, adequacy of available resources and appropriate relationships with the executive and parliamentary branches of government (Principle IV). At the same time, the Principles also acknowledge the importance of the *accountability* of the judiciary in order to ensure public confidence in the judicial system.

(1) The United Kingdom

27. The most elaborate measure of judicial reform in the Commonwealth is currently taking place in the United Kingdom. Many of the reforms embodied in legislation currently before parliament in July 2004, are designed to remove from the British constitution historical anomalies which, without the buttress of constitutional convention, would appear to bring into question the independence of the judiciary. Thus the Constitutional Reform Bill (CRB)[8] will abolish the office of Lord Chancellor, thus removing from the constitution an office which, while a 1000-year old office, appears to conflict with the relationship between the three branches of government delineated in the Commonwealth Principles in so far as the office-holder is a member of the government, the judiciary (though the present Lord Chancellor has declined to sit in a judicial capacity) and the legislature.

28. The major innovation will be the replacement of the Judicial Committee of the House of Lords with a new Supreme Court of the United Kingdom which will be separate from Parliament. The Government's rationale for the new body is to "put the relationship between the executive, the legislature and the judiciary on a modern footing which takes account of people's expectations about the independence and transparency of the judicial system".[9] The Bill makes elaborate statutory provision for the appointment and discipline of the judiciary. In most Commonwealth countries these matters are prescribed in the chapter on the judiciary in the constitution.[10]

29. The salient features of the scheme relating to the new Supreme Court are as follows:

(a) Judicial Independence

The actual independence of the modern British judiciary is not in doubt as is evidenced in recent times by senior judges' public criticisms of the executive where threats to the rule of law are perceived. However, particularly after the incorporation of the European Convention on Human Rights, the perception must be made to coincide with the reality. The protection of judicial independence has traditionally been the role of the Lord Chancellor. Clause 1 of the CRB imposes a statutory duty on the Secretary of State for Constitutional Affairs (SSCA) to have regard to the need to defend the continued independence of the judiciary - a provision which offers little by way

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8 This may have become an Act by the time that this paper is considered by Senior Officials.

9 Department of Constitutional Affairs *Constitutional Reform: A Supreme Court for the United Kingdom* (July 2003).

10 See, for example, Chapter VII of the Constitution of Belize.

of effective safeguard in the event of a real challenge to that independence from an ill-disposed government.[11]

(b) Separation of Powers

The new Supreme Court (SC) will be entirely separate from Parliament. Holders of full-time judicial office will be excluded from sitting and voting in the House of Lords.

(c) Jurisdiction

The SC will assume the jurisdiction of the House of Lords and also that of the Judicial Committee of the Privy Council in devolution matters. Otherwise the Privy Council will function as before in relation to appeals from certain Commonwealth members, United Kingdom Crown dependencies and overseas territories. The SC is a purely appellate tribunal and there is no provision for original jurisdiction.[12] The SC will not have the power of judicial review of legislation, except to the limited extent provided by the Human Rights Act.[13]

(d) Appointment, Discipline and Removal

The existing Lords of Appeal in Ordinary will become judges of the Supreme Court. New appointments thereafter will be made by a process involving the recommendation to the SSCA by an *ad hoc* commission (representing the existing senior judges of the SC and the judicial appointments bodies of England and Wales, Scotland and Northern Ireland). The Bill is likely to provide that the SSCA will receive one nomination which the SSCA must then either submit to the Prime Minister who must in turn recommend appointment to the Queen or seek a second name from the commission. Judges of the SC will continue to hold office during good behaviour until the statutory retirement age of 70, but may be removed on the address of both Houses of Parliament.

The appointment of other members of the higher judiciary of the Supreme Court of England and Wales will be in the hands of the Judicial Appointments Commission, an innovation for the United Kingdom but a familiar feature of other Commonwealth constitutions. The membership of such commissions is an issue of abiding controversy. The CRB contains provisions for appointment by the Crown, on the recommendation of the SSCA, after an elaborate statutory process of consultation. The Commission of 15 must contain members of the judiciary, the legal profession and at least six lay members. In an innovative measure, there is a requirement that one member must be a lay justice.

Complaints about the conduct of the appointments process may be made to a "Judicial Appointments and Conduct Ombudsman". There are also to be elaborate statutory procedures for the disciplining of judges. Complaints about the conduct of these may also be investigated by the Ombudsman.

The senior judge of the SC will be styled "President". The Lord Chief Justice will acquire the additional statutory title of President of the Courts of England and Wales and will, in effect, assume the judiciary-related functions of the Lord Chancellor which are not transferred to the SSCA.

(e) Summary

In general, the reforms will bring the United Kingdom closer into line with judicial arrangements in other Commonwealth countries and appear to provide a greater degree of accountability and

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[11] *Cf*, for example, the entrenched protection of judicial independence in section 165 of the Constitution of South Africa, 1996.

[12] *Cf* section 167(6) of the South African Constitution, which makes provision for direct access to the Constitutional Court with leave, when required, in the interests of justice. The positive impact made by this Court might also encourage other Commonwealth countries to consider introducing such a body.

[13] *Viz*. the power of the court to make a declaration of incompatibility in respect of primary legislation in terms of section 4 of the Act.

transparency in the judicial process. Concern has been expressed however at the disappearance of the powerful figure of the Lord Chancellor and his replacement (there never has been a female holder of the office!) in the political role by a relatively junior member of the cabinet who may not be a lawyer. Moreover, the pace of reform has caused consideration by persons previously wedded to the unwritten constitution, of more fundamental changes in the constitutional structure of the United Kingdom.[14]

The establishment of a judicial Ombudsman mirrors the approach in some other Commonwealth countries and it might be helpful to assess their organisation and effectiveness.

(2) New Zealand

30. The Supreme Court Act 2003 abolished appeals from New Zealand to the Privy Council in respect of any civil or criminal decision of a New Zealand court made after 31 December 2003 and created in its place a Supreme Court of New Zealand with effect from 1 January 2004. The new court held its first hearings in July 2004, replacing the Judicial Committee as the second tier appeal court for New Zealand.

31. The Supreme Court is presided over by the Chief Justice with not fewer than four nor more than five other judges. The Act contains none of the elaborate provisions in relation to appointments contained in the United Kingdom Bill. Appointments are made by the Governor-General acting, according to constitutional convention, on the advice of the Attorney General, or, in the case of the Chief Justice, the Prime Minister. In fact, the first court consisted of the existing Chief Justice, Dame Sian Elias and the four most senior judges from the Court of Appeal. On future appointments, the Attorney General will be advised by an *ad hoc* committee consisting of the Chief Justice, the Solicitor-General and a former Governor-General, pending a future review of the judicial appointments system. As in the case of the United Kingdom proposals, the new court will be a purely appellate body.

32. Given New Zealand's constitutional arrangement, the court will lack the power of judicial review of primary legislation. Indeed, in the light of the United Kingdom's association with the European Union, New Zealand may now be regarded as the bastion in the Commonwealth of the pure doctrine of parliamentary sovereignty. In order to address concerns that the establishment of the new court would disturb the existing balance between the three branches of government, the independence of the judiciary and the Treaty of Waitangi, the Supreme Court Act contains a "purpose clause" (section 3) referring expressly to the resolution of important legal matters, including matters relating to the Treaty of Waitangi, with an understanding of New Zealand conditions, history and traditions and to the improvement of access to justice. The section also affirms that the Act was not intended to affect New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament. Of course, the recording of constitutional conventions in an ordinary Act of Parliament, as in the United Kingdom case, does not give them the formal protection afforded by inclusion in a constitution which is the supreme law.

(3) The Regional Model: the Caribbean Court of Justice

33. This Court will replace the Privy Council as the final court of appeal for those Commonwealth Caribbean states that are parties to the agreement establishing the court (as well as

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[14] Lord Woolf, the Lord Chief Justice, has expressed his doubts: "What has happened since June last [2003] does raise the issue as to whether or not the time has come when it is necessary at least to consider embarking on the difficult task of establishing a written constitution for the United Kingdom. I have up until now preferred the flexibility inherent in an unwritten constitution. I no longer see a written constitution containing entrenched provisions as not being on the agenda." "Constitutional Reform in the UK: Change for Change's Sake?" *Commonwealth Lawyer*, April 2004, p.21.

having certain functions in relation to the CARICOM Treaty). The creation of the Court has provoked considerable controversy and has been the subject of constitutional challenge in Jamaica. While the creation of a regional court of appeal may appear an attractive option in terms of sharing of judicial resources, there are problems in relation to the appointment of judges to reflect regional balance, the location and funding of the court and the establishment of the authority of the new body.

34. In this respect it is important to build upon the work of the Law Development section of the Legal and Constitutional Affairs Division in advising countries to replace the Judicial Committee of the Privy Council.

35. The regional option might also be appropriate for the Pacific. In particular, it would enable the creation of a second tier appeal process in respect of jurisdictions where it is currently lacking.

Promoting human rights

36. The Westminster export model included a bill of rights based on the European Convention of Human Rights (which the British had played an important role in drafting). This model is retained in many Commonwealth countries, e.g. in much of the Caribbean as well as in Botswana and Mauritius. In the United Kingdom, the Human Rights Act 1998 incorporated the European Convention into domestic law.

37. The new wind of change that swept over much of Commonwealth Africa in the 1990s saw the introduction of wide-ranging and justiciable bills/declarations of right into the new constitutions. In many cases, in addition to the traditional civil and political rights, these also included for the first time, economic, social, cultural and environmental rights. Here the Canadian Charter of Human Rights was influential partly because Canada had a justiciable bill of rights grafted onto an older Westminster model and partly because the Charter served as one of several precedents examined when later constitutions in Commonwealth Africa were being drafted. This move towards expanding the scope of the bill of rights is also in line with the gradual move by Commonwealth countries towards becoming parties to the major international human rights conventions. This significant expansion of the scope of bills of right has also raised significant issues regarding the role of courts in dealing with social policy issues: for example, the jurisprudence from the Constitutional Court in South Africa concerning access to retroviral drugs, the right to health and the right to housing and the response of government thereto.

38. A feature in some countries, such as Uganda, is the inclusion in their constitutions of non-justiciable rights in the form of, in the words of the Ugandan Constitution, "National Objectives and Directive Principles of State Policy". In view of the trend towards making all constitutional rights justiciable, the value of such an approach might need re-considering.

39. The importance of comparative Commonwealth jurisprudence in this field is well known and the Commonwealth Secretariat is already involved in its dissemination via the INTERIGHTS' Commonwealth Law Programme and through links with the *Law Reports of the Commonwealth*. It may be useful to examine the effectiveness of this work and how it might be improved and expanded to benefit all member states.

40. Thus there may be some merit in reviewing the promotion of human rights issues taking into account factors such as:

- the scope of bills of right in the Commonwealth;
- whether or not all rights contained in a constitution should be justiciable;
- the role of judges in the development of social policy issues;

- whether improvements are required in the dissemination of comparative Commonwealth jurisprudence;
- the extent to which constitutions adequately address issues of gender and minority rights.

Separation of Powers

41. The earlier discussion has noted the position as it has been considered in relation to constitutional reform in New Zealand and the United Kingdom. The Commonwealth's position in general has been stated in the Commonwealth Principles (see the Appendix).

42. Issues that might affect the proper balance between the three branches of government include:

- *effective limitation of executive power*, particularly where there may be excessive accumulation of constitutional and political power in a presidential executive;
- *the securing of judicial independence* on the basis of Part IV of the Commonwealth Principles;
- *the strengthening of the role of Parliament* in terms of training, resources and mechanisms for ensuring the accountability of the executive: as referred to in Part VI (2)(a) of the Latimer House Guidelines from which the Principles are derived. Also mechanisms for protecting the independence of parliamentarians (noted below).

Developing oversight bodies

43. In the Harare Declaration, Commonwealth Heads of Government recognised that developing appropriate "institutional structures which reflect national circumstances" is a key element for promoting and protecting human rights, good governance and the rule of law. Further, Principle XI of the Commonwealth Principles states that steps which may be taken to encourage public sector accountability include:

> "The establishment of scrutiny bodies and mechanisms to oversee Government, [as this] enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances,"

44. Thus there may be merit in examining the work and effectiveness of oversight bodies.

45. Offices of the Ombudsman already operate in the majority of Commonwealth countries and are mainly concerned with public sector administrative justice issues. Separate equality and anti-discrimination commissions are also well established.

46. A more recent trend has seen the establishment of human rights commissions designed to promote and protect human rights in both the private and public sectors. Whilst in 1990 only Australia had a fully-fledged human rights commission, today they operate in some 15 Commonwealth countries, with the latest additions being in Kenya and Maldives.

47. Concern about tackling corruption has also encouraged states around the Commonwealth to establish separate anti-corruption commissions e.g. in Australia, Brunei, Jamaica, and Malawi.

48. There is considerable variety in the oversight institutions established by Commonwealth countries. Some have developed a series of single-issue institutions as well as an office of the

ombudsman e.g. England and Wales has an Equal Opportunities Commission, Race Relations Commission and Disability Rights Commission as an ombudsman although there is now a proposal to establish a "one-stop" commission. Others have established a separate office of the ombudsman and human rights commission (e.g. Uganda) whilst yet others have a single institution that combines the work of an ombudsman, human rights commission and anti-corruption commission, e.g. the Commission for Human Rights and Administrative Justice in Ghana.

49. The Commonwealth Secretariat has done much to support such institutions. In particular, the development in 2001 of the *Best Practice Principles for National Human Rights Institutions*. Yet there has been little work done on examining the extent to which these are being put into practice.

50. Thus issues that might require further consideration include:

- what type of oversight bodies exist in the Commonwealth?;
- the benefits of establishing/maintaining a single or multiple institution, particularly in relation to small states;
- the extent to which Commonwealth Best Practice Principles provide a useful template for the organisation, powers and operation of oversight bodies;
- whether countries need to re-assess the role and function of their oversight bodies in the light of privatisation and increasing cross-border issues;
- to what extent oversight bodies help promote and protect human rights and administrative justice. What are the factors that, in particular, impact on the effective operation of such institutions?

Democratic entitlements and political parties

(1) Preserving the independence of members of parliament

51. This is an issue that provokes some debate. The Commonwealth Principles make it clear that "Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference" (Principle III(a)). However, there are several factors affecting such independence. These include the following:

(a) Right of recall

Some Commonwealth constitutions provide for the recall of members. For example, article 84 of the Ugandan Constitution provides for the recall of members by the electorate during their elected term on grounds of incapacity, misconduct or "persistent deserting of the electorate without reasonable cause". However, the Latimer House Guidelines (III(2)(b)) suggest that such provisions "should be viewed with caution, as a potential threat to the independence of members".

(b) Floor-crossing[15]

The expulsion of members from parliament as a penalty for leaving their parties (floor crossing) also remains a matter of some controversy.

However floor-crossing can represent a barrier against the corruption of MPs and thus the Latimer House Guidelines III(2)(a) suggest that:

[15] Such behaviour is a hallowed tradition in the House of Commons at Westminster and the right of sitting members to follow their consciences and switch their allegiance to another party (or simply to sit as independents) is seen as an integral part of a competitive party system. Not surprisingly, the Westminster export model constitution did not seek to regulate the matter.

"[T]he expulsion from parliament as a penalty for leaving their parties (floor crossing) should be viewed as a possible infringement of members' independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices."

Of course, an anti-floor crossing provision is seen as a necessary part of any proportional representation electoral system which seeks to provide a quorum of representatives of individual parties as determined by the entire electorate.

(c) Protecting parliamentarians from unwarranted attacks

A traditional mechanism for protecting unwarranted attacks on parliamentarians has been the use of criminal libel laws (see, for example the recent Privy Council decision in *George Worme and Grenada Today Limited v Commissioner of Police*) and contempt laws. However, such provisions have long been viewed with considerable concern. Here Principle III(b) of the Commonwealth Principles seeks to provide a suitable balance:

"Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege."

Political party funding

52. State funding for political parties is now increasingly viewed as a necessary part of strengthening democracy and helping to create a level political playing field.

53. Yet enhanced transparency in the financing of election campaigns and political parties is now recognised as being essential to efforts to prevent corrupt practices that can significantly affect the political process (see for example, the provisions of the new United Nations Convention against Corruption). The strategies being undertaken around the Commonwealth to address this issue may merit attention.

(3) Utilising the experience of Commonwealth election monitors

54. The numerous election monitoring exercises since 1980 have enabled the Commonwealth to build up considerable experience and expertise on the key requirements for holding free and fair elections, including the development of a series of important codes of conduct. In view of this, there may be scope for refining and disseminating such information on a Commonwealth-wide basis.

(4) Providing for a representative legislature and political system

55. Note 10 to the Latimer House Guidelines puts the matter succinctly:

"Parliament should reflect the composition of the community which it represents in terms of ethnicity, social and religious groups and regional balance".

56. Yet the record of Commonwealth countries in terms of gender balance is a cause for concern. For example, in November 1996 the Fifth Meeting of Commonwealth Ministers Responsible for Women's Affairs recommended that member countries be encouraged to achieve a target of not less than 30 per cent of women in decision-making in the political, public and private sectors by the year 2005. This target is unlikely to be met by most, if not all, Commonwealth countries.

57. However, Commonwealth countries have developed a variety of approaches that might assist efforts to address this issue. These include:

- requiring political parties to have national (rather than simply regional) support;
- providing for the election of persons representing special interest groups;
- providing for members nominated by the President (or other state official);
- providing for regional representatives (often through the use of a bi-cameral legislature);
- using a variety of electoral systems to encourage greater regional representation in the legislature;
- encouraging the selection of women and persons from ethnic or other minorities as parliamentary candidates (for example, the "merit with bias" approach i.e. where if two applicants are of equal merit, the bias should be to appoint a woman or candidate from an under-represented region or background).

58. Thus there may therefore be some merit in studying the mechanisms used by Commonwealth countries to enhance the democratic entitlement of their citizens.

Headship of State

59. The issue of the move towards a republic in those countries which have retained Her Majesty the Queen as Head of State is a matter exclusively for the states concerned. However, issues of fundamental constitutional importance in connection with the role of the Head of State require consideration. These include:

(i) the expression in a written constitution of the conventions of constitutional monarchy, most recently attempted in the case of Lesotho and currently an issue in Swaziland's constitutional evolution;

(ii) the relative merits of systems which may be broadly classified as parliamentary or presidential executive.

60. The parliamentary executive system is derived from the classic Westminster model: i.e. the Head of Government is separate from the Head of State who performs largely ceremonial functions and may be an hereditary monarch or (usually indirectly elected) President; the Head of Government (Prime Minister) and fellow cabinet ministers are responsible to the legislature of which they are normally members. This model remains popular in the Caribbean, Asia and the Pacific and in the "old" Commonwealth (29 countries).

61. The presidential executive system confers executive power on a (usually popularly elected) President who is both Head of State and Government and to whom ministers are accountable rather than to the legislature. This model became popular in Africa where it was said that the separation of Head of State and Government defied local political culture and tradition (24 countries).

62. A history of abuse of presidential power in presidential executives raises the question of a possible return to the classic "Westminster" division of executive power between a largely ceremonial Head of State and a Prime Minister who is a member of and directly accountable to parliament. In Kenya, the Ghai Commission controversially proposed a return to a prime ministerial system with the president playing the role of guardian of the constitution.

COMMONWEALTH SECRETARIAT MANDATE

63. The *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government* and the *Aso Rock Declaration on Democracy and Development* reflect many of the current constitutional and good governance issues and challenges for the Commonwealth. Thus this paper seeks to identify areas that might merit further attention by the Legal and Constitutional Affairs Division. These include:

Good Governance

(a) Building on existing work on the promotion of democratic governance in areas such as elections and the development of effective oversight bodies.

(b) Providing advice and assistance to Commonwealth countries to help develop and sustain institutions of good governance.

(c) Monitoring good practice in the implementation of the Commonwealth Principles working in partnership with the Commonwealth Lawyers' Association, Commonwealth Legal Education Association, Commonwealth Magistrates' and Judges' Association and the Commonwealth Parliamentary Association.

Constitutional Reform

(a) Providing advice and assistance, particularly for small and poverty-hindered jurisdictions, on capacity building in establishing sound constitutional structures, especially where there is experience of constitutional breakdown or ethnic/communal tensions.

(b) Reviewing bills of right in Commonwealth constitutions.

(c) Providing advice on mechanisms for constitutional reform and amendment.

(d) Monitoring and advising on the development of appellate court structures and systems.

(e) Reviewing the structure, powers and accountability of the executive.

(f) Ensuring that effective means of disseminating information about current Commonwealth developments are in place.

ANNEX B

Workshop on Constitution Making Process
Livingstone, Zambia, 18 – 21 July 2005

GUIDELINES FOR CONSTITUTION MAKING PROCESS

A. Agenda Setting	
1	Announcement of the intention
2	Consultation with stakeholders to establish agenda
3	Announcement of process
4	Consultation with interested parties
5	Legal framework for the process
B. Consultative Stage	
1	Setting up the review body - Composition - Rules of procedure - Structures and sub committees
2	Information collection and dissemination - For draft committee o Experts o Materials o Receiving public submissions - For the public o Media campaign o Civil society outreach o Public submissions process
3	Writing the constitution
C. Popularisation of the draft document	
1	Circulation and dissemination of the document
D. Legitimisation	
1	Adoption
2	Post adoption - Embedding institutions - Civic Education etc

GENDER AND HUMAN RIGHTS IN THE COMMONWEALTH: CRITICAL ISSUES FOR ACTION IN THE PLAN OF ACTION FOR GENDER EQUALITY 2005-2015

Paper by the Commonwealth Secretariat

BACKGROUND

1. The Gender Section of the Social Transformation Programmes Division (STPD), Commonwealth Secretariat, assists Commonwealth Ministers Responsible for Women's Affairs to advance gender equality through the realisation of women's rights and the promotion of gender justice. A new Commonwealth Plan of Action for Gender Equality 2005-2015 was agreed at the 7th Women's Affairs Ministers Meeting (7WAMM) in Fiji Islands in May-June 2004. It positions the Commonwealth at the centre of global agenda setting on gender equality, as the only intergovernmental organisation to have developed a new Plan of Action (PoA) at the end of the Beijing+10 decade.

2. The 2005-2015 Plan of Action identifies four critical areas for Commonwealth action over the next ten years:

- gender, democracy, peace and conflict;
- gender, human rights and law;
- gender, poverty eradication and economic empowerment;
- gender and HIV/AIDS.

3. The Secretariat works to realise women's rights and gender equality in these four action areas by:

- providing policy and technical advice to Ministries of Women's Affairs and other key sector ministries, to strengthen institutional capacity for gender mainstreaming;
- playing a strong advocacy role for policy change and reform;
- holding capacity-building workshops for policy makers and practitioners to develop effective approaches to addressing critical gender issues; and
- documenting and sharing Commonwealth best practices in the four critical areas. Through more effective participation by key partners, gender issues are recognised and advanced in democratic processes and political decision making, constitutional and legal reforms, national budgets, multilateral and national trade policies and programmes, HIV/AIDS policies and strategies, and in social programmes for education and health.

4. A special meeting of Women's Affairs Ministers in New York in February 2005 sent messages to the UN Beijing +10 Review and to the forthcoming 2005 Commonwealth Heads of Government Meeting (CHOGM) in Malta. In presenting their message to CHOGM, Ministers Responsible for Women's Affairs, reiterated the Denarau Statement issued at the Fiji meeting, which noted the progress made by member countries in the development of national action plans on gender. The Denarau Statement further noted the actions taken by member countries in advancing *de jure* equality through the institutionalisation of constitutional or legislative reforms for claiming women's rights. The message also reaffirmed the Commonwealth's commitment to the Convention on the Elimination of All forms of Discrimination against Women (CEDAW), the Beijing Platform for Action, the Millennium Development Goals, and UN Security Council Resolution 1325. It also called for the endorsement by Commonwealth leaders of the 2005-2015 Plan of Action and the

allocation of necessary resources for its implementation. The meeting established a Gender Plan of Action Monitoring Group, comprising 20 representatives of governments and civil society across all regions of the Commonwealth.

5. The following section highlights the Gender Section's work on human rights to lead into substantive points on gender and human rights as outlined in the Commonwealth Plan of Action for Gender Equality 2005-2015. The paper also identifies some challenges faced by the Commonwealth in advancing women's rights and achieving gender equality.

ADVANCING WOMEN'S RIGHTS: THE WORK OF THE SECRETARIAT

6. The right to gender equality is enshrined in the Commonwealth Plan of Action (PoA) for Gender Equality (2005-2015) and guides all aspects of the work of the Gender Section. The PoA recognises that the achievement of gender equality is crucial to the enhancing of democracy and peace, poverty eradication and violence against women, and ensuring access to education and health for all. The PoA also recognises that international human rights instruments impose a duty on States Parties to guarantee equality of rights between women and men. The PoA therefore provides the framework within which the Commonwealth will advance its commitment to achieving women's rights and gender equality.

7. A pan-Commonwealth Expert Group Meeting on Gender and Human Rights was convened by the Gender Section in London in February 2004. The papers presented at the meeting together with the outcomes from the discussions have resulted in a book. The book, entitled, Gender and Human Rights in the Commonwealth: Some critical issues for action in the decade 2005-2015, was launched at the UN in New York during the Beijing+10 review, March 2005.

8. Key issues flagged by the Expert Group Meeting include: legislative and constitutional reform, and judicial capacity building; gender, culture and the law; women's access to land and property rights; gender, youth and indigenous peoples; and gender-based violence, linked to work on trafficking in women and children, and situations of post-conflict reconstruction and peace-building. The Gender Section's work on human rights and the law is complemented by the work of the Legal and Constitutional Affairs Division and the Human Rights Unit.

9. The Gender Section's programme on Human Rights and the Law has its antecedents in its work on gender-based violence. The programme has provided technical assistance to governments on developing national action plans to address gender-based violence in East and Southern Africa. The programme has also developed model legislation on women's human rights and violence against women in the Caribbean. A case law book on women and human rights has been published and offers legal practitioners, academics and civil society groups' critical information on case laws, and other useful information and resources to address the realisation of women's human rights from the standpoint of legal provisions. Key rights of women in relation to marriage, family, inheritance, employment, reproductive health, socio-economic access, citizenship and migration issues are addressed. The compilation arises from a series of judicial colloquia and presents over 50 significant cases from international and national courts.

10. As part of the ongoing work on gender and human rights at the international level, the Gender Section is a member of the task force on indigenous women under the UN Inter-Agency Network on Women and Gender Equality. The Gender Section was represented at the 61st session of the UN Human Rights Commission and the 4th Session of the UN Permanent Forum on Indigenous Issues.

11. The Section addresses the realisation of women's rights to gender equality through focusing on the four critical areas of concern in the PoA outlined earlier and by offering technical assistance

to national women's machineries and other government offices, raising awareness on key issues and forging a Commonwealth strategy for the achievement of gender equality goals.

KEY GENDER AND HUMAN RIGHTS ISSUES FOR ACTION IN THE POA

12. The PoA notes that a number of Commonwealth countries have made legislative and procedural provisions to combat domestic and other forms of gender-based violence. Some 11 Caribbean countries have specific laws to combat gender-based violence that are drawn from the Secretariat's model legislation. Twelve SADC and East African countries have developed national action plans. Despite these achievements, the PoA registers the need to accelerate implementation by member countries of key international conventions and treaties, national gender policies, and national laws for the realisation of women's rights and the achievement of gender equality.

13. The PoA acknowledges the challenges presented by persistent gender inequalities and inequities. These include the widespread prevalence of gender-based violence and violations of women's human rights, the exacerbation of feminisation of poverty, lack of women's full participation in leadership and decision making, and women's continued unequal access to economic and social resources and justice. Among the current and emerging challenges, the PoA identifies significant social, economic and political changes, particularly in relation to conflict, globalisation, poverty and HIV/AIDS as those having serious implications for the achievement of gender equality.

14. With regard to the specific area of human rights and the law, the PoA states:

> *'The lack of a gender perspective in the administration of the law has stymied gains made in international and regional treaties and conventions. Even where sound legislation exists, application and interpretation of these laws are inadequate for many reasons; lack of political will, jurisdictional issues, lack of awareness in the public service and justice systems at all levels, lack of enforcement capacity, traditional or customary systems of law that discriminate against women, women's inadequate awareness or legal illiteracy concerning their rights and recourse to justice, limited human and financial resources for monitoring and enforcement at national, local and community levels, and inadequate evidence-based data collection. It is in this context that violations of human rights of women and girls including elderly women and women with disabilities, occur and actions to redress these issues such as human rights education, remain urgent priorities.'*

15. In highlighting the structural, systemic, cultural and ideological barriers to the realisation of women's rights, the PoA underscores the fact that women and girls experience different forms of discrimination and disadvantage at different stages in the life cycle which are evident in the institutions of the State, the market and the household/community. The PoA therefore calls for adequate support for women and girls during their life-cycle transitions in order that progress made at one stage in the life cycle is not negated by adverse experiences and discrimination at a later stage.

16. In speaking to the meanings and values that cultural and religious practices have for women's lives, the PoA acknowledges the important role played by customary and religious laws and traditions. While the PoA notes the value of established statutory and constitutional laws, in also according importance to customary and religious laws, the PoA goes beyond addressing women's *de jure* claims to rights. The PoA positions culture and religion as significant factors in mediations within the community for the claiming of rights by women. Consequently, the PoA calls for the promotion of active dialogue and engagement among members of the justice system, religious, cultural, traditional and civil institutions and communities to address women's human rights in all cultures. Particular issues identified include widow inheritance, female genital mutilation (FGM), and land and property rights for women.

17. Other gender and human rights issues for action include legislative and constitutional reform, focus on anti-trafficking measures to protect the rights of women and children, enhancement of women's role in conflict-resolution and peace-building, and improvement of marginalised women's lives including those from indigenous communities.

CONCLUSION

18. In ensuring that women's rights move from aspirations to entitlements, the Commonwealth Secretariat endeavours to work with governments and their institutions, civil society partners, the women's movements at national, regional and international levels and other stakeholders to enhance women's capabilities to claim their rights. The PoA offers the template to move from plans to actions given the commitments made by Commonwealth governments.

LEGAL DEVELOPMENT ISSUES

COMMONWEALTH LAND-LOCKED STATES AND THE LAW OF THE SEA

Paper by the Commonwealth Secretariat

EXECUTIVE SUMMARY

BACKGROUND

1. In 2004 the Secretariat prepared a report to inform Senior Officials of the rights of Land-locked States under the provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Following the October 2004 meeting of Senior Officials, the Secretariat held a seminar for the Land-locked States of Africa in June 2005 with a view to sensitising these states as to the benefits to be derived from being fully on stream with UNCLOS. From discussions at the seminar certain issues emerged which the Secretariat wishes to bring to the attention of Law Ministers. These issues, outlined in greater depth in the Report that follows, are:

- the perception that benefits from UNCLOS through ratification are a distant hope; and
- the view that ratification will give rise to costs.

MEASURES THAT SHOULD BE TAKEN BY LAND-LOCKED STATES

2. The Report outlines three distinct measures which developing Land-locked States that wish to obtain full advantage of the benefits contemplated in UNCLOS will generally need to undertake.

I. Accession to the UNCLOS pursuant to Article 307.
II. Consideration of the need for enabling legislation to bring the provisions of the Convention into force in local law.
III. Consideration of the need to enter into bilateral or regional agreements with other countries to secure access to the sea and to foreign exclusive economic zones.

ACTION BY LAW MINISTERS

3. In light of the information outlined in the Report, Law Ministers are asked to:

(a) consider the position of Land-Locked States and the possibilities granted to them under UNCLOS to achieve access to the sea and living resources so as to foster and encourage sustainability;

(b) endorse the efforts of the Commonwealth Secretariat to sensitise member states to the immediate need to accede to UNCLOS for those states which have not done so;

(c) encourage Land-locked States to enact enabling legislation to implement, the provisions of Part V of UNCLOS;

(d) encourage both Land-locked States and their coastal neighbouring states to utilise the provisions of UNCLOS to foster relations and simultaneously recognise the benefits of entering into regional arrangements for access to the sea.

REPORT

COMMONWEALTH LAND-LOCKED STATES AND THE LAW OF THE SEA

INTRODUCTION

1. The Commonwealth Secretariat informed the meeting of Senior Officials of Law Ministries in London, last October, of the rights of land-locked states under the provisions of the **1982 United Nations Convention on the Law of the Sea (UNCLOS)**. Rights of land-locked states are generally, but not exclusively, derived from UNCLOS. Thus, as a starting point, any attempt by land-locked states to improve their access to the sea, and their access to the resources of the sea, should take the relevant provisions of UNCLOS fully into account. In some cases, too, rights for land-locked states may be derived from customary international law and, to a lesser extent, from the 1958 Geneva Conventions on the Law of the Sea. The treaties that were opened for signature and ratification in Geneva in 1958 were: the Convention on the Territorial Sea and Contiguous Zone, the Convention on the Continental Shelf, the Convention on the High Seas, and the Convention on Fishing and Conservation of Resources of the High Seas. The Convention on Fishing and Conservation of Resources of the High Seas has had comparatively little impact on the development of the law of the sea, and no impact in respect of land-locked states, so its provisions will not be given consideration in this Report.

2. Still as a general proposition, whether or not a particular land-locked country may derive rights directly from UNCLOS will, of course, depend on its ratification of or accession to the treaty. At the present time, the following African land-locked member states of the Commonwealth are parties to UNCLOS: Botswana (became a party on May 2, 1990); Uganda (became a party on November 9, 1990); and Zambia (became a party on March 7, 1983). The following African land-locked member states of the Commonwealth have not become parties to the Convention: Lesotho (signed, but not ratified); Malawi (signed, but not ratified); Swaziland (signed, but not ratified). Zimbabwe, which has been suspended from the Commonwealth, ratified UNCLOS on February 24, 1993.

3. Having regard to the fact that three of the six Commonwealth African land-locked states are not parties to UNCLOS, one of the first strategic recommendations is that the non-parties to the Convention should seriously consider ratifying it. As will be discussed below, developing land-locked countries could benefit from the Law of the Sea Convention: this possibility informs the present recommendation.

ACTIVITY BY THE COMMONWEALTH SECRETARIAT

4. Since the October 2004 meeting of Senior Officials, the Commonwealth Secretariat held a seminar for the land-locked states of Africa with a view to sensitising those states to the benefits to be derived from being fully on stream with UNCLOS.

5. That seminar was held in Swaziland from 13 to 15 June, 2005 and was attended by senior officials of the respective countries. From discussions at the seminar, certain issues emerged which the Secretariat wishes to bring to the attention of Law Ministers.

(a) **The perception that benefits from UNCLOS through ratification is a distant hope.** Because land-locked states have no coastline, and are generally remote from the sea, policy-makers may take the view that any benefits to be gained from ratifying a treaty on the law of the sea are too distant. This position may be understandable at first sight, for with respect to

some aspects of the sea, land-locked states have traditionally not had rights. This is so, for example, in matters concerning the continental shelf, a legal concept that has essentially been associated with coastal states. For this reason, in the North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)(ICJ Reports 1969, p. 4), the International Court of Justice noted that land-locked states would not have an interest in the 1958 Geneva Convention on the Continental Shelf. The perception that land-locked states have nothing to gain in law of the sea matters is also based on the fact that the typical land-locked state – and certainly the typical African land-locked state – has no important seafaring tradition and no offshore fishing industry.

Although it is true that land-locked states have no direct interests in some areas of the sea, the perception that nothing is to be gained from ratifying UNCLOS is built on the incorrect assumption that the treaty as a whole ignores the concerns of land-locked states. Some of the main ways in which UNCLOS takes into account the interests of land-locked states will be discussed below.

(b) **The view that ratification will give rise to costs.** When a state ratifies the Law of the Sea Convention, the state incurs an obligation to contribute to the operation of the International Seabed Authority, on a pro rata basis, having regard to the state's normal level of contribution to the United Nations. For the typical developing land-locked country, this level of contribution is not likely to be prohibitive, as it will be less than one per cent of the costs pertaining to the International Seabed Authority. The ratifying state will also incur the costs of diplomatic representation and participation in the work of the Authority. The expenses of a small delegation for these purposes are likely to be a relatively insignificant portion of the foreign affairs budget of the typical land-locked country. Generally, though, the question of costs must also be seen in light of the prospective benefits that may accrue to land-locked states through their participation in diplomatic initiatives concerning the law of the sea.

6. Naturally, in considering whether to ratify the Law of the Sea Convention, the typical land-locked state will bear in mind the costs of ratification. There are, however, a number of other background policy matters that point in favour of ratification. These include:

(c) **The state of customary international law.** For a country that has not ratified UNCLOS, customary international law provides the legal foundation concerning rights and duties. Alternatively, for countries that have ratified the Geneva Conventions, those treaties will set out the prevailing law. Customary international law does not completely disregard the aspirations of land-locked countries in law of the sea matters. At the same time, however, customary international law tends to be less precise than the terms of UNCLOS; also, as is set out further below, customary international law does not treat land-locked states as well as UNCLOS does.

(d) **UNCLOS as the high water mark.** UNCLOS was negotiated from 1973 to 1982 with substantial participation by land-locked states. The result in this treaty is probably the best that could have been obtained given the balance of political forces at the Third United Nations Conference on the Law of the Sea (UNCLOS III), where the terms of UNCLOS were agreed. This is so because, at UNCLOS III, land-locked states consistently worked as a unit, and in formulating their proposals, they often worked as a group along with countries described as "geographically disadvantaged". Altogether, the Group of Land-locked and Geographically Disadvantaged States included more than 50 states, enough to constitute an influential body of opinion at UNCLOS III. Indeed, at various times the Group of Land-locked and Geographically Disadvantaged States was able to form a "blocking third" at the

conference: their numerical strength was such that they could ensure that proposals sharply inimical to their interests would be excluded from the terms of the Law of the Sea Convention.

(e) **Insistence on rights.** At UNCLOS III, the land-locked states and their geographically disadvantaged counterparts insisted that various rights in the sea, and not just to the sea, were important to them. For the land-locked states, in particular, these rights were said to be economically important, and in some cases, it was argued that the non-recognition of some rights could even affect the survival of individual countries. This insistence that rights be granted to land-locked states, together with the numerical strength of the Group of Land-locked and Geographically Disadvantaged States, was the key point in whatever successes the land-locked states have been able to garner in UNCLOS. Against this background, it appears counter-intuitive for land-locked countries to now stay out of the Convention. To stay out of UNCLOS creates the impression today that the prior insistence on the need for rights at the UNCLOS III was an exaggeration. And, if this perception is allowed to remain, it could affect the way in which land-locked countries are viewed in future negotiations.

(f) **UNCLOS as a package.** One of the central features of UNCLOS is its comprehensive reach. Unlike previous treaties on the law of the sea, the Convention covers all the zones of the sea, and the different issues of navigation, resource-access and related questions that arise with respect to the sea. All states, in considering whether or not to ratify UNCLOS, should bear in mind that although in one area the prospective benefits may be limited, in others the benefits may be meaningful. The Convention was negotiated as a package, so that some trade-offs were made for other benefits. So, for example, land-locked states may not have obtained all they wished in respect of access to the resources of the exclusive economic zone, but this was implicitly taken into account in deliberations concerning preferential rights in the deep seabed. In practice, therefore, land-locked states would be advised to look at the overall effect that the Convention may have on their prospects, and not only at how specific parts of this treaty apply to their interests.

(g) **Rights as bargaining chips.** Some of the rights held by states pursuant to UNCLOS may not be immediately of interest to particular land-locked countries. But this is not necessarily a reason for those land-locked countries to ignore the Convention. For one thing, some rights may be used as bargaining chips. A land-locked state may not, presently, wish to explore and exploit the resources of the exclusive economic zone of a neighbouring coastal state, but the possession of this right could be used in bargaining for other rights in the context of negotiations – as, for example, in a trade-off between fishing rights and rights of access across coastal state territory on preferential terms.

(h) **The attitude of other Land-locked States.** In determining its political attitude to the Law of the Sea Convention, each land-locked state may also have regard to the stance taken by other land-locked counterparts. This will provide general information as to current perceptions of like-minded countries to the Convention. Of the 42 land-locked countries in the world today, 17 are party to UNCLOS. These are:

Armenia
Austria
Bolivia
Botswana
The Czech Republic
Hungary
Laos
Luxembourg
Mali
Mongolia
Nepal
Paraguay
Slovakia
Macedonia
Uganda
Zambia
Zimbabwe

It may also be noted that there are 15 land-locked states on the African continent, and that five have become party to UNCLOS to date. The ten that have remained outside the scheme are as follows:

Burkina Faso	Lesotho*
Burundi	Malawi*
Central African Republic	Niger
Chad	Rwanda
Ethiopia	Swaziland*

* Lesotho, Malawi and Swaziland have signed but not ratified/acceded to the Convention.

With reference to all land-locked countries, it may be difficult to identify a clear pattern concerning ratification and non-ratification, though some of the states that participated most actively at UNCLOS III (e.g., Austria, Bolivia, and Zambia) have been more willing to adhere to the Convention than other land-locked countries. It is, therefore, important to address the question whether UNCLOS is beneficial to land-locked countries, and especially the developing states among them.

DOES UNCLOS HELP LAND-LOCKED STATES?

7. The suggestion that UNCLOS does not cater to land-locked countries is difficult to sustain, for, as noted above, several provisions of the treaty seek to take into account the concerns of countries that have no coastlines. This point bears elaboration with full reference to the Convention. In respect of land-locked states, the Convention achieves two main objectives, namely:

(i) **the affirmation of existing rights; and**
(ii) **the creation of new rights.**

(i) Affirmation of Existing Rights

(a) **Affirmation that ships under the flag of Land-locked States have the right of innocent passage.** Article 17(1) of UNCLOS indicates that:

"Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

From the perspective of land-locked states, this right facilitates access by all states to the various zones of the sea. The form of words used in Article 17 of the Convention is similar to the language set out in Article 14(1) of the Geneva Convention on the Territorial Sea and Contiguous Zone. It may be reasonably assumed that the basic right to innocent passage set out in Article 17 of the 1982 Convention is also part of customary international law, so that this right exists for all land-locked states, and not just for land-locked states that have ratified UNCLOS.

(b) **Affirmation that all rights on the high seas are open to Land-locked States as they are to other States:** Article 87 of UNCLOS indicates that

"(t)he high seas are open to all States, whether coastal or land-locked."

The provision then sets out a non-exhaustive list of the high seas freedoms open to all states. These freedoms shall be available to both coastal and land-locked states, and they include, inter alia, freedom of navigation, freedom of overflight, freedom to lay submarine cables and

pipelines, freedom to construct artificial islands and other installations, freedom of fishing, and freedom of scientific research. This provision reflects, in large part, the terms of Article 2 of the High Seas Convention which, in addition to listing four freedoms of the high seas, indicates that the high seas are "open to all nations". The provisions of the High Seas Convention are widely regarded as having codified established rules of customary international law, so that, again, the rules in Article 87 of the 1982 Convention that pertain to land-locked states are part of customary international law. Article 87 of the 1982 Convention differs from Article 2 of the High Seas Convention in its listing of freedoms available to all countries, with the latter stating expressly that high seas freedoms comprise the freedoms of navigation, fishing, and overflight, as well as the freedom to lay submarine cables and pipelines, among other things.

(c) **Affirmation of the right of access of Land-locked States to and from the sea and freedom of transit:** Part X of UNCLOS (Articles 124 to 132) specifies a number of rules concerning the right of access of land-locked states to and from the sea, and the concomitant right to traverse transit states to and from the sea. The main provision in this regard is to be found in Article 125 of the 1982 Convention. It reads as follows:

"1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, Land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.

2. The terms and modalities for exercising freedom of transit shall be agreed between the Land-locked States and transit States concerned through bilateral, sub-regional or regional agreements.

3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for Land-locked States shall in no way infringe their legitimate interests."

Part X of the Convention, in setting out particular features of the right of access, indicates that provisions in favour of land-locked states shall not be subject to the most-favoured nation clause, and that traffic in transit shall not be subject to customs duties, taxes or other charges save for charges levied for specific services. Similarly, the means of transport in transit and other facilities provided for and used by land-locked states shall not be subject to taxes or charges higher than those levied for the use of means of transport of the transit state. Part X also allows transit states to establish, by agreement, free zones and other customs facilities in transit states. Transit states are required to take appropriate measures to avoid delays and technical problems for traffic in transit, and ships flying the flag of land-locked states shall enjoy treatment equal to that accorded to other foreign ships in maritime ports. Finally, UNCLOS as a whole does not derogate from any greater rights in respect of transit that land-locked states may have, by agreement, with particular transit states.

The provisions in Part X of the 1982 Convention represented a significant victory for the Group of Land-locked and Geographically Disadvantaged States at UNCLOS III. This is evident when the terms of Part X are compared with relevant rules on access to the high seas in the 1958 High Seas Convention. Specifically, it is to be noted that Part X describes access to the sea as a "right", and that the mandatory term "shall" is used to confirm that the right is to be enforceable against States Parties to the Law of the Sea Convention. The particular form of words used in Article 125(1) of the 1982 Convention (quoted above) also reflects a significant shift away from the terminology of the High Seas Convention, in favour of land-

locked states. Article 3 of the High Seas Convention indicates that states without coastlines "should" have free access to the sea, but it fails to specify in definite terms whether this means that States Parties to the High Seas Convention are legally bound to provide access for their land-locked counterparts, or whether they have only a moral obligation to do so. This point of uncertainty has been removed with respect to land-locked and transit states that are party to the 1982 Convention; it remains for states that are party only to the High Seas Convention. If a transit state is party to neither UNCLOS nor the High Seas Convention, then the rules of customary international law would apply: the better view is that the rules set out in the High Seas Convention reflect customary international law on the point of access to the sea for land-locked states.

Thus, UNCLOS sets out a legal rule in favour of transit rights for land-locked atates. On the other hand, it is not altogether clear that land-locked states have a legal right of access to the sea across the territory of transit states that have ratified only the High Seas Convention, or across the territory of transit states that have ratified neither UNCLOS nor the High Seas Convention. This is an issue that may require further study.

(ii) Creation of New Rights

In addition to reaffirming rights that existed prior to 1982, UNCLOS has also created a number of new rights for land-locked and geographically disadvantaged states. These rights are new in the sense that they did not exist under the Geneva Conventions or under customary international law, in the form in which they have been incorporated in the 1982 Convention. They include the following:

(a) **Rights in respect of the Exclusive Economic Zones (EEZs) of other States:** The concept of the EEZ, first given treaty recognition in Part V of UNCLOS, has meant that, subject to geographical limitations, each coastal state has the right to proclaim an area of up to 200 nautical miles mainly for resource purposes. More specifically, in its EEZ, each coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and its subsoil.

With respect to non-living resources, the rights of the coastal state correspond significantly with rights traditionally held by coastal states under the doctrine of the continental shelf. Under the rules applicable to both the EEZ and the continental shelf, the rights of the coastal states over non-living resources are exclusive to the coastal state. Thus, land-locked states have no legal basis to claim access to non-living resources that are found in a coastal state's waters out to the limit of 200 miles.

With respect, however, to living resources, UNCLOS creates the possibility that land-locked and geographically disadvantaged states may have access the EEZs of other States. In brief, Part V of the Convention requires each coastal state to share its surplus of living resources with land-locked and geographically disadvantaged states. Thus, Articles 61 and 62 of the Convention, taken together, specify that when a coastal state has a surplus, it shall allocate this surplus to various categories of states, including land-locked and geographically disadvantaged states. Articles 69 and 70 of the Convention elaborate on this right of access to living resources for land-locked and geographically disadvantaged states. By virtue of these two provisions, land-locked and geographically disadvantaged states:

> "shall have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the Exclusive Economic Zones of coastal States of the same sub-region or region, taking into account the relevant

economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and articles 61 and 62."

Articles 69 and 70 of the Convention also indicate that "the terms and modalities" under which land-locked and geographically disadvantaged states are to have access to living resources in foreign EEZs are to be established through bilateral, sub-regional or regional agreements. Articles 69 and 79 also contemplate that when a coastal state "approaches" the point at which it will have no surplus of living resources for allocation to land-locked and geographically disadvantaged states, the coastal state and other states concerned shall co-operate to allow for participation of land-locked and geographically disadvantaged states in the EEZ of the coastal state. This is to be undertaken "on terms satisfactory to all parties."

In practical terms, if a land-locked state ratifies UNCLOS, the state will have the right to negotiate with neighbouring coastal states (and states in the same region or sub-region) for rights to surplus living resources in the EEZs of the coastal states. Pursuant to the Convention, some rights of access must be granted. On the other hand, if a land-locked state does not ratify the Convention, it is very likely that this state will not have a place at the negotiating table. Coastal states will be able to ignore any interests land-locked countries have in living resources in foreign EEZs. This is so because although the concept of the EEZ has become a part of customary international law, there is no evidence that under customary law coastal states are required to share living resources of their EEZs with land-locked countries. In other words, the sharing requirement for the benefit of land-locked states does not exist in customary law.

Two additional points should be noted about the EEZ regime as it applies to land-locked states. The first concerns the determination of the surplus of EEZ resources to be shared with land-locked states. Under the Convention, the surplus is defined as the difference between the allowable catch in the coastal state's EEZ and the harvesting capacity of that state. In simplified form the allowable catch reflects the quantity of available living resources in the EEZ of the coastal state for a given year, having regard to the need to preserve living resources for needs in subsequent years; and, as its name suggests, the harvesting capacity represents the capacity of the coastal state to take the living resources in its EEZ. The point to note here, though, is that under the Convention it is the coastal state that is responsible for determining the two elements that go into the determination of the surplus. Thus, it is possible that a coastal state may underestimate its surplus by overstating its harvesting capacity or by understating its allowable catch. And, if the coastal state does this, the land-locked country may find itself negotiating for access to a smaller quantity of living resources than it is properly entitled to pursue. This possibility follows from the language in Articles 61 and 62 of the Convention, which provide guidance on the determination of the surplus in the terms summarised in this paragraph. It also follows, however, from the language of Article 297(3) of the Convention.

Specifically, Article 297 (3)(a) acknowledges that some coastal state rights may be subject to the dispute settlement mechanisms of the Convention, but it further stipulates that the coastal state shall not be obliged to accept the submission to dispute settlement issues:

"relating to its sovereign rights with respect to living resources in the Exclusive Economic Zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations."

Similarly, Article 297(3)(b) acknowledges that in some circumstances disputes may be submitted to conciliation procedures, but these issues shall not include disputes about the actual determination of the allowable catch or the harvesting capacity by the coastal state. Rather, they include disputes concerning the coastal state's arbitrary failure to determine the allowable catch and its harvesting capacity, or its arbitrary refusal to allocate its surplus. Once the coastal state has determined its surplus, its decision shall not be subject to dispute settlement under the Convention. This situation opens land-locked states to the possibility of abuse, but if a land-locked state is party to the Convention it may be able to argue that coastal states have a duty to act in good faith in the determination of the surplus.

Secondly, it is to be noted that land-locked states are not the only countries entitled to access to the living resources of the EEZs of coastal states. Article 62(3) of UNCLOS indicates that in giving access to its surplus to other countries, the coastal state shall take into account a number of factors including, inter alia:

a. the significance of the living resources of the EEZ to the economy and other national interests of the coastal state;

b. the rights of land-locked and geographically disadvantaged countries of the region or sub-region;

c. the requirements of developing states of the region or sub-region;

d. the need to minimise economic dislocation in states whose nationals have habitually fished in the particular EEZ or which have made substantial efforts in research and identification of stocks.

The list in Article 62(3) is not exhaustive, so that it is open to coastal states to allocate access to the surplus with reference to other considerations, including a country's ability to pay fees for access to the resources. Thus, the coastal state may want to allocate access to the countries willing to pay the highest fees, a situation that could work to the disadvantage of land-locked developing countries. Similarly, the legal requirement that the coastal state should take into account the interests of habitual fishing states and states that have undertaken research, may also reduce the size of the surplus that will be made available to a land-locked country in a specific region or sub-region. These considerations, however, do not negate the right of land-locked states to access the surplus. Where a land-locked state has ratified the Law of the Sea Convention, its right of access to living resources in the EEZ is assured, by virtue of Article 69. The main issue here – namely, what will constitute equitable access in any given situation – is to be determined by negotiation. Land-locked states will therefore derive some benefits to living resources of the sea pursuant to Article 69 of the Convention.

(b) **Rights in respect of the Continental Shelf:** As noted above, UNCLOS does not grant rights to non-living resources of the EEZ or of the continental shelf. In one instance, however, the Convention does accord rights to land-locked states in relation to the continental shelf. Article 82 of the Convention is concerned specifically with that part of a coastal state's continental shelf that lies beyond a distance of 200 nautical miles from the coastline. Article 82 stipulates that if a coastal state exploits resources from this part of the continental shelf, the state must make payments or contributions in kind to the International Seabed Authority for distribution to various countries. These payments are to be made annually on a scale of contributions starting in the sixth year of production from a particular site. In the sixth year, the level of payment shall be 1 per cent of the value of production from the site, and this shall rise annually by 1 per cent up to the twelfth year of

production. Following the twelfth year of production, the level of payment shall be at 7 per cent per annum. Developing land-locked states have a direct interest in these provisions because Article 82(4) of the Convention specifies that payments and contributions made under this arrangement shall be distributed to states "on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and Land-locked among them."

(c) **Rights in respect of the Deep Seabed:** Part XI of UNCLOS (when read with the 1994 Implementation Agreement on the Deep Seabed) establishes an elaborate regime for the exploration and exploitation of the resources of the deep seabed area (the Area). By virtue of Article 136, the Area and its resources are accepted as the common heritage of mankind and various other articles in Part XI set out in detail how the common heritage principle is to be recognised in practice. These provisions take into account some of the interests of land-locked and geographically disadvantaged states. So, for example, Article 140 notes that activities in the deep seabed area shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, and whether those states are coastal or land-locked.

Similarly, Article 148, on participation, expressly acknowledges the situation of land-locked and geographically disadvantaged states in the following terms:

> "The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special need of the Land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it."

This provision has been criticised for its imprecision. It does not indicate the point at which liability will arise for breach of its terms and it fails to specify the penalties that may be enforced for breach.

The regime in Part XI also sets out rules concerning membership of the Council of the International Seabed Authority. Specifically, Article 161 (d) of the Convention specifies that, in addition to certain other categories, there shall be six developing countries representing the special interests, including the following: states with large populations, land-locked or geographically disadvantaged states, major importers of the category of minerals derived from the Area, potential producers of those minerals and least developed states. As there are six allotments for five categories of states, the largest number of land-locked or geographically disadvantaged states that can be elected specifically under this heading is two. And, given that other developing countries, such as archipelagic states and island developing states also represent specific interests, the number of land-locked or geographically disadvantaged states for this category could be one. This is not the complete picture concerning membership in the Council, however, Article 161(2) further requires the Assembly to ensure that land-locked and geographically disadvantaged states are represented to a degree that is reasonably proportionate to their representation in the Assembly. One question that arises therefore is the extent to which land-locked and geographically disadvantaged states have actually enjoyed representational rights (as a special interest group) in the work of the Council of the International Seabed Authority. This is a question of some importance not least because Part XI of the Convention has left various points of elaboration on the deep seabed regime to subsequent formulation by the Authority. If land-locked and geographically disadvantaged states have been under-represented, this could have

had some bearing on the subsidiary rules developed since the Convention entered into force in 1994.

Other rules in Part XI expressly take into account the concerns of land-locked countries. So, for example, Article 160(2)(k) empowers the Assembly to consider problems of a general nature faced by developing countries in deep seabed matters, and to have regard to "problems for States in connection with activities in the Area that are due to their geographical location, particularly for Land-locked and geographically disadvantaged States." Also, for reasons of clarification, Article 152(2) indicates that the general principle of non-discrimination applicable to activities in the deep seabed area does not exclude the possibility of "special consideration for developing States, including particular consideration for the Land-locked and geographically disadvantaged among them", as provided for in Part XI of the Convention.

Overall, the regime in Part XI of the Convention seeks to give preferential treatment to developing countries in deep seabed matters. This is reflected in various provisions on the distribution of proceeds of seabed mining, protection for land-based producers, encouragement for developing states to participate in the regime in Part XI, and training of nationals of developing countries, among other things. Some provisions, originally incorporated into Part XI for the special benefit of developing countries (e.g. those pertaining to the transfer of technology), have been changed by the Implementation Agreement of 1994, but even so, Part XI as it now stands takes into account developing country concerns. With this in mind, it is fair to conclude that developing land-locked countries could derive real advantages in the future pursuant to the deep seabed mining provisions of the Convention.

GIVING EFFECT TO THE LAW OF THE SEA CONVENTION

8. The developing land-locked states that wish to obtain the full range of benefits contemplated in UNCLOS will generally need to undertake three distinct measures. These measures are as follows.

(a) **Accession to the Convention.** The land-locked state will need to become a party to the Law of the Sea Convention. The state may do this by acceding to the Convention pursuant to Article 307. The Convention does not allow for general reservations or exceptions other than those that are allowed by specific articles, but some states – in the course of ratification or accession – have made declarations as to their understanding of particular provisions.

(b) **Enabling Legislation.** The land-locked state will need to consider whether enabling legislation is necessary to bring into force specific provisions of the Convention into local law. Generally, the extent to which the land-locked state will need to pass enabling legislation will depend on its internal constitutional and legal arrangements. If those arrangements allow treaties to be automatically applied as law within the domestic sphere, then local legislation may not need to be passed. If treaties are not automatically incorporated into local law, then enabling legislation will need to be considered. For the typical developing land-locked state, the range of items that may need to be included in local legislation is likely to be limited. Generally, coastal states are obliged to pass legislation pertaining to each of the zones of the sea that they are claiming for legal purposes (including the territorial sea, the contiguous zone, the EEZ and the continental shelf). In contrast, land-locked states will not need to make such claims because, by definition, they do not have zones of the sea as extensions of their territory. Nevertheless, if a land-locked state wishes to enjoy all the benefits available under the Law of the Sea Convention, that state may consider passing legislation on matters such as ship registration, and jurisdiction on vessels

relying on the services of nationals or carrying the flag of the land-locked state. The land-locked state may also consider whether it is necessary to pass legislation to facilitate participation by its nationals in deep seabed matters.

(c) **Bilateral Agreements.** Two of the most significant areas of interest for land-locked states, namely, access to the sea across the territory of transit states and access to foreign EEZs, require land-locked states to enter into bilateral or regional agreements with other countries. These agreements are necessary for the implementation of the broad rights assured for land-locked states under the Convention. Thus, the land-locked state should be prepared to enter into negotiations with coastal states pursuant to the terms of Articles 125(2) and 69(2) of the Convention. The negotiating approach taken by the land-locked state in each case will vary according to the particular needs of the land-locked state, its geographical location, the relative strengths of the parties, the history of relations between the parties, and other considerations. It is to be emphasised here, however, that these negotiations are required by the Law of the Sea Convention, so the land-locked state is entitled to request that its coastal counterparts take part in the negotiating process.

CONCLUSION

9. UNCLOS represents a deliberate effort on the part of the international community to ensure that the resources of the sea are not subject to the control of a small group of powerful states. At the same time, the main provisions of the Convention reflect the desire to promote the interests of developing countries as a group, and to take into account the interests of the most disadvantaged of the developing countries, namely, the developing land-locked states.

10. Law Ministers are now asked to:

(a) consider the position of land-Locked states and the possibilities granted to them under UNCLOS to achieve access to the sea and living resources so as to foster and encourage sustainability;

(b) endorse the efforts of the Commonwealth Secretariat to sensitise member states to the immediate need to accede to UNCLOS for those states which have not done so;

(c) encourage land-locked states to enact enabling legislation to implement, the provisions of Part V of UNCLOS;

(d) encourage both land-locked states and their coastal neighbouring states to utilise the provisions of UNCLOS to foster relations and simultaneously recognise the benefits of entering into regional arrangements for access to the sea.

CRIMINAL LAW ISSUES

REPORT ON THE PROLIFERATION OF SMALL ARMS AND LIGHT WEAPONS WITHIN THE COMMONWEALTH

Paper by the Commonwealth Secretariat

EXECUTIVE SUMMARY

1. The widespread availability, unregulated transfer and misuse of small arms and light weapons (SALW) gravely undermine key Commonwealth priorities in human rights, development, conflict prevention and strengthening democracy. Many Commonwealth governments are adversely affected by the uncontrolled flow and misuse of these weapons.

2. Concerns about excessive and destabilising accumulation of weapons have been consistently raised by Commonwealth Heads of Government, including in the 2003 Abuja Communiqué where Heads of Government voiced their concern about the "proliferation of small arms, ammunition, and light weapons, which had contributed to the intensity and duration of armed conflicts as well as to international terrorism".

3. SALW have also been a priority for member states through their participation in the United Nations. In 2001 a Programme of Action (PoA) was adopted with recommendations for action at the national, regional and global levels.

4. While the PoA provides a framework from which member states can take action to control SALW, a number of national, regional and international agreements and initiatives have also been launched to address these problems. From these initiatives, common approaches have emerged including: the need to make changes to domestic criminal laws and other legislation; the need for the development of minimum standards; ensuring harmonisation of legislation in geographic regions; and co-operation among states.

5. The Secretariat is strategically poised to play a significant role in further advancing the progress that has been made and to ensure that states can follow through with the commitments they have made to control the transfer and use of SALW. Law Ministers are invited to consider the role the Secretariat could play in the following areas:

- assisting with the drafting of model criminal legislative provisions;
- developing draft model legislative provisions and regulations for marking, tracing and brokering SALW;
- preparing a summary of the obligations that its member states already possess under international law that apply to transfers and uses of SALW;
- capacity building to ensure the effective implementation of initiatives;
- liaising with other organisations to facilitate funds that can be used on a state or regional level in support of the development of programmes focused on capacity building within key public sectors;

- monitoring international developments in the area of SALW controls in order to provide member countries with information and updates on major initiatives of interest and best practices.

REPORT ON THE PROLIFERATION OF SMALL ARMS AND LIGHT WEAPONS WITHIN THE COMMONWEALTH

INTRODUCTION

"Even in societies not beset by civil war, the easy availability of small arms has in many cases contributed to violence and political instability. These, in turn, have damaged development prospects and imperilled human security in every way." – UN Secretary General Koffi Annan

1. Small arms and light weapons (SALW) have been described as the new weapons of mass destruction. It is estimated that the use of SALW causes the death of up to a half million people every year, at least half of them in the context of military conflict, mostly internal conflict and civil war, the rest in other kinds of gun-related violence. Their widespread availability, unregulated transfer and misuse gravely undermine key Commonwealth priorities, including human rights, democracy, people-centred development, and conflict prevention and resolution in many Commonwealth countries. The need to address these impacts and to work towards disarmament and effective arms control has been consistently expressed as a priority for governments of the Commonwealth. As more regional and international initiatives are developed and implemented, the Secretariat is strategically poised to play a significant role in advancing the progress that has been made, to help ensure that states effectively implement their various commitments and to facilitate with the development of common approaches to achieve progress to control the transfer and use of SALW.

2. This paper will provide a brief overview of the concerns raised by SALW and the need to address these concerns as a Commonwealth priority. It will also document the important developments made in recent years to control their transfer and use and recommend ways that the Secretariat can constructively play a role in further advancing the progress that has been made to date.

SMALL ARMS AND LIGHT WEAPONS AS A COMMONWEALTH PRIORITY

3. Illicit trafficking, proliferation and misuse of SALW is now widely recognised to be a major source of insecurity and human suffering across much of the world. Commonwealth Heads of Government have consistently expressed concern at the continued destabilising accumulation and proliferation of small arms, ammunition and light weapons, which contribute to the intensity and duration of armed conflicts as well as to international terrorism. They have also highlighted the fact that many Commonwealth governments are adversely affected by the uncontrolled flow and misuse of these weapons. Concern has been expressed that the spread of small arms threatens national, regional and global security and impedes basic social and economic development. Heads of Government have also noted that the challenges posed by the proliferation of small arms involve security, humanitarian, health and development dimensions.

4. The need to develop effective arms controls has been a longstanding Commonwealth priority. In the 1991 Harare Declaration, Commonwealth countries pledged to "support United Nations and other international institutions in the world's search for peace, disarmament and effective arms control."

5. Concern about the excessive and destabilising accumulation of weapons and the need for urgent action was expressed in the 1999 Durban Communiqué. Again, in 2003, Heads of Government voiced their concern in the Abuja Communiqué about the "proliferation of small arms, ammunition, and light weapons, which had contributed to the intensity and duration of armed conflicts as well as to international terrorism", and noted that many member state governments were

adversely affected by the uncontrolled flows of these weapons. Member countries were urged to support initiatives at the global and regional level to curb and prevent their illicit production, trafficking and misuse. At that same meeting, the *Aso Rock Commonwealth Declaration on Development and Democracy: Partnership for Peace and Prosperity* committed members to support "efforts to curb the illicit trade in small arms and light weapons".

6. The need to take action on SALW also remains high on the global agenda. The United Nations General Assembly regularly focuses on the impacts of SALW and has passed numerous resolutions on the issue. For example, in 2004, the General Assembly reaffirmed "the importance of ongoing efforts at the regional and sub-regional levels...and invite[d] all Member States that have not yet done so to examine the possibility of developing and adopting regional and sub-regional measures, as appropriate, to combat the illicit trade in small arms and light weapons in all its aspects".[1]

7. In 2003 the General Assembly invited "all member States ...to enact or improve national legislation, regulations and procedures to exercise effective control over the transfer of arms, military equipment and dual-use goods and technology, while ensuring that such legislation, regulations and procedures are consistent with the obligations of States parties under international treaties."[2]

8. The United Nations Security Council has also made SALW a priority area, expressing grave concern at the negative impacts of SALW, for example on civilians in situations of armed conflict, particularly on vulnerable groups such as women and children.[3] In the most recent Presidential statement on small arms, the Security Council encouraged "the arms-exporting countries to exercise the highest degree of responsibility in small arms and light weapons transactions according to their existing responsibilities under relevant international law" and urged Member States "to establish the necessary legislative or other measures, including the use of authenticated end-user certificates, to ensure effective control over the export and transit of small arms and light weapons".[4]

9. As a final example, the *Agenda for Humanitarian Action* adopted by the 191 States Parties to the 1949 Geneva Conventions at the 28th International Conference of the Red Cross and Red Crescent placed the reduction of human suffering resulting from the uncontrolled availability and misuse of weapons as one of its key goals, highlighting the need for States to respect international humanitarian law as a means of strengthening the controls on the availability of weapons.[5]

UNITED NATIONS PROGRAMME OF ACTION

10. SALW have also been a priority for Commonwealth members through their participation in the United Nations. The issue was taken up in a United Nations conference in 2001 and in biennial review meetings in 2003 and 2005. In 2001 a Programme of Action[6] (PoA) was adopted with recommendations for action at the national, regional and global levels. In practice, the UN PoA establishes an international programme of relatively comprehensive scope. It contains substantial agreed norms, standards and programmes on a number of issues, including:

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1 General Assembly Resolution 59/86 (10 December 2004).
2 General Assembly Resolution 58/42 (17 December 2003).
3 See, for example, Resolutions 1296 (2000) of 19 April 2000, 1314 (2000) of 11 August 2000, 1379 (2001) of 20 November 2001, and the statement of its President of 7 May 2002 (S/PRST/2002/12).
4 S/PRST/2005/7 (17 February 2005).
5 28th International Conference of the Red Cross and Red Crescent (2-6 December 2003), Agenda for Humanitarian Action, General Objective 2 – Weapons, Final Goal 2.3.
6 United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons, UN Document A/CONF.192/15 (2001).

(a) strengthening or developing agreed norms and measures at the global, regional and national levels that would reinforce and further co-ordinate efforts to prevent the illicit trade in SALW;

(b) preventing and combating illicit SALW production and trafficking;

(c) placing particular emphasis on post-conflict situations to deal with excessive and destabilising accumulation of SALW;

(d) mobilising the political will throughout the international community to adopt effective measures;

(e) promoting responsible action by States with a view to preventing the illicit export, import, transit and retransfer of small arms and light weapons;

(f) ensuring all exports of SALW are made in accordance with States' existing obligations under international law.

11. The PoA now stands as the central global agreement on preventing and reducing the trafficking and proliferation of SALW. Of particular importance, the PoA has been endorsed by Commonwealth Heads of Government. In the 2003 Abuja Communiqué, Commonwealth Heads of Government "supported the adoption of the United Nations Programme of Action on the Illicit Trade in Small Arms and Light Weapons in all its Aspects that emerged from the 2001 UN Conference on Small Arms." They urged member states to support "further implementation of the programme [of action] at the international, state and regional levels to curb and prevent their illicit production, trafficking and misuse."

RECENT INITIATIVES AND DEVELOPMENTS

12. While the PoA provides a comprehensive framework from which states can take action on controlling SALW, in recent years a number of national, regional and international agreements and initiatives have also been launched to address these problems. Some of these initiatives were in place prior to the adoption of the PoA and others have been developed subsequently, as part of ongoing efforts to fulfil commitments made in the PoA. Since its adoption, the PoA has provided an important focal point from which to build on initiatives regionally. As is evident, Commonwealth members are involved in each of the initiatives that have emerged. Some of the key developments in controlling SALW in its various aspects include the following.

- In 1997, the **Organisation of American States** (OAS) concluded the *Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials* (Inter-American Convention). The purpose of the Convention is to "prevent, fight and eradicate the problem of the illicit manufacturing and trafficking of firearms, ammunition, explosives and the related materials because of their connection with terrorism, drug trafficking, organised crime, and related felonies". The Convention sets basic standards for the control of the import, export and transit of arms and promotes further co-operation among States. It also established the world's first international system for tracing light weapons. The OAS has also adopted *Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition.* The regulations, agreed upon by all OAS members, encourage the regulation and licensing of firearm transfers between OAS members. Model Brokering Regulations have also been adopted.

- In October 1998, the 16 nations of the **Economic Community of West African States** (ECOWAS) declared a voluntary three-year *Moratorium on the Importation, Exportation and Manufacture of Small Arms and Light Weapons.* The Moratorium was intended to serve as a co-

ordinated and sustainable regional approach to controlling the illicit proliferation of small arms in West Africa. The Moratorium was extended in October 2001 for another three years. Most recently, commitment has been expressed by ECOWAS members to turn the Moratorium into a legally binding document.

- The *Nadi Framework*, which was adopted by the 16 member states of the **Pacific Islands Forum** in March 2000, is a Framework for a Common Approach to Weapons Control. This Framework sees legislative measures being put in place to establish criminal offences for illicit manufacturing, trafficking, sale and possession of firearms, ammunition and other related materials.

- In November 2000, the **Organisation of African Unity** (now the African Union) states signed the *Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons*. The Declaration recommends that states take appropriate measures to control arms transfers by manufacturers, suppliers, traders and brokers. It also encourages the codification and harmonisation of legislation governing the manufacture, trading, brokering, possession and use of small arms and ammunition. As a political statement, it creates no binding obligations. However, it is the only document that commits all the states in Africa to a common set of principles on small arms.

- The 2001 the **Southern African Development Community** (SADC) *Protocol on the Control of Firearms, Ammunition and Other Related Materials* reaffirmed the priority to be given to controls of firearms because of their links with, *inter alia*, terrorism, transnational organised crime, mercenary and other violent criminal activities. The Protocol requires SADC member states who have ratified it to enact national legal instruments to ensure proper controls over the manufacturing, possession and use of firearms and ammunition. Priority areas for legislative change include, *inter alia*, the prohibition of unrestricted possession of small arms by civilians, a total prohibition on civilian use of light weapons, and provisions ensuring standardised marking of firearms at the time of manufacture, import or export. The SADC Protocol entered into force in 2004.

- Signed in 2004, the *Nairobi Protocol for the prevention, control and reduction of small arms and light weapons in the Great Lakes Region and the Horn of Africa* is the legal expression of principles expressed not only in the Bamako Declaration, but also the 2000 Nairobi Declaration, which committed states to fight the flow of illicit weapons into the sub-region. The Declaration elucidated the intention of states of the Great Lakes and Horn of Africa to "carry out a concrete and co-ordinated agenda for action that promotes human security and ensures that all States have in place adequate laws, regulations and administrative procedures to exercise effective control over the possession and transfer of small arms." There are 11 signatory states from East and the Horn of Africa. The Protocol is legally binding and entered into force in April 2005.

- The **Association of Southeast Asian Nations** (ASEAN) countries have focused on arms through its *Plan of Action to Combat Transnational Crime*. A Work Programme on Terrorism developed in 2002 commits ASEAN to work towards the harmonisation of marking systems for ammunition, arms, their parts and their components in line with the international system developed by the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunitions* (UN Firearms Protocol). In the *Plan of Action*, ASEAN also recognises the need for members to have comprehensive legislation against illicit arms trafficking.

- Focusing on transparency and voluntary restraint in transfers, the **European Union** (EU) states established a *Code of Conduct on Arms Exports* in 1988. The adoption of the Code marked a

qualitatively new stage in the EU's development of a common approach to arms exports as an important element of the Common Foreign and Security Policy. Under this code all member states have pledged to observe eight common criteria – i.e. criterion 2: "the respect of human rights in the country of final destination - when determining whether arms export licences should be granted or refused. The Code of Conduct also aims to improve the sharing of information between member states and to increase mutual understanding of their export control policies.

- The **EU Common Position on Brokering** was agreed on 23 June 2003. This requires all EU member states to establish a clear legal framework for lawful brokering activities. On 19 June 2003 the European Parliament adopted a *Resolution on Implementation of the United Nations Programme of Action to Prevent, Combat and Eradicate the illicit Trade in Small Arms and Light Weapons in all Its Aspects* calling upon the Council of the EU and member states to reaffirm their commitment to the PoA and to the development of legally binding international instruments on marking, tracing and brokering of SALW.

- On 24 November 2000, **the Organization for Security and Co-operation in Europe** (OSCE) adopted the Document on Small Arms and Light Weapons. The OSCE participating states agreed to co-operate to address the problems associated with SALW in a comprehensive way by developing norms, principles and measures covering all aspects of the issue. In 2003 a Handbook of Best Practices on Small Arms and Light Weapons was adopted as a means of enhancing OSCE members' implementation of their commitments.

- Also of significance, the *United Nations Convention against Transnational Organised Crime* was agreed in December 2000, and in Spring 2001, a Firearms Protocol[7] to the Convention dealing with illicit firearms manufacturing and trafficking was adopted. The **UN Firearms Protocol** is the first binding instrument on small arms to be agreed at the global level. It is focused particularly on illicit firearms used in crime, particularly transnational crime, and primarily adopts a crime prevention and law enforcement approach to the small arms problem. The Protocol has not yet entered into force.

- On 24 January 2005, a United Nations Open Ended Working Group on **Marking and Tracing** began negotiations on a draft international instrument for the timely and reliable identification and tracing of illicit small arms and light weapons.

- In 2003, a UN General Assembly Resolution[8] requested the Secretary-General to begin consultations on further steps that should be taken to address illicit arms **brokering** activities.

STATES' EXISTING OBLIGATIONS UNDER INTERNATIONAL LAW

13. In addition to these specific agreements, both politically and legally binding, all states have already made commitments in international law to abide by certain principles when transferring or using arms within their jurisdictions. The commitment to international law standards was reiterated in Part II, Paragraph 11 of the UN PoA where Parties agreed "[T]o assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law...". The PoA does not elucidate what those specific international legal obligations are under international law. One of the challenges for states is therefore to identify with sufficient clarity and precision the content of their existing legal responsibilities and then to consider ways in

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[7] Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime. The Protocol was adopted by General Assembly Resolution 55/255.

[8] General Assembly Resolution 58/241 (December 2003).

which these responsibilities can be effectively applied to assist the prevention, combat and eradication of the illicit trade in small arms and light weapons.

14. Some of the key existing obligations under international law pertaining to the transfer and use of SALW include:

- obligations to abide by UN Security Council arms embargoes and embargoes imposed by other regional organisations of which a state is a member;

- obligations under specific treaties such the 1997 Landmines Convention[9] which provides *inter alia* that States Parties shall never under any circumstances "transfer to anyone, directly or indirectly, anti-personnel mines" (Article 1(b));

- long-established and widely accepted principles of international humanitarian law which prohibit the use of weapons that are of a nature to cause superfluous injury or unnecessary suffering or that are incapable of distinguishing between combatants or civilians;

- human rights obligations under the International Covenant on Civil and Political Rights such as the right to life that obligates States to ensure that weapons, security equipment and training are not used by military, security or police forces for human rights abuses.

15. In advancing any programme to control SALW, it is important that states are mindful of the scope of their international commitments and incorporate these when determining how best to implement the various initiatives.

COMMON APPROACHES TO ADDRESSING SALW PROBLEMS

16. The problems associated with SALW are complex and cut across many spheres of international and public policy-making, including peace and security, arms control and disarmament, crime prevention and control, humanitarian assistance, human rights protection, post-conflict reconstruction and peace building, and development. To be effective, international responses to prevent and reduce illicit trafficking, proliferation and misuse of SALW need to be comprehensive in scope and involve all stakeholders at a combination of local, national, regional and international levels. From the brief overview of the initiatives that have emerged in recent years to address various aspects of issues with SALW, it is clear that there is an emerging consensus on how the PoA goals and other commitments are to be addressed and implemented. It is felt that the Commonwealth, with its strategic advantage of a largely common law based juridical system should be strategically poised to assist in the ongoing initiatives which include:

- **strengthening of criminal law:** many of the regional initiatives include the requirement to adopt legislative measures to establish criminal offences for the illicit possession, trafficking and misuse of small arms and light weapons, and for violations of Security Council and other regional organisations arms embargos.[10] The Protocols, for example, set out in great detail the particular activities to be incorporated into criminal legislation such as civilian possession of machine guns. In addition to establishing criminal offences, the regional protocols and

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9 *1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.*

10 For example, the Nairobi Protocol states "[E]ach State Party shall adopt such legislative and other measures ... to establish as criminal offences under its national law the following conduct, when committed intentionally: i. Illicit trafficking in small arms and light weapons; ii. Illicit manufacturing of small arms and light weapons; iii. Illicit possession and misuse of small arms and light weapons. ... State Parties ... shall adopt the necessary legislative or other measures to sanction criminally ... the violation of arms embargoes mandated by the Security Council of the United Nations and/or regional organisations" (Article 3.a.i – iii and 3.b). Similar provisions exist in the SADC Protocol (Article 5.1 and 5.2), the Nadi Framework (Article 2.1) and the Inter-American Convention (Article IV).

conventions emphasise the need for legal uniformity in the sphere of sentencing between states at the regional level;[11]

- **comprehensive legislative change:** detailed provisions to be incorporated into national law are also a key component of the initiatives that have been developed. For example, both the Nairobi and SADC Protocols require legislation ensuring proper controls over the manufacturing of SALW,[12] while others set out the requirement to establish clear legal frameworks for regulating dealers and brokers of SALW[13] or for marking of firearms;[14]

- **minimum standards and legal uniformity:** there is a recognition that if these regional initiatives are to be successful, there needs to be both the adoption of minimum standards and legal uniformity, particularly with respect to the manufacture, control, possession, import, export, re-export, transit, transport and transfer of SALW;[15]

- **harmonisation of legislation in geographic regions:** creating sub-regional systems to harmonise legislation, documentation and certification is a key component of the various initiatives. In some instances states are required to develop harmonised systems for import, export and transfer documents and end-user certificates.[16] ASEAN members have committed to working towards harmonisation of marking systems for ammunition, arms, their parts and their components in line with the UN Firearms Protocol;[17]

- **improved operational capacity:** in recognition of the fact that problems associated with SALW cut across many spheres of public policy, the protocols and conventions require State Parties to improve the capacity of police, customs, border guards, the military, the judiciary and other relevant agencies to fulfil their roles in implementation of the initiatives. The need for national training programmes for police, customs and border guards is given priority;[18]

- **co-operation amongst states:** the various regional initiatives represent an extremely ambitious set of guidelines. It is not surprising then that they put a heavy emphasis on co-operation between states. Although legislation needs to be country-specific, because the small arms problem is transnational, any solution demands that states work more effectively together. As long as there is a disparity in the laws between countries, arms dealers will move from country to country looking for less stringent rules, and small arms will continue to destabilise the regions. The documents are replete with commitments by states to set up and maintain joint enforcement mechanisms, share data and expertise, and above all to co-operate at the bilateral, regional and international levels.[19]

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11 For example, the SADC Protocol requires States Parties to "introduce harmonised, heavy minimum sentences for small arms and light weapons crimes and the carrying of unlicensed small arms and light weapons" (Article 5.b.ii).

12 For example, Article 3.c.iv of the Nairobi Protocol and Article 5.3.e of the SADC Protocol.

13 For example, Article 11.i of the Nairobi Protocol, Article 2.2 of the EU Common Position on Brokering.

14 For example, Article VI of the Inter-American Convention, Article 4.0 of the Nadi Framework and Article 7 of the Nairobi Protocol.

15 For example, Article 3.c.vi of the Nairobi Protocol, Article 5.3.f of the SADC Protocol and Article 6.1.a of the Nadi Framework.

16 For example, Article 16.f of the Nairobi Protocol.

17 Article 4.2 ASEAN Work Programme on Terrorism to Implement the ASEAN Plan of Action to combat Transnational Crime.

18 For example, Article 6 of the SADC Protocol, Article 4 of the Nairobi Protocol, and Articles XV and XVI of the Inter-American Convention.

19 For example, Articles XIII and XIV of the Inter-American Convention and Article 16 of the Nairobi Protocol.

CONSIDERING THE ROLE OF THE COMMONWEALTH SECRETARIAT

17. Progress is being made at national, regional and global levels to address the harm caused by the unregulated transfer, proliferation and widespread availability of SALW. At the regional level, there are a number of comprehensive agreements in place, outlining ambitious sets of guidelines and goals. Member states are active participants in each of these regional initiatives. Further, given their commitment to promote human rights, member states are in a position to help further focus the debate internationally on what governments can do to halt and prevent the misuse of small arms.

18. Given this, the Secretariat can play a significant role in further advancing the progress that has been made and to ensure, through concrete areas of action, that states can follow through with the commitments they have made to control the transfer of weapons. In particular, while the last few years might best be described as the era of conceptualising how to address the issues, it is clear that states have moved into an era of implementation. Commitments and obligations that have been made must now be put into place through comprehensive and effective mechanisms. The development of common standards, significant legislative change, harmonisation and co-operation amongst states are all crucial.

19. Further, the PoA Review Conference will be held in 2006. It is unclear at this stage which goals or activities might be agreed within a continuing PoA framework. Regardless, the initiatives that have already been developed will continue to be implemented. The Secretariat could play an important institutional role in supporting those initiatives and providing a focal point from which initiatives can continue to progress, particularly if a UN PoA-driven process finishes in 2006.

Action by Law Ministers

20. Law Ministers are invited to consider the role of the Secretariat in a number of overarching key areas, including:

- assisting with strengthening the capacity of developing countries to bring their domestic legislation in line with international norms and standards;

- interacting with members so as to promote the further development of long-term strategies to halt the illicit proliferation of SALW both within the framework of ongoing international and regional efforts and in the context of the PoA;

- disseminating best practices, and keeping members up-to-date on developments as they transpire around the globe.

21. Many of the initiatives require states to either update or implement new legislation, both in the area of criminal and civil law. The Key Areas above can be deconstructed into more particular areas on which attention might be focused. Emphasis could be placed on assisting with the development of draft legislative provisions that create criminal offences for illicit trafficking, illicit manufacturing, illicit possession and misuse of SALW and falsifying, obliterating or altering the marking on small arms and light weapons. Law Ministers are invited to consider the role of the Secretariat in the following specific areas:

- assisting with the drafting of model legislative provisions. This could include model draft legislative provisions for the implementation of SALW provisions within member states. Priority could be given to the development of model criminal law legislation and uniform sentencing guidelines. Marking and tracing of SALW and the need for tighter controls on brokering are two areas where the international community is currently focusing its

attention. They are also the two areas, specifically identified in the PoA and the various initiatives, as requiring legislation or the development of agreed systems of controls;

- assisting Commonwealth member states to develop model legislative provisions and regulations in marking, tracing and brokering. As discussed, states also need to consider how best the content of the existing legal responsibilities of states can be identified with a clarity and precision that will assist states in fulfilling their commitments under the various initiatives and conventions. A detailed study of the range of applicable law would help to ensure that a comprehensive and uniform approach is taken and that member states are aware of the full scope of international law applicable to their transfers and the use of SALW;

- preparing a summary of the obligations that its members already possess under international law that have application to transfers and uses of SALW;

- capacity building through training programmes, inter-agency working groups, and joint training exercises. This is fundamental to ensuring the effective implementation of the various initiatives. In particular, the police, military, border and customs officials and the judiciary are seen as key agencies where training should be focused;

- liaising with other international and regional organisations and bodies, as well as financial institutions, to facilitate funds that can be used on a state or regional level in support of the development of programmes focused on capacity building within key public sectors. There is a significant amount of activity globally, regionally and nationally as members implement their commitments made in the PoA and the various initiatives. Exchange of experience and information and the promotion of progress and new strategies are important and necessary to the development of best practices and further long-term strategies to deal with the problems associated with SALW;

- monitoring international developments in the area of SALW controls in order to provide member countries with information and updates on major initiatives of interest.

INTERNATIONAL HUMANITARIAN LAW (IHL)

Paper by the International Committee of the Red Cross

INTRODUCTION

1. International Humanitiarian Law regulates armed conflict to limit adverse humanitarian effects on both combatants and civilians, and includes, *inter alia*, the 1949 Geneva Conventions and their 1977 Additional Protocols, weapons treaties, the International Criminal Court Statute, and the Child Soldiers Protocol.

2. This policy paper covers three aspects of IHL:

- encouraging better IHL implementation through national implementation;
- promoting Commonwealth work on controlling the transfer of small arms and light weapons to IHL violators;
- announcing the Customary IHL Study.

ENCOURAGING IMPROVED IHL IMPLEMENTATION

3. Commonwealth States have a reasonably good record of treaty accession in matters of IHL.[1] For example, 52 of the 53 countries of the Commonwealth have ratified the 1949 Geneva Conventions,[2] and a number of other IHL treaties have over 40 accessions from among the 53 Commonwealth states.

4. However, recent years have shown that in many countries the legislation needed to implement the obligations arising from these Conventions is missing. While not all of the principal 25 IHL treaties require implementation, many do. This is all the more true in common law states, where treaties are not normally directly applicable in the domestic law of States Parties. However, even in states where direct applicability may be possible, the nature of many of the obligations which require implementation means that legislation is still necessary to give effect to these obligations. For example, to give effect to an obligation to enact criminal provisions that incorporate grave breaches of the Geneva Conventions it would be necessary to provide for the nature of the punishment to be imposed in the event of a breach.

(a) Treaty accession

5. The Advisory Service on IHL of the International Committee of the Red Cross (ICRC) was established in 1996. Its aim is not only to encourage and support states in ratifying or acceding to IHL treaties, but also to assist states in adopting appropriate national legislation in order to give effect to their IHL treaty obligations. The table that will be distributed to states gives an overview of treaty accession and legislative incorporation of the IHL obligations undertaken. Also highlighted is

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[1] Including the 1949 Geneva Conventions and their Protocols, the Hague Cultural Property Convention and its Protocols, the International Criminal Court Statute, the Environmental Modification Convention, the Biological Weapons Convention and the 1925 Geneva Protocol, the Chemical Weapons Convention, the Convention on Certain Conventional Weapons and its Protocols, the Anti-Personnel Landmines Convention, and the Optional Protocol to the Convention on the Rights of the Child.

[2] Nauru is the only state that has not yet ratified the 1949 Geneva Conventions.

the progress that states have made since 1999, when the ICRC last presented an overview to Commonwealth Law Ministers, at their Port-of-Spain, Trinidad and Tobago Meeting.

6. As will be seen from the table to be presented, the 145 treaty accessions of the 53 Commonwealth states since 1999 is impressive. This represents 15 per cent of all treaty accessions ever undertaken by Commonwealth members.

(b) Legislative implementation

7. However, legislative action lags behind. Of the nine major legislative measures that may be taken by each state, there have been a total of only about 30 such laws adopted since 1999. Meanwhile, according to the ICRC's records, some 175 laws for which treaty obligations appear to require adopting legislation remain unadopted by Commonwealth states. Without such legislation, one consequence is that states may not be able effectively to punish or deter the commission of grave breaches of IHL. Following the publication of the ICRC's *Roots of Behaviour in War* study, it appears more important than ever to ensure that national laws and regulations reflect international obligations.[3] We hope that recent efforts to adopt new model legislation[4] in these areas, together with more direct work with states, will help improve these figures. Further, regional and Commonwealth meetings have been held, for example the July 2005 Nairobi Commonwealth Meeting of National IHL Committees, to help make states aware of the technical assistance available to support their consideration of existing legislation and their adoption of appropriate and effective laws.

(c) National Committees

8. Thirteen of the 53 states of the Commonwealth have National IHL Committees.[5] The primary role of a National Committee is to help the government in carrying out its IHL obligations, in particular, in the areas of implementation and dissemination, and in its consideration of IHL treaties to which the state is not yet a party. Many government departments as well as the armed forces have a responsibility for applying IHL, and the National Committee can help to bring representatives together and provide a practical means for ensuring effective co-ordination and general oversight. The ICRC's Advisory Service therefore calls upon states to engage in more "TLC", or IHL Treaty accessions, Legislative implementation, and the establishment of National IHL Committees.

9. In doing so, the ICRC stands ready to assist all Commonwealth states in their work towards full implementation of IHL treaty obligations.

Action by Law Ministers:

10. Commonwealth Law Ministers, meeting in Accra, may be invited, in their final statement, to encourage member states to consider acceding further to IHL treaties, to ensure effective domestic implementation of those treaties adopted and to consider the establishment of National IHL Committees. Law Ministers may also wish to encourage follow-up to the 2003 Commonwealth Red

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[3] Available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/FC4181278BEE58FEC1256ECA00357055, the conclusions of which included that IHL should be seen as a political and legal matter regulated by norms, rather than a moral one, and that training of bearers of weapons and the enforcement of sanctions for IHL lapses are essential.

[4] Such as the 1949 Geneva Conventions and their Additional Protocols, the International Criminal Court Statute, the Anti-Personnel Landmines Treaty, the Chemical Weapons Convention, and the Biological Weapons Convention.

[5] Worldwide, 73 of 192 states have such committees. The Commonwealth states with committees are Australia, Canada, The Gambia, Kenya, Lesotho, Malawi, Mauritius, Namibia, New Zealand, Sri Lanka, Seychelles, Trinidad and Tobago, and the United Kingdom.

Cross and Red Crescent Conference on IHL, including the measures contained in the summary report, and the holding of a second such Conference in 2007.

Action by the Commonwealth Secretariat:

11. The Commonwealth Secretariat could be invited, in co-operation with the ICRC, to assist states in drafting model provisions, for example with respect to the Hague Cultural Property Convention and its 1954 and 1999 Protocols, the latter of which makes explicit reference to criminal provisions which need to be adopted.

PROMOTING COMMONWEALTH WORK ON CONTROLLING THE TRANSFER OF SMALL ARMS AND LIGHT WEAPONS (SALW) TO VIOLATORS OF IHL

12. In order to enhance the protection of civilians during and after armed conflicts, the ICRC promotes measures aimed at achieving a long-term reduction in the availability of arms to violators of IHL and in the misuse of weapons by arms bearers.

13. Article 1, common to the four 1949 Geneva Conventions, requires Parties not only to respect the rules of international humanitarian law, but also to **ensure** respect for these rules. As affirmed by States Parties to the Geneva Conventions at the International Conference of the Red Cross and Red Crescent in 2003, this requires strict controls on the availability of weapons and ammunition to ensure that they do not end up in the hands of those who will use them to violate international humanitarian law (Agenda for Humanitarian Action, Final Goal 2.3).

14. Small arms and light weapons are a particular concern, as their availability is subject to much fewer controls than larger conventional weapons. The adoption of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in 2001 was a first step by states towards addressing this issue at the global level.

15. The ICRC has been working with states and regional organisations in order to have states strengthen their arms transfer regulations. In particular, it has urged the inclusion in regional arms transfer documents, as well as national laws and policies, of requirements to assess the recipient's respect for international humanitarian law and to deny transfers when there is a clear risk that the proposed transfer will be used for serious violations of this law. This is consistent with the commitment in the UN Programme of Action that states should "assess applications for SALW export authorizations according to strict national regulations and procedures (...) consistent with the existing responsibilities of States under international law (...)" (Section II, paragraph 11 of the Programme of Action).

16. Several regional organisations (e.g. the OAS, EU, ECOWAS, as well as the East African States party to the Nairobi Protocol) have adopted legally binding agreements, codes of conduct or model regulations in the area of small arms control. Requirements to consider the recipient's respect for humanitarian law when transferring small arms has been incorporated into several of these. Yet only a handful of countries have to date included criteria based on humanitarian law in their *national* arms transfer laws or policies. In addition, the humanitarian law references included in various regional documents differ and not all regions have adopted such documents.

17. At the global level, the ICRC has encouraged:

- the implementation of the UN Programme of Action;
- the development of an international agreement on the marking and tracing of such weapons;
- further work on controls on brokers and agreed standards for international arms transfers.

Action by Law Ministers:

18. Commonwealth Law Ministers may wish to consider the need for further work to implement the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons, including the development of global arrangements to regulate the activities of arms brokers and to establish common standards for arms transfers based on states' responsibilities under international law, including international humanitarian law.

19. Commonwealth Law Ministers are also invited to consider including, in all national and regional norms regulating arms transfers, a requirement to assess the recipient's likely respect for international humanitarian law and a requirement not to authorize transfers if there is a clear risk that these arms would be used for serious violations of international humanitarian law.

Action by the Commonwealth Secretariat:

20. Law Ministers may consider mandating the Commonwealth Secretariat to draft Commonwealth guidelines on national regulations and procedures for applications for export of small arms and light weapons.

ANNOUNCING THE CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY

21. Treaty and custom are both sources of international law which bind states. While many treaty rules of international humanitarian law are binding on almost all states, such as the four Geneva Conventions of 1949, others, such as the two Additional Protocols to the Geneva Conventions of 1977, are not binding on all states (163 and 159 respectively of 192), including some countries which are or have been involved in armed conflict. Therefore, in order to have a comprehensive view of the rules applicable in times of war, it was necessary to try to uncover those rules which, by virtue of state practice, have become part of customary international law and are therefore binding on all states.

22. The ICRC was requested by states in 1995 to produce a study on the rules that had developed into customary international humanitarian law, and the Study, the three volumes of which include some 5000 pages, was launched this year. The 161 rules in the Study[6] cover all major areas of IHL, and will be used by the ICRC in its discussions with states on aspects of IHL. It may prove useful for armed forces in their training on IHL, and may also have an impact on legislation adopted in order to implement international humanitarian law obligations.

[6] An overview of the study is available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf.

CRIMINAL DEFAMATION IN THE COMMONWEALTH – A CASE FOR ABOLITION

Paper prepared by the Commonwealth Press Union (CPU)

1. Courts around the world – both national and international – have started to reform defamation law in recognition of the importance of free speech and their obligation to respect constitutional and international guarantees of freedom of expression. Over the past half century, courts have protected freedom of expression by denying certain bodies the right to bring defamation cases, by enhancing the traditional defences, and by limiting the chilling effect of excessive damage awards and criminal sanctions.

2. This paper presents an overview of this jurisprudence and outlines the Commonwealth Press Union's (CPU) campaign to seek the abolition of criminal defamation throughout the Commonwealth.

BACKGROUND

3. Free expression plays a vital role in the democratic process. Without a free flow of information and ideas, the public cannot formulate opinions about its government, elected officials and other matters of public interest. The media plays a particularly important role, providing the public with information and acting as a watchdog, exposing corruption and inspiring political debate. As the US Supreme Court has noted, *"speech concerning public affairs is more than self-expression; it is the essence of self-government."*[1]

4. Indeed, this commitment to freedom of expression was recognised by the Commonwealth when it was included for the first time in the Coolum Declaration of 2002 where it states *"We stand united in: our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights"*[2]

5. In many Commonwealth countries, defamation law represents one of the most serious threats to the open discussion that underpins democracy. Most people agree defamation laws serve a legitimate purpose, protecting reputations by providing redress against certain types of statements, variously described as those: *"'lowering the plaintiff in the estimation of right-thinking people generally'; 'injuring the plaintiff's reputation by exposing him to hatred, contempt or ridicule' and 'tending to make the plaintiff be shunned and avoided'."*[3] At the same time, political bodies and public figures often abuse defamation laws to silence their critics. In some cases, governments effectively muzzle debate and critical voices by invoking harsh defamation laws to imprison members of the opposition and journalists. In others, the technicalities of litigation and the cost of defending defamation actions serve to stifle free discussion on matters of public interest. Traditional common law defences offer inadequate protection in a modern democracy while procedural rules and heavy sanctions inhibit open political debate.

6. Criminal defamation laws – including those that provide special protection to the President and other public figures – are unnecessary to protect reputations and should be abolished. The threat of criminal sanctions – including a suspended sentence with the threat of imprisonment in case of subsequent breach – exerts a significant chilling effect on freedom of expression which cannot be

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1 *Garrison v. Louisiana* 379 US 64 (1964), pp. 74-75.
2 The Coolum Declaration, *Commonwealth Secretariat March 2002*.
3 Robertson and Nicol, *Media Law* (London, Penguin Books,1992), p. 46.

justified. Other laws provide sufficient protection in situations where there is a risk of a breach of the peace. Criminal defamation laws are frequently abused, being used in cases which do not involve the public interest and as a first, rather than last resort. In practice, criminal defamation laws do not provide a remedy for ordinary citizens, who cannot generally bring cases; they are far more likely to be used instead by politicians and senior public officials.

HISTORY

7. The offence of criminal defamation exists in the majority of Commonwealth countries, either as a common law offence (as in English law) or codified into Penal or Criminal Codes. In many countries - including Singapore, Uganda, Tonga, some Australian states, Bangladesh, Cameroon, Swaziland, The Gambia, Sierra Leone, Nigeria, Samoa and Malaysia - it is still active and, more or less, in use. In others, including Sri Lanka and Ghana, it has been abolished. In the United Kingdom it remains on the statute books but no cases have been brought since 1977. Indeed, the Law Commission in the United Kingdom has recommended its abolition[4] and it has been pointed out that its scope conflicts with the European Convention on Human Rights which was adopted into UK law through the Human Rights Act 1998 which passed through Parliament in 2000.

8. Unquestionably people need the right to defend their reputation against defamatory statements, and have legal recourse should they need to defend that reputation in court if they consider themselves to have been libelled. Media independence does not, after all, mean the freedom to say what you want about anybody, regardless of truth or intention. But solving defamation through the criminal justice system is widely held to be an inappropriate anachronism. As successive review bodies in the UK, Australia, Canada and New Zealand have found, the offence is riddled with flaws which make it not so much an appropriate tool for repairing reputations - financial damages perform that task better - but more a gift to those who would muzzle legitimate criticism of public conduct. As a result, New Zealand has already expunged it from the statute books.

9. Originally, the offence was explicitly designed as a means of shielding the actions of public figures from comment or critique. Its 13th Century origins in the crime of "*scandalum magnatum*" are precisely that; and the development of the offence since has reflected its roots.

10. Unusually for criminal law - at least as far as English-derived systems are concerned - the presumption is of guilt. The defendant has to prove his innocence of the crime, and proving that is often far more difficult than defending a civil libel. Not only does the information published have to be entirely true; it also has to be "in the public interest". Trying to meet this high standard of proof has historically been a heavy burden for defendants. In addition, intent plays no part; whether the alleged defamation was accidental - the result of an entirely honest mistake, negligent or malicious – the result is the same.

11. This is a standing temptation for those who wish to control - as the evidence from the countries mentioned above amply demonstrates. In Bangladesh, for example, the courts need not be involved; government officials who feel they have been defamed can order immediate arrest, with up to 2 years in jail as the penalty.

12. It is usually public figures, political and administrative leaders, businessmen and those close to them, who use criminal defamation. But again, a sizeable body of legal opinion - including a judgement known as the "*Theophanus*" decision in Australia, several judgements from the European Court of Human Rights (ECHR) and accepted practice in the US - suggests that public figures should, if anything, have less recourse to defamation suits than their private counterparts, since their

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[4] The Law Commission, Consultation Paper No 84, HMSO 1982.

conduct is of necessity valid material for wide discussion. Indeed, the ECHR has passed judgements at least four times in the last 15 years which affirm that criminal defamation is contrary to the European Convention on Human Rights, going way beyond proportionate responses to the task of protecting reputations. It should, the Court declares, be abolished.

13. It is worth noting that civil defamation is also widely misused, and different jurisdictions can define it in such a way as to make defending defamation cases almost impossible. In New Zealand, for instance, judicial attitudes are moving towards making any part of a story actionable in isolation, without reference to balancing arguments or evidence elsewhere in the piece. The most trivial factual error, or an apparently loaded comment in the first paragraph which is not backed up until further down the article, might place the writer and the publication in jeopardy.

14. The criminalisation of a particular activity implies a clear State interest in controlling the activity and imparts a certain social stigma to it. In recognition of this, international courts have stressed the need for governments to exercise restraint in applying criminal remedies when restricting fundamental rights. In many countries, the protection of one's reputation is treated primarily or exclusively as a private interest and experience shows that criminalising defamatory statements is unnecessary to provide adequate protection for reputations.

15. In many countries, criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations. There is always the potential for abuse of criminal defamation laws, even in countries where in general they are applied in a moderate fashion. The illegitimacy of the use of criminal defamation laws to maintain public order, or to protect other public interests, has already been noted. For these reasons, criminal defamation laws should be repealed.

16. In many countries criminal defamation laws are still the primary means of addressing unwarranted attacks on reputation. To minimise the potential for abuse or unwarranted restrictions on freedom of expression in practice, we feel that it is essential that criminal defamation laws should be abolished. A basic principle of criminal law, namely the presumption of innocence, requires the party bringing a criminal case to prove all material elements of the offence. In relation to defamation, the falsity of the statement and an appropriate degree of mental culpability are material elements. The existence of a criminal defamation offence violates the presumption of innocence and cramps free speech. These concerns are exacerbated by the frequent abuse of criminal defamation laws by public officials, including through the use of State resources to bring cases. Defamation is fundamentally personal in nature, concerning the protection of one's reputation. As such it should be a civil matter. Criminal sanctions are disproportionate and potentate a chilling effect on freedom of expression.

17. Criminal defamation laws remain on the books of most common law countries, although the frequency of their use varies considerably. As has already been noted, excessive sanctions themselves breach the guarantee of freedom of expression. The key problem with criminal defamation is that a breach can lead to a custodial sentence. The fact that these are rarely applied mitigates the problem only slightly, since the severe nature of this sanction means it casts a long shadow. Suspended sentences, common in some countries, also exert a significant chilling effect as subsequent breach within the prescribed period means that the sentence will be imposed.

18. Criminal defamation laws vary from country to country. An analysis of the law in Britain serves to highlight some of the problems with criminal defamation. The Libel Act 1843 provides for a one year sentence for publication of a defamation in permanent form, increased to two years if the

author knew the material to be false.[5] These provisions lay dormant for many years but have recently been relied on in a number of private prosecutions.[6]

19. It used to be thought that a distinctive feature of, and indeed the primary justification for, criminal libel was that it was available only where publication was likely to provoke a breach of the peace[7] but the House of Lords has held that the proper test is whether the libel is "sufficiently serious to justify, in the public interest, the institution of criminal proceedings."[8] Procedurally, leave of a High Court Judge in chambers is required to institute criminal libel proceedings but they may be brought by any individual with a legitimate interest in the case. In *Gleaves v. Deakin*, several of their Lordships noted that this was most unsatisfactory and called for the law to be amended so that prosecutions could not be commenced without leave of the Attorney General. In theory, the Attorney General may terminate proceedings by issuing a *nolle prosequi*, but in practice this appears to be rare.

20. A key problem with criminal libel is that the defence of justification is much weaker than for civil libel. In particular, justification requires not only proof of the truth of the statements, but also proof that publication was for the public benefit. As Lord Diplock stated in *Gleaves v. Deakin*, "*This is to turn article 10 of the [European Convention on Human Rights] on its head ... article 10 requires that freedom of expression shall be untrammelled [unless interference] is necessary for the protection of the public interest.*"[9] The other defences are similar to those for civil defamation claims.

21. A number of international bodies have condemned the threat of custodial sanctions, both specifically for defamatory statements and more generally for the peaceful expression of views. Two United Nations Special Rapporteurs on freedom of expression have seriously called into question the imposition of custodial sanctions for expression related matters.[10] Since 1994, the UN Human Rights Committee has expressed concern about the possibility of custodial sanctions for defamation in a number of countries including Iceland, Norway, Jordan,[11] Tunisia, Morocco,[12] Mauritius[13] and Iraq.[14] In its annual resolution on freedom of expression, the UN Commission on Human Rights regularly expresses concern at the use of detention, "including through the abuse of legal provisions on criminal libel" against persons who exercise the right to freedom of expression.[15] The UNESCO sponsored *Declaration of Sana'a* declared, "Disputes involving the media and/or the media professionals in the exercise of their profession...should be tried under civil and not criminal codes and procedures."[16]

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5 Sections 4 and 5.

6 See *Goldsmith v. Pressdram* [1977] QB 83, *Gleaves v. Deakin* [1980] AC 477 and *Desmonde v. Thorpe* [1982] 3 All ER 268. None of these cases have gone to trial because either the plaintiffs failed to obtain leave to proceed or the cases were discontinued.

7 Carter-Ruck and Walker, *Carter-Ruck on Libel and Slander* (London, Butterworths, 1995), p. 167.

8 *Gleaves v. Deakin*, *op. cit.*, p. 491, *per* Lord Scarman.

9 *Ibid.*, p. 483.

10 *The Right to Freedom of Opinion and Expression: Update of the preliminary report prepared by Mr. Danilo Turk and Mr. Louis Joinet, Special Rapporteurs*, Submitted to the Sub-Commission for the Prevention of Discrimination and Protection of Minorities, UN Document E/CN.4/Sub/2/1991/9, para.100.

11 *Annual General Assembly Report of the Human Rights Committee*, 21 September 1994, Volume I, No.A/49/40, paras. 78, 91 and 236, respectively.

12 *Annual General Assembly Report of the Human Rights Committee*, 3 October 1995, No. A/50/40, paras. 89 and 113, respectively.

13 *Annual General Assembly Report of the Human Rights Committee*, 16 September 1996, No. A/51/40, para. 154.

14 *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee on Iraq*, 19 November 1997, No. CCPR/C/79/Add.84, para.16.

15 See Resolution 1999/36, para. 3.

16 *Declaration of Sana'a*, 11 January 1996, endorsed by the General Conference by Resolution 34, adopted at the 29th session, 12 November 1997.

THE ROLE OF THE COMMONWEALTH PRESS UNION

22. The CPU represents the interests of the newspaper industry of the Commonwealth. Its origins go back to 1909 but in 1950 it changed its name to its present form and broadly adopted its principles to be in line with those of the new Commonwealth. Throughout its long history, the CPU has monitored and responded to threats to press freedom across the Commonwealth and, working with our members (over 750 newspaper houses, newspapers and wire services in 50 Commonwealth countries), has actively pursued issues of mutual concern.

23. The Commonwealth Press Union is required, by our charter, to "*...give effect to the opinion of the members of the Union on all matters that might effect the freedom and interests of the Press throughout the Commonwealth...watching for and opposing all measures or proposals likely to affect the freedom of the Press...*". Throughout our existence we have vigorously and successfully defended press freedom and our stance on key issues is well established and recognised by Heads of Government throughout the Commonwealth.

24. The 2005 CPU Biennial Conference & Editors' Forum in Sydney, Australia produced a unanimous resolution calling upon Commonwealth governments to abolish criminal defamation throughout the Commonwealth – starting with the United Kingdom.

25. The organisation has always lobbied for the abolition of this archaic law and in recent correspondence with the Lord Chancellor's Department in the UK, has put forward a case for abolition in the UK, supported by the UK Society of Editors. We have received a sympathetic response from the Lord Chancellor and, we are now awaiting further developments. The CPU was also actively involved in the successful campaign to abolish criminal defamation in Sri Lanka in 2002 and the subsequent setting up of the Sri Lanka Press Complaints Commission, a self-regulatory body which is now active and effective.

26. It is our belief that if journalists seek freedom of expression, then they must take responsibility for their own actions and, as a priority, should set about instituting a self-regulatory body which oversees the ethical and professional behaviour of the press. We recommend to governments that alongside the abolition of criminal defamation there must be active encouragement to set up a self-regulatory body with an agreed code of practice which becomes the accepted norm for all participating newspapers and journalists. The process for achieving this is fully outlined in the comprehensive report published by the CPU in 2002.[17]

27. Governments are often concerned that self-regulatory bodies are too industry-centric and for this reason, we subscribe wholly to the UK model in which the commission has a strong lay majority, thus negating accusations of self-interest.

28. Imposed statutory bodies are not an acceptable alternative because "*A press which is regulated by the government of the courts cannot be truly free. At best it is loosely tethered by light touch regimes; at worst, it is ruthlessly shackled.*[18]

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[17] *Imperfect Freedom*, Commonwealth Press Union 2002.
[18] *Ibid.* p.7.

BRIEF OVERVIEW OF CRIMINAL DEFAMATION STATUS IN SELECT COMMONWEALTH COUNTRIES

Australia

29. Although provided for by state statute in most Australian jurisdictions, criminal convictions for defamation are rare in recent times. The last case of imprisonment for criminal defamation was more than 50 years ago.

Canada

30. The Law Reform Commission recommended the abolition of criminal libel in 1983. In Canada, prosecutions are rare and custodial sentences are even rarer. In the 10 year period from 1963 to 1973, only four such sentences were actually served, two of which involved sentences of fewer than 2 months.

Commonwealth Caribbean

31. In Guyana, Jamaica and St Vincent & The Grenadines, there have been few instances of prosecutions for criminal libel in recent years. The Guyana statute is typical in its definition of defamatory libel as a "matter published without any legal justification or excuse, designed to insult the person to whom it is published, or calculated to injure the reputation of any person by exposing him to hatred, contempt or ridicule". Punishments range from a fine and imprisonment for one year to imprisonment for three years for offences involving threats, extortion and the like. Criminal libel laws are seldom used in Guyana. In the last 50 years, there have been three or four such cases, during times of political conflict. Similarly the offence of criminal libel exists in St Vincent & The Grenadines and in Jamaica but is very rarely used in either country.

Nigeria

32. Criminal defamation laws exist but are hardly ever used. There have been only two such prosecutions in the 1990s, neither of which have been concluded. The criminal defamation provisions in Nigeria are similar to those in other Commonwealth countries, save for some particularly harsh provisions such as Section 2 of the Defamatory and Offensive Publications Act. This provision makes it an offence, for which the alleged offender may be arrested without a warrant to, *inter alia*, "sing songs, play any instrument or recording of sounds or self, lend or hire any record of sounds, the words of which are likely to provoke any section of the community".

CONCLUSION

33. It is now widely recognised that *"The law of criminal libel is an unnecessary relic of the past that is now generally agreed to have no place in modern jurisprudence.*[19]

34. Additionally, the UK Privy Council pointed out that *"it would in any view be a grave impediment to the freedom of the press if those who print or distribute matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based."*[20]

35. In almost every Commonwealth country there are adequate civil defamation laws in place to ensure protection of reputation. The continuing presence of colonial legislation on the statute books of these countries is not only incompatible with freedom of expression and a free press, but also a

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[19] Robertson and Nicol, *Media Law* (London, Penguin Books,1992), p.102.

[20] Hector v A-G of Antigua & Barbuda

direct bequest from the colonial era. Criminal defamation offences, Public Order and Security Laws, Internal Security and Official Secrets Acts, powers of detention without trial for up to two years, newspaper licensing, newsprint control, and crimes of insulting parliament, the prime minister or the president were all devised by colonial rulers as a means of direct repression of a subject people. That they still exist is unfortunate. That they are still widely deployed by the leaders of long-independent states could be construed as being in breach of the Harare Declaration's support for individual liberty under the impartial rule of law.

36. To this end, the Commonwealth Press Union, on behalf of our members, request Commonwealth Law Ministers to consider the abolition of criminal defamation throughout the Commonwealth.

HUMAN RIGHTS EDUCATION AND AWARENESS PROJECTS

Paper by the Commonwealth Secretariat

SUMMARY

1. This paper by the Human Rights Unit (HRU) of the Secretariat seeks the further support of Law Ministers of member countries for certain educational, promotional and awareness-building activities of the Unit, in pursuit of attainment of the Commonwealth's strategic goal of strengthening respect for and fulfilment of basic human rights in member countries.

2. The human rights awareness projects and initiatives of the Secretariat are premised on an understanding that "...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." (*Universal Declaration of Human Rights* 1948, Preamble). Considerations of principle, as well as this recognition of a link between widespread respect for human rights and the existence of a peaceful, just and prosperous society informs the commitment of member countries to Commonwealth values and principles, including respect for fundamental rights.

3. Effective promotion and protection of human rights requires that there be knowledge and awareness of the source, nature and scope of human rights (and their proper and reasonable limitations) among public decision-makers at all levels, law enforcement officials and the judiciary, members of civil society, the media and the professions, students and young people, and women and vulnerable persons. The 1996 Law Ministers Meeting held in Malaysia noted the Oxford Declaration on Human Rights Education and its framework of activities on human rights and urged the Secretariat to continue providing assistance and training on such matters.

4. This paper is intended to be read with the Activities Report of the Human Rights Unit (LMM(05)36), to which it refers. Rather than dealing with a particular issue, as some policy papers do, it puts before Ministers for their consideration the thematic issue of human rights education in the Commonwealth.

COMMONWEALTH BEST PRACTICE

5. As well as having certain international and domestic legal consequences, ratification of major human rights conventions and conventions on international humanitarian law (and promulgation of accompanying implementing legislation) has a demonstrative effect that itself helps to promote awareness of and respect for the human rights standards described in such conventions. Similarly, the production and public promulgation of model legislation, implementation kits and best practice guidelines has the effect of increasing awareness of specific human rights issues that Commonwealth countries have decided to deal with (such as Trafficking in Women and Children).

6. The HRU invites Law Ministers to note the activities of the Secretariat in promoting and assisting in the ratification of human rights instruments, and the promulgation of best practice guidelines, to support the HRU's efforts to assist those member countries which may be seeking support in the process of adoption or implementation of instruments setting out international human rights standards and to liaise with other international human rights organisations including in the UN to facilitate the obtaining of expertise and materials for such activities.

HUMAN RIGHTS EDUCATION – MODEL HUMAN RIGHTS COURSES AND CURRICULA

7. In its Activities Report, the HRU has described its work with the Commonwealth Legal Education Association (CLEA) to develop (initially in India) model Commonwealth human rights curricula and arrangements for joint certification of university courses on this basis. This project is not limited to undergraduate level, to law schools or to legal education, although it includes a full model curriculum (and teacher's guide) for an undergraduate law course in human rights in the Commonwealth. As described in the Activities Report the model courses were launched in India. Following consolidation in this initial jurisdiction their extension is planned to encompass the South Asian region, the Caribbean (the University of the West Indies) and the South Pacific (University of the South Pacific). Regionally relevant content will be inserted in consultation with educators.

8. The HRU invites Law Ministers to note the achievements and activities of the Secretariat on the piloting of this initiative in India, and to support the consolidation of this model curricula project in the South Asia region and its extension to other parts of the Commonwealth in due course.

HUMAN RIGHTS EDUCATION – RIGHTS EDUCATION FOR YOUTH

9. In its Activities Report, the HRU has described its work in building the human rights component of the Commonwealth Youth Programme (CYP), the Youth In Development programme, and training CYP tutors in human rights.

10. The HRU invites Law Ministers to note the activities of the Secretariat in working with CYP towards increasing awareness of human rights in Commonwealth youth and encouraging the informed participation of youth in civil society, and to support the continuation of such activities.

HUMAN RIGHTS EDUCATION – POLICE AND LAW ENFORCEMENT OFFICERS

11. In its Activities Report, the HRU has described its efforts (so far in West Africa) to contribute to more peaceful, stable communities by helping to build a human rights and community-based approach to policing into police training. This also responds to the request in the 2002 Law Ministers Meeting Communiqué. Such work is relatively easily adapted to other Commonwealth countries, and much interest has been expressed in it, including by the UN and regional organisations. It is projected to extend this programme to other parts of the Commonwealth in due course.

HUMAN RIGHTS EDUCATION – CURRICULUM DEVELOPMENT IN SCHOOLS

12. The HRU has produced educational material on law and human rights, and on citizenship, in the Commonwealth. It has been working on the development of human rights curricula (described above) and on building human rights elements into existing curricula (for example, of police training academies). The Unit seeks to work with the Secretariat's Education section and regional teacher training and education institutions to build the capacity of teachers in Commonwealth countries to impart knowledge of human rights and constitutionalism to students of all ages.

HUMAN RIGHTS EDUCATION – THE MEDIA AND LEGAL ISSUES OF FREEDOM OF THE PRESS

13. Law Ministers have previously requested the Secretariat to examine legal issues concerning freedom of the press in Commonwealth countries. The HRU has convened an expert group on issues of freedom of expression, association and assembly. The Unit considers knowledge and awareness of the importance of press freedom as central to achievement of the Commonwealth's strategic goals in

relation to democracy and human rights. It also considers awareness of human rights and discrimination issues among journalists and editors an important part of building a culture of tolerance and respect for human rights. The HRU is considering working with experienced journalists to increase the degree of sensitivity, accuracy and proportion to media coverage of human rights issues.

14. The HRU invites Law Ministers to reaffirm the central importance of an independent media in attaining open, accountable, informed and responsive government, and to support activities of the Secretariat designed to increase awareness of the importance of press freedom and awareness of human rights issues among members of the public and private media in Commonwealth countries.

HUMAN RIGHTS EDUCATION – HUMAN RIGHTS IN COUNTER-TERRORISM

15. The difficult balance in an age of terrorism, between securing public safety and preserving fundamental liberties of the individual, is well versed. Measures to counter-terrorism should not have the consequence of undermining the societal values that they purport to defend. The HRU is working with the LCAD of the Secretariat in its work on supporting member states to fulfil their obligations to take counter-terrorist measures. The aim is to ensure that all model legislative provisions and training materials are designed to be compatible with international standards on preserving human rights while countering terrorism. The HRU has participated in an UN Working Group on this issue (June 2005).

16. The HRU invites Law Ministers to note the importance of ensuring that measures to combat terrorism are consistent with international human rights standards in dealing with such matters, and to support the work of HRU in this regard.

CONCLUSION – HUMAN RIGHTS EDUCATION – GENERAL MATTERS

17. People not only have certain fundamental rights, they also have a right to be informed about what these rights are, and how they enable and empower individuals and groups to participate meaningfully in shaping and developing their societies. Exclusion and perceived exclusion breeds discontent. This knowledge and awareness of the existence, importance, nature, operation and limits of human rights protections is important both for those who wield public power (law-makers, judges, prosecutors, police and law enforcement officers, and decision-makers generally), for those able to influence the shape of their present or future societies (media, students and youth, schoolchildren), and for those most excluded or most vulnerable to neglect or abuse of rights, for whom awareness of rights is a means of enabling participation in society (women, especially rural women or those subject to domestic abuse, and children).

18. The subject of this paper is well captured by Statement 35 (Human Rights Education) of the Pan African Forum on the Latimer House Principles (Kenya, April 2005), which the HRU invites Law Ministers to consider:

> "35. Delegates endorsed the need for mainstreaming human rights education in law schools within a holistic approach. However, it is essential that such education should begin in schools. Delegates appreciated that human rights provisions are entrenched in our constitutions. However, there was still the need for effective implementation of international human rights norms to which judges and all the three branches of governments should be sensitised. Participants recommended that the Commonwealth Secretariat should expand a regional programme of human rights training for judges, state attorneys, advocates and civil society organisations."

19. In the light of the above two paragraphs, and taking into account the mandate of paragraph 7 of the most recent CHOGM outcome statement (Aso Rock Declaration, Abuja, December 2003), the HRU invites Law Ministers to:

- reaffirm the importance of human rights education to the achievement of the Commonwealth's expressed strategic goal of strengthening respect for and fulfilment of basic human rights in member countries;

- note and to support generally the ongoing and planned human rights education and awareness activities of the HRU (as described in this document and the 2005 Activities Report), to enable these initiatives to be consolidated and extended to other parts of the Commonwealth;

- consider other areas (or audiences) of significance to which (or whom) human rights education projects might be directed in the future, for example, continuing legal education for judges, education on the nature and proper interpretation of social and economic rights, education on the importance of an independent civil society and media, etc.

THE HARARE SCHEME ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS: POSSIBLE AMENDMENTS TO THE SCHEME AND DISCUSSION OF INTERCEPTION OF COMMUNICATIONS AND RELATED MATTERS

Paper by the Commonwealth Secretariat

INTRODUCTION AND TERMS OF REFERENCE

1. At their meeting at St. Vincent and the Grenadines in November 2002, Law Ministers asked their Senior Officials to consider amendments to the Harare Scheme to allow for provisions relating to the interception of communications (including computer communications) and to the preservation of computer data.

2. In 2004, Senior Officials considered possible amendments/additions to the Harare Scheme to provide for the interception of communications, including the preservation and interception of computer communications as part of a series of proposed amendments to the Scheme. Several member countries raised concerns about the amendments, in particular the non-admissibility of evidence gathered through interception and the limited use of the contents of such intercept at the investigation stage. Consequently, Senior Officials were of the view that further consideration should be given to the entire issue.

3. Senior Officials agreed to establish an expert working group charged with preparing draft proposals for the treatment in the Harare Scheme of the preservation of computer data and to examine in depth the issues surrounding the interception of communications, both in domestic law and in the context of mutual legal assistance. Senior Officials stated that work done under the auspices of international agreements should be taken into account and they specifically requested the Expert Working Group to, *inter alia*:

- **prepare draft proposals for the treatment in the Harare Scheme of the preservation of computer data;**
- **consider the interception of communications in domestic law and in the context of Mutual Legal Assistance**
- **consider the need for adequate safeguards; and**
- **consider the issue of costs relating to these measures.**

4. The Expert Working Group met in Marlborough House, London from 7-9 September 2005 and compiled a report for presentation to Senior Officials at the meeting immediately before the Law Ministers Meeting in October 2005. This paper is a summary of that report. The recommendations of the Expert Working Group are set out in **Annex 1.**

POSSIBLE AMENDMENTS TO THE HARARE SCHEME ON MUTUAL ASSISTANCE

Preservation of Computer Data

5. The importance of the preservation of data and interception of communications in the investigation of crime has been discussed previously in the paper on Evidence (SOLM(04)6) and the paper by the Commonwealth Secretariat on the Harare Scheme on mutual legal assistance in criminal matters SOLM(04)4.

6. At the meeting the Expert Working Group considered whether proposed amendments to the Harare Scheme could be extended to incorporate both the preservation of data (computer and telephonic) and interception of communications (computer and telephonic). However, interception of communications is an intrusive measure and a sensitive issue amongst member states and requests for mutual legal assistance are routinely declined.

7. Preservation of data is however a less intrusive measure. It deals with existing data held by the providers and requests relating to subscriber information and stored traffic computer data (not telecommunications data) and could be readily adapted into the Harare Scheme. It is distinct from interception of communications as it provides basic information about traffic computer data and is analogous to requests for documentary evidence.

8. Preservation of telecommunication traffic data was confined to computer data. It proved impossible to reach a consensus on a definition of "traffic data", sufficiently precise and technically correct to be applied to both computer and telephonic traffic data.

9. As a request for mutual assistance for the preservation of computer data was not considered contentious and could be possibly carried out under existing domestic law, a request could be made to preserve stored computer data pending a formal mutual legal assistance request. Nevertheless, the Expert Working Group thought it may still be very useful to specifically include preservation of computer data in the Harare Scheme for the following reasons:

- whilst a request for preservation of computer data can arguably be met under the domestic law of most member states, this may not be an option available in all states. Creating specific provision(s) for it in the Harare Scheme allows member states to determine how it will be implemented under their own domestic law;

- preservation of computer data needs to be defined precisely so as to exclude the inadvertent preservation of data that had been stored in its transmission, for example when e-mail is temporarily stored by mailboxes during the course of its journey from sender to recipient. This would amount to intercept, not preservation;

- specific measures are required to reflect the importance of immediacy in responding to requests for the preservation of computer data. Accordingly, supplementary provisions have been drafted to deal with such requests. These are set out under the heading "REQUESTS FOR THE PRESERVATION OF COMPUTER DATA".

10. The proposed procedures recommend that requests for preservation of computer data can be made and received in the first instance by "an agency or authority competent to make such a request under the laws of the requesting country" and such a request can only be refused **"to the extent that it appears to the requested country that compliance would be contrary to the laws and/or constitution of that country, or would prejudice the security, international relations, or other essential public interests of that country"** rather than the more general grounds for refusal. This distinction was drawn so as to prevent the loss of potentially valuable evidence at the initial stage.

11. As the request for preservation of computer data is a preliminary step to seeking production of the data, it is inevitable that there will be a lapse of time before a request for assistance can be submitted through the Central Authorities. The Group agreed that the previously suggested 40 day period was insufficient and suggested that a period of between 90 - 120 days would be more realistic.

12. The proposed amendments do not however reflect the lack of a common standard of communications infrastructure in Commonwealth member states. Some countries may not have the technical knowledge or wherewithal in any event to respond to requests to preserve; it is therefore

important to recognise that if this situation arose it should not be considered by the requesting state to constitute a refusal under the Scheme.

13. At the same time the proposed amendments cannot extend to requests for preservation of computer data made by non-Commonwealth states to Commonwealth states unless there is an existing bilateral treaty between them. Whilst preservation of computer data has long been a tool of investigation in domestic criminal proceedings, it had not been formally adopted by the international community as a basis for mutual legal assistance until the more recent multilateral instruments - the Council of Europe Convention on Cybercrime 2001 and the Convention on Mutual Assistance in Criminal Matters Between Member States of the European Union 2000.

POSSIBLE ACTION

14. Senior Officials are asked to recommend to Law Ministers that the Harare Scheme be amended as drafted by the Expert Working Group. The Harare Scheme with relevant provisions in bold is set out at **Annex 2.**

15. Senior Officials may wish to recommend to Law Ministers that Commonwealth countries should be encouraged to accede, sign and ratify the Council of Europe Convention on Cybercrime 2001.

INTERCEPTION OF COMMUNICATIONS

16. Interception of communications is a highly intrusive and controversial method of law enforcement. Essentially it violates the expectation of privacy of an individual. Equally, it is a vital tool in the investigation of serious crime in an era of advanced and rapidly emerging technology.

17. Most states employ this tool of investigation with the necessary safeguards set out under their domestic law and international obligations. However, states are reluctant to afford mutual legal assistance for interception involving communications of their citizens unless adequate safeguards can be identified and agreed which would have to be reflected in the Harare Scheme.

18. At the same time technology is moving at a phenomenal pace that has created its own difficulties. There seems to be little consensus amongst technical experts on what amounts to, for example, live data and what information falls within preservation and at what point can it be said that interception occurs. Equally, the market practice of the industry prevents any meaningful assessment of costs, which may depend upon where the service providers are located. For example, service providers in the UK have wide differentials in their charging practices whilst some states are seeking to regulate the industry in this regard.

19. In accordance with the recommendations of Senior Officials, the Group heard from delegates concerning the operation of domestic legislation in Australia, Canada, India, Jamaica, Kenya, Malaysia, South Africa, and the UK. An expert from the United States also gave a presentation outlining the US scheme on Mutual Legal Assistance (MLA) in Electronic Crime. For the sake of completion the Expert Working Group also sought the views of the Council of Europe, as it has the only global convention dealing with cybercrime offences, definitions and international co-operation. A summary of the domestic laws of each of the eight member States communications in the context of mutual legal assistance is summarised in the table included at **Annex 3.**

20. At the same time the Expert Working Group considered what safeguards would be necessary to allow for requests for mutual assistance in the interception of communications. To that end they identified the following as initial safeguards which require further deliberation before inclusion in the Harare Scheme: legality, necessity and proportionality; dual criminality; judicial authorisation/review

or other independent oversight of the interception; duration of the interception order; risk of collateral intrusion; restriction on use of the intercepted material to specific proceedings; notification to person affected.

POSSIBLE ACTION

21. Given the concerns expressed by the expert working group and the technical and legal complexity of interception of communications Senior Officials may wish to consider recommending a further examination of these issues in order to draft meaningful and workable amendments to the Harare Scheme in relation to the interception of communications.

Summary of Recommendations of the expert working group

R1. The proposed amendments to the Harare Scheme on Mutual Assistance in Criminal Matters in respect of preserved computer data should be adopted as drafted.

R2. In accordance with the proposed amendments to the Harare Scheme member states should as a matter of priority review and implement in their domestic laws provisions to allow for the preservation and production of computer data.

R3. In reviewing their domestic laws member states must be alert to combating transnational crime which uses fast developing technology.

R4. Member states are encouraged to sign, ratify, accede to and implement the Council of Europe Convention on Cybercrime of 23 November 2001 as a matter of priority as it provides a basis for mutual legal assistance between Commonwealth member states and non-Commonwealth states.

R5. Interception of communications is an intrusive act and violates the privacy of an individual. In order to draft meaningful and workable amendments to the Harare Scheme in relation to the interception of communications further work is needed to:

(a) examine the technological advances in this area;

(b) examine the issues surrounding the use of evidence obtained through interception;

(c) identify and determine the necessary safeguards sufficient to ensure the integrity of the evidence; and

(d) consider adequate measures dealing with respect for fundamental human rights.

R6. R6. In dealing with adequate safeguards consideration should be given to, *inter alia*:

(a) judicial authorisation/review or other independent oversight of the interception;

(b) seriousness of the offence;

(c) duration of the interception order;

(d) risk of collateral intrusion;

(e) notification to person affected; and

(f) restriction on use of the intercepted material to specific proceedings.

R7. Costs for preservation and production of computer data should be borne by the requested state. However, where the requested state regards the expense incurred in carrying out the request as extraordinary the existing measures in Article 12(3) of the Harare Scheme 2002 would apply.

R8. Consideration should be given to reviewing and extending the 1999 Guidelines on the apportionment of costs incurred in providing mutual legal assistance in criminal matters to requests for preservation and production of computer data.

R9. If the Harare Scheme 2002 is subsequently extended to interception of communications including computer based communications consideration should be given to reviewing and extending the 1999 Guidelines on the apportionment of costs incurred in providing mutual legal assistance in criminal matters.

R10. As far as possible efforts to amend the Harare Scheme in relation to interception of communications, including computer based communications, should be included under one legal regime within the Scheme.

ANNEX 2

SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH

including amendments made by Law Ministers in April 1990 and November 2002

Proposed amendments drafted by London Working Group 7-9 September 2005 appear in bold in main text

PURPOSE AND SCOPE

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.

(2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).

(3) Assistance in criminal matters under this Scheme includes assistance in

a) identifying and locating persons;

b) serving documents;

c) examining witnesses;

d) search and seizure;

e) obtaining evidence;

f) facilitating the personal appearance of witnesses;

g) effecting a temporary transfer of persons in custody to appear as a witness;

h) obtaining production of judicial or official records;

i) tracing, seizing and confiscating the proceeds or instrumentalities of crime; **and**

j) preserving computer data.

MEANING OF COUNTRY

2. For the purposes of this Scheme, each of the following is a separate country, that is to say

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and

(b) each country within the Commonwealth which, though not sovereign and independent, is not designated for the purposes of the preceding sub-paragraph.

CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter arises in a country if the Central Authority of that country certifies 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.

(2) "Offence", in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof.

(3) "Forfeiture proceedings" means proceedings, whether civil or criminal, for an order

(a) restraining dealings with any property in respect of which there is reasonable cause to believe that it has been

(i) derived or obtained, whether directly or indirectly, from; or

(ii) used in, or in connection with,

the commission of an offence;

(b) confiscating any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii); or

(c) imposing a pecuniary penalty calculated by reference to the value of any property derived or obtained as provided in paragraph (a)(i) or used as provided in paragraph (a)(ii).

REQUESTS FOR COMPUTER DATA - DEFINITIONS

4. For the purposes of this Scheme

(1) "subscriber information" means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:

a. the type of communication service used, [the technical provisions taken thereto] and the period of service;

b. the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;

c. any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.

(2) "computer system" means a device or a group of interconnected or related devices, including the Internet, one or more of which, pursuant to a program, performs automatic processing of data;

(3) **"computer data" means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function;**

(4) **"service provider" means:**

a. **a public or private entity that provides to users of its services the ability to communicate by means of a computer system, and**

b. **any other entity that processes or stores computer data on behalf of that entity or those users.**

(5) **"traffic data" means any computer data:**

a. **that relates to a communication by means of a computer system; and**

b. **is generated by a computer system that formed a part in the chain of communication; and**

c. **shows the communication's origin, destination, route, time, date, size, duration, or type of underlying service.**

(6) **"Content data" means the content of the communication; that is, the meaning [or purport] of the communication, or the message or information being conveyed by the communication. It is everything transmitted as part of the communication that is not traffic data.**

(7) **"Preservation of computer data" means the protection of computer data which already exists in a stored form from modification or deletion, or from anything that would cause its current quality or condition to change or deteriorate. Computer data that is stored on a highly transitory basis as an integral function of the technology used in its transmission is not computer data which already exists in a stored form for the purposes of this definition.**

CENTRAL AUTHORITIES

5. Each country shall designate a Central Authority to transmit and to receive requests for assistance under this Scheme.

ACTION IN THE REQUESTING COUNTRY

6. (1) A request for assistance under this Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country.

(2) The Central Authority of the requesting country shall, if it is satisfied that the request can properly be made under this Scheme, transmit the request to the central Authority of the requested country and shall ensure that the request contains all the information required by the provisions of this Scheme.

(3) The Central Authority of the requesting country shall provide as far as practicable additional information sought by the Central Authority of the requested country.

ACTION IN THE REQUESTED COUNTRY

7. (1) Subject to the provisions of this Scheme, the requested country shall grant the assistance requested as expeditiously as practicable.

(2) The Central Authority of the requested country shall, subject to the following provisions of this paragraph, take the necessary steps to ensure that the competent authorities of that country comply with the request.

(3) If the Central Authority of the requested country considers

(a) that the request does not comply with the provisions of this Scheme, or

(b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or

(c) that the request cannot be complied with, in whole or in part, or

(d) that there are circumstances which are likely to cause a significant delay in complying with the request,

it shall promptly inform the Central Authority of the requesting country, giving reasons.

(4) The requested country may make the granting of assistance subject to the requesting country giving an undertaking that:

(a) the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person; or

(b) a court in the requesting country will determine whether or not the material is subject to privilege.

(5) If the requesting country refuses to give the undertaking under sub-paragraph (4), the requested country may refuse to grant the assistance sought in whole or in part.

REFUSAL OF ASSISTANCE

8. (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme if the criminal matter appears to the Central Authority of that country to concern

(a) conduct which would not constitute an offence under the law of that country; or

(b) an offence or proceedings of a political character; or

(c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or

(d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.

(2) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme

(a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or

(b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.

(3) The requested country may refuse to comply in whole or in part with a request for assistance to the extent that the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country.

(4) An offence shall not be an offence of a political character for the purposes of this paragraph if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.

MEASURES OF COMPULSION

9. (1) The competent authorities of the requested country shall in complying with a request under this Scheme use only such measures of compulsion as are available under the law of that country in respect of criminal matters arising in that country.

(2) Where under the law of the requested country measures of compulsion cannot be applied to any person to take the steps necessary to secure compliance with a request under this Scheme but the person concerned is willing to act voluntarily in compliance or partial compliance with the terms of the request, the competent authorities of the requested country shall make available the necessary facilities.

SCHEME NOT TO COVER ARREST OR EXTRADITION

10. Nothing in this Scheme is to be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

CONFIDENTIALITY

11. The Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

LIMITATION OF USE OF INFORMATION OR EVIDENCE

12. The requesting country shall not use any information or evidence obtained in response to a request for assistance under this Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country

EXPENSES OF COMPLIANCE

13. (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.

CONTENTS REQUEST FOR ASSISTANCE

14. (1) **Except in the case of a request for the preservation of computer data under Article 1 (3) (j) of this Scheme**, a request under the Scheme shall:

(a) specify the nature of the assistance requested;

(b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;

(c) indicate any time-limit within which compliance with the request is desired, stating reasons;

(d) contain the following information:

(i) the identity of the agency or authority initiating the request;

(ii) the nature of the criminal matter; and

(iii) whether or not criminal proceedings have been instituted.

(e) where criminal proceedings have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identity of the accused person;

(iii) the offences of which he stands accused, and a summary of the facts;

(iv) the stage reached in the proceedings; and

(v) any date fixed for further stages in the proceedings.

(f) where criminal proceedings have not been instituted, state the offence which the Central Authority of the requesting country has reasonable cause to believe to have been committed, with a summary of known facts.

(2) A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.

REQUESTS FOR THE PRESERVATION OF COMPUTER DATA

15. (1) **A request for the preservation of computer data under this Article made by an agency or authority competent to make such a request under the laws of the requesting country can be directly transmitted to an agency or authority competent to receive such a request under the laws of the requested country.**

(2) **A request for the preservation of computer data shall**

(a) **specify the identity of the agency or authority making the request;**

(b) **contain a brief description of the conduct under investigation;**

(c) **contain a description of the computer data to be preserved and its relationship to the investigation or prosecution, and in particular identifying whether the computer data to be preserved includes:**

i. **subscriber information**
ii. **traffic data**
iii. **content data.**

(d) **contain a statement that the requesting country intends to submit a request for mutual assistance to obtain the computer data within the period permitted under this Article.**

(3) **The preservation of computer data pursuant to a request made under this Article shall be for a period of 40 (forty) days, pending submission by the requesting country of a request for assistance to obtain the preserved computer data. Following the receipt of such a request, the data shall continue to be preserved pending the determination of that request and, if the request is granted, until the data is obtained pursuant to the request for assistance.**

(4) **If the requested country considers that the preservation of computer data pursuant to a request made under this Article will not ensure the future availability of the computer data, or will threaten the confidentiality of, or otherwise prejudice the investigation in the requesting country, it shall promptly inform the requesting country, which shall then determine whether the request should nevertheless be executed.**

(5) **A request for the preservation of computer data under this Article may be refused only to the extent that it appears to the requested country that compliance would be contrary to the laws and/or constitution of that country, or would prejudice the security, international relations, or other essential public interests of that country.**

IDENTIFYING AND LOCATING PERSONS

16. (1) A request under this Scheme may seek assistance in identifying or locating persons believed to be within the requested country.

(2) The request shall indicate the purpose for which the information is requested and shall contain such information as is available to the Central Authority of the requesting country as to the whereabouts of the person concerned and such other information as it possesses as may facilitate the identification of that person.

SERVICE OF DOCUMENTS

17. (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.

(2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(3) The Central Authority of the requested country shall endeavour to have the documents served:

(a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or

(b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.

(4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

(5) A person served in compliance with a request with a summons to appear as a witness in the requesting country and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country notwithstanding any contrary statement in the summons.

EXAMINATION OF WITNESSES

18. (1) A request under this Scheme may seek assistance in the examination of witnesses in the requested country.

(2) The request shall specify, as appropriate and so far as the circumstances of the case permit:

(a) the names and addresses or the official designations of the witnesses to be examined;

(b) the questions to be put to the witnesses or the subject matter about which they are to be examined;

(c) whether it is desired that the witnesses be examined orally or in writing;

(d) whether it is desired that the oath be administered to the witnesses (or, as the law of the requested country allows, that they be required to make their solemn affirmation);

(e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and

(f) any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country.

(3) The request may ask that, so far as the law of the requested country permits, the accused person or his legal representative may attend the examination of the witness and ask questions of the witness.

SEARCH AND SEIZURE

19. (1) A request under this Scheme may seek assistance in the search for, and seizure of property **or computer data** in the requested country.

(2) The request shall specify the property **or computer data** to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required to be adduced in an application under the law of the requested country for any necessary warrant or authorization to effect the search and seizure.

(3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property **or computer data** seized.

OTHER ASSISTANCE IN OBTAINING EVIDENCE

20. (1) A request under this Scheme may seek other assistance in obtaining evidence.

(2) The request shall specify, as appropriate and so far as the circumstance of the case permit:

(a) the documents, records, property **or computer data** to be inspected, preserved, photographed, copied or transmitted;

(b) the samples of any property **or computer data** to be taken, examined or transmitted; and

(c) the site to be viewed or photographed.

PRIVILEGE

21. (1) No person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he could not be compelled to give:

(a) in criminal proceedings in that country; or

(b) in criminal proceedings in the requesting country.

(2) For the purposes of this paragraph any reference to giving evidence includes references to answering any question and to producing any document.

PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS

22. (1) A request under this Scheme may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.

(2) For the purposes of this paragraph "judicial records" means judgements, orders and decisions of courts and other documents held by judicial authorities and "official records" means documents held by government departments or agencies or prosecution authorities.

(3) The requested country shall provide copies of judicial or official records which are publicly available.

(4) The requested country may provide copies of judicial or official records not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

TRANSMISSION AND RETURN OF MATERIAL

23. (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record or property, the requested country

(a) may postpone the transmission of the material if it is required in connection with proceedings in that country, and in such a case shall provide certified copies of a document or record pending transmission of the original;

(b) may require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.

(2) Where any document, record or property is transmitted to the requesting country in compliance with a request under this Scheme, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless that country has indicated that its return is not desired.

(3) The requested country shall authenticate material that is to be transmitted by that country.

AUTHENTICATION

24. A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:

(a) purports to be signed or certified by a judge or Magistrate, or to bear in the stamp or seal of a Minister, government department or Central Authority; or

(b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY

25. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required; and

(c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.

(3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and

(a) ask whether they agree to appear;

(b) inform the Central Authority of the requesting country of their answer; and

(c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

(4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

PERSONAL APPEARANCE OF PERSONS IN CUSTODY

26. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify:

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required.

(3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.

(4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.

(5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

(6) Where persons in custody are transferred, the requested country shall notify the requesting country of:

(a) the dates upon which the persons are due under the law of the requested country to be released from custody; and

(b) the dates by which the requested country requires the return of the persons

and shall notify any variations in such dates.

(7) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub-paragraph (6).

(8) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.

(9) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.

(10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agreed.

IMMUNITY OF PERSONS APPEARING

27. (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.

(2) The immunity provided for in that paragraph shall cease:

(a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have

nevertheless remained in the requesting country, or having left that country have returned to it;

(b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

28. (1) A request under this Scheme may seek assistance in identifying, locating and assessing the value of property believed to have been derived or obtained, directly or indirectly, from, or to have been used in, or in connection with, the commission of an offence and believed to be within the requested country.

(2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

SEIZING AND CONFISCATING THE PROCEEDS OF INSTRUMENTALITIES OF CRIME

29. (1) A request under this Scheme may seek assistance in securing:

(a) the making in the requested country of an order relating to the proceeds of instrumentalities of crime; or

(b) the recognition or enforcement in that country of such an order made in the requesting country.

(2) For the purpose of this paragraph, "an order relating to the proceeds of instrumentalities of crime" means:

(a) 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;

(b) an order confiscating property derived or obtained, directly or indirectly, from, or used in or in connection with, the commission of an offence; and

(c) an order imposing a pecuniary penalty calculated by reference to the value of any property so derived, obtained or used.

(3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.

(4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

(5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

(6) The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:

(a) for the giving of notice of the making of orders restraining or confiscating property; and

(b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order

(i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and
(ii) restoring such property or the value of the interest therein to the applicant.

DISPOSAL OR RELEASE OF PROPERTY

30. (1) The law of the requested country shall apply to determine the disposal of any property

(a) forfeited; or

(b) obtained as a result of the enforcement of a pecuniary penalty order

as a result of a request under this Scheme.

(2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.

(3) The law of the requested country may provide that the proceeds of an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be

(a) returned to the requesting country; or

(b) shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.

CONSULTATION

31. The Central Authorities of the requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.

OTHER ASSISTANCE

32. After consultation between the requesting and the requested countries assistance not within the scope of this Scheme may be given in respect of a criminal matter on such terms and conditions as may be agreed by those countries.

NOTIFICATION OF DESIGNATIONS

33. Designations of dependent territories under paragraph 2 and of Central Authorities under paragraph 4 shall be notified to the Commonwealth Secretary-General.

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
AUSTRALIA	• Telecommunications (interception) Act 1979 (T.I. Act) and subsequent amendments. • Surveillance Devices Act 2004. • Mutual Assistance in Criminal Law Matters Act 1987.	Warrant is necessary. Can only be obtained for certain offences. May only be obtained by specific named persons, or agencies specified in the relevant Acts. With exceptions a warrant may only be granted by a federal court judge or a nominated member of the Administrative Appeals Tribunal. Warrant is issued for 90 days. Extension possible. Product admissible in criminal proceedings.	Interception based solely on the request of a foreign state is not permitted A foreign state may apply for material obtained during a domestic investigation pursuant to a request for mutual assistance in respect of offences punishable by imprisonment for 3 years or more.
CANADA	The Criminal Code governs interception by prohibiting it but creates a scheme for judicial authorization.	Issued by a Superior Court Judge on the application of a representative of the Attorney General of Canada or of a province specially designated for the purpose. The authorization is for an initial period of 60 days but can be renewed. Special exceptions for longer periods can be made depending on the nature of the offence under investigation.	Interception based solely on the request of a foreign state is not permitted. A foreign state may apply for material obtained during a domestic investigation pursuant to a request for mutual assistance.
INDIA	• Unlawful Activities (Prevention) Act, 1967; • Information Technology Act, 2000 • Indian Telegraph Act, 1885.	A designated individual can order any Government agency to intercept any information transmitted by computer if it is necessary or expedient to do so in the interests of: • the sovereignty or integrity of India, • the security of the state, • friendly relations with foreign states • public order or • for preventing incitement to the commission of any cognizable offence. The reasons for the order must be recorded in writing. The	MLA requests are dealt with according to applicable treaty/arrangement.

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
		Information Technology Act 2000 does not prescribe any time limits. The Indian Telegraph Amendment Rules, 1999, included under the Indian Telegraph Act, 1885, states interception of any message may only be ordered by the Secretary for the Government of India in the Ministry of Home Affairs (in Federal cases) or by the Secretary to the State Government (in State cases). In emergencies, such order can be issued by the officer of the rank of Joint Secretary, duly authorised by the Home Secretary, giving reasons for such action. A copy of the order shall be forwarded to the Review Committee within 7 days. The Indian Telecommunication Rules provide for 90 days and not exceeding 180 days. In remote areas or for operational reasons, prior permission cannot be obtained, the officer can intercept subject to confirmation from the competent authority within 15 days.	
JAMAICA	The Interception of Communications Act 2002	Any request for interception must be authorised by a warrant issued by a judge in chambers (ex parte application). The warrant may be issued for a period not exceeding 90 days initially, and is then renewable for a second period not exceeding 90 days and a final renewal not exceeding 90 days from the date of expiration of the second period. Information obtained from the intercept is admissible in criminal proceedings but no evidence may be adduced or questions asked relating to the method of interception or the identity of the person(s) carrying out or assisting in the interception.	The Mutual Assistance (Criminal Matters) Act 1995 contains no specific provisions for the interception of communication or data preservation but does contain a general provision for assistance for "such matters as may be included in an agreement or arrangement in force between Jamaica and a foreign state."

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
KENYA	• Criminal Procedure Code • Communications Act 1998.	Any request for interception must be authorised by the Attorney General and be made by a judge or magistrate. The product obtained is admissible in criminal proceedings.	A draft bill is to be presented before Parliament dealing with mutual legal assistance. Consideration of any request for assistance will take into account human rights issues including the protection of privacy. It is envisaged that manageable costs will be borne by Kenya; but extraordinary costs will be shared between Kenya and the requesting state.
MALAYSIA	• The Communication and Multimedia Act 1998 • The Criminal Procedure Code; and • The Kidnapping Act 1957	The Attorney General is the person designated as competent to issue an authorisation for a police officer to obtain an intercept warrant from the Court. Intercept warrants can only be obtained for specific offences contained in the relevant legislation.	The Acts do not provide for MLA for interception at the request of a foreign state but amendments are under consideration
SOUTH AFRICA	• Electronic Communications and Transactions Act 2002 (Act 25 of 2002) • Regulation of Interception of Communication and Provision of Communications–Related Information Act 2002 (Act 70 of 2002).	Any request for interception must be made to a judge or a magistrate who authorises the request by issuing a direction. The product obtained from an interception is admissible in criminal proceedings.	The Act provides for compliance with a request for interception from a foreign state, but the judge or magistrate must be satisfied that an offence has been or is about to be committed.

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
UK	Regulation of Investigatory Powers Act 2000 (RIPA).	Lawful public interception is by a warrant issued by the Secretary of State and it must be both necessary and proportionate. The product of interception is for intelligence purposes only and cannot be admitted in proceedings. The product of private intercept, when carried out with the consent of the systems controller and subject to defined criteria, is admissible as evidence in court proceedings.	No request pursuant to any designated international agreement for assistance of interception is to be made except with lawful authority. The EU Convention on MLA in criminal matters (2000) is the only designated international agreement. A request made outside a designated agreement is capable of being complied with but is subject to the discretion of the Home Secretary and whether it is the product of an on-going UK investigation.
USA	Federal statutory law: • *Interception of contents*. The statutory scheme relating to interception of contents of communications is specified in Title 18, United States Code, Sections 2510-2522: Interception of Wire, Oral, and Electronic Communications. • *Collection of traffic data*. The statutory scheme relating to real-time collection of traffic data is specified in Title 18, United States Code, Sections 3121-3127: Pen Registers and Trap and Trace Devices. • Other powers related to collection and disclosure of	*Interception of content*. A judicial authority must authorize real-time interception of content on application from a designated high-ranking executive official from the Department of Justice, or by an authorized principal prosecuting attorney within a constituent State or subdivision thereof. *Collection of traffic data*. A judicial authority must authorize real-time collection of traffic data, following application by an attorney for the government. *Emergency authorizations*. A high-ranking executive official, in specified emergency situations generally involving an immediate threat to life or limb or to national security, may authorize either interception of content or collection of traffic data for a limited time without prior judicial authority. Emergency authorizations must be followed by a full application for the appropriate order from the	The United States is not able to intercept contents of communications based solely upon a mutual legal assistance request of a foreign state but it may share proceeds of lawful domestic intercepts with a foreign state. Traffic data can be captured on behalf of a foreign state following a MLA request in furtherance of an ongoing criminal investigation The proceeds of lawful intercepts authorized under domestic procedures may be shared with foreign law enforcement officials to the extent that such disclosure is

COUNTRY	LEGISLATION GOVERNING INTERCEPTION	AUTHORISATIONS	MUTUAL LEGAL ASSISTANCE
	stored data, including preservation of data, are included in Title 18, United States Code, Sections 2701-2712: Stored Wire and Electronic Communications and Transactional Records Access.	appropriate judicial authority within 48 hours of the initiation of the collection. *Time Limits* • For content interceptions authorisations are for an initial period of 30 days subject to renewal following re-application in the same manner. • For real time traffic data interceptions authorisations are for 60 days, and subject to renewals for up to sixty days authorised by the judicial authority if the initial requirements are still met. Both lawfully intercepted content and lawfully captured traffic data are admissible in criminal proceedings, subject to any other evidentiary privilege (*e.g.*, privileged attorney-client communications)	appropriate to the proper performance of the official duties of the officer making or receiving the disclosure. In the case of real-time collection of traffic data, the request would be submitted for judicial approval, as is the case under its domestic law. The same requirements and time limits apply.

CIVIL RECOVERY OF CRIMINAL ASSETS AND TERRORIST PROPERTY: HARARE SCHEME ON MUTUAL ASSISTANCE AND DRAFT MODEL LEGISLATIVE PROVISIONS

Paper by the Commonwealth Secretariat

INTRODUCTION

1. At their Meeting in St. Vincent and the Grenadines in 2002, Law Ministers considered measures to enhance capacity regarding the seizure and forfeiture of criminal assets. They asked the Commonwealth Secretariat to provide model legislative provisions dealing with the seizure and forfeiture of terrorist assets and for civil forfeiture regimes.

2. This paper and its Annex have been prepared in response to that mandate.

DRAFT MODEL LAW ON CIVIL RECOVERY OF CRIMINAL ASSETS INCLUDING TERRORIST PROPERTY

3. Over the past several years, a number of international initiatives including penal law Conventions such as the *1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* and the *United Nations Convention against Transnational Organised Crime* and the work of the Financial Action Task Force (FATF), have led to the development and adoption by states of legislation to allow for the restraint and forfeiture of the proceeds and instrumentalities of crime. Recent initiatives relating to terrorism, in particular the *Convention for the Suppression of the Financing of Terrorism*, have led to an expansion of forfeiture laws to cover terrorist property.

4. To date, much of the legislation adopted has provided for "conviction based" forfeiture where proceedings to forfeit assets are based on an underlying criminal conviction. Recently however, several states have also adopted laws that will permit "non-conviction based" or "civil recovery" of criminal assets as an additional tool to combat serious crime and the financing of terrorism. Under these regimes, the proceedings are generally *in rem*, brought against property as opposed to a person. Civil rules of procedure apply and forfeiture can be ordered on the basis of evidence to a standard of balance of probabilities.

5. Several examples of such legislation can be found in Commonwealth jurisdictions such as Australia, Canada, South Africa and the United Kingdom, as well as in Ireland and the United States.

6. Pursuant to the request of Law Ministers, the Secretariat has undertaken a project to develop a model law which countries considering the adoption of such legislation could use as a resource tool. To avoid duplication of effort and the waste of resources, it was decided to develop a draft model law in collaboration with the United Nations Office on Drugs and Crime (UNODC) in Vienna.

7. In late September of 2003 an expert group meeting was held in Vienna to develop drafting instructions for a model law on civil forfeiture. Experts from Australia, Canada, Ireland, South Africa, the United Kingdom and the United States participated in the meeting along with officials from UNODC and the Commonwealth Secretariat. The Government of Canada agreed to provide the services of a legislative drafter to prepare the model law.

8. In January of 2004, the legislative drafter, in consultation with the Commonwealth Secretariat and UNODC prepared a draft of a chapter on civil asset forfeiture for inclusion in the existing UNODC Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill of 2003. This draft was adapted by the Commonwealth Secretariat into a stand alone *Draft Commonwealth Model Law on the Civil Recovery of Criminal Assets including Terrorist Property* (**Annex 1**).

CONSIDERATION BY SENIOR OFFICIALS

9. Senior Officials welcomed the work undertaken by the Commonwealth Secretariat in the preparation of a Draft Commonwealth Model Law on the Civil Recovery of Criminal Assets including Terrorist Property. It was noted that the Model Bill was drafted so as to give a broad scope to the legislative provisions, which could be reduced to meet the particular needs and constitutional obligations of each enacting country. The meeting gave a general welcome to the drafts, but as a number of delegations had indicated that they had technical amendments to propose it was agreed that the Commonwealth Secretariat would engage in discussions with those delegations with a view to preparing a revised draft for submission to Law Ministers. Those discussions were carried out in the margins of SOLM.

ACTION BY LAW MINISTERS

10. The *Draft Commonwealth Model Law on the Civil Recovery of Criminal Assets including Terrorist Property* (Annex 1), incorporating amendments following the comments from SOLM, is now presented for consideration by Law Ministers.

ANNEX 1

DRAFT COMMONWEALTH MODEL LEGISLATIVE PROVISIONS ON THE CIVIL RECOVERY OF CRIMINAL ASSETS INCLUDING TERRORIST PROPERTY[1]

[NOTE: Provisions in italics represent options that a State may wish to include in legislation]

Division 1 - Interpretation

1. Definitions

(a) "currency" means the coin and paper money of [**name of State**] or of a foreign country that is designated as legal tender and which is customarily used and accepted as a medium of exchange in the country of issue, monetary instruments that may be exchanged for money (such as cheques, travellers' cheques, money orders, negotiable instruments in a form in which title thereto passes on delivery), jewellery, precious metals and precious stones. Where the context permits, currency includes currency in electronic form;

(b) "document" means a record of information kept in any form;

(c) "instrumentality of unlawful activity" means property

(i) used in or in connection with unlawful activity;
(ii) that facilitates or is otherwise concerned in unlawful activity;

(d) "interest" in relation to property means:

(i) a legal or equitable estate or interest in the property;
(ii) a right, power or privilege in connection with the property.

(e) "lawful owner" means a person who

(i) has an interest in the property which is the subject of the application,
(ii) has exercised reasonable care to ensure that the property is not terrorist property;
(iii) is not a member of a terrorist group.

(f) "legitimate owner" means, with respect to property that is proceeds of unlawful activity, a person who did not, directly or indirectly, acquire the property as a result of unlawful activity carried out by the person and who

(i) was the rightful owner of the property before the unlawful activity occurred and was deprived of the possession or control of the property by means of the unlawful activity; or
(ii) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity;

(g) "place" means any physical location and includes land, water, vessels, buildings and premises

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[1] This draft has been prepared through co-operative work with the United Nations Office of Drugs and Crimes (UNODC)and generally parallels a draft Part IV.1 that has been prepared for inclusion in the UNODC Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill 2003.

(h) "proceeds of unlawful activity" means any property or economic advantage derived or realised, directly or indirectly, as a result of or in connection with a unlawful activity, irrespective of the identity of the offender and irrespective of whether committed before or after the commencement of this Act and includes, on a proportional basis, property into which any property derived or realised directly or indirectly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the unlawful activity;

(i) "property" means any asset of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and includes legal documents or instruments in any form including electronic or digital evidencing title to, or interest in such assets, including but not limited to bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit;

(j) "responsible owner" means, with respect to property that is an instrumentality of unlawful activity, a person with an interest in the property who has done all that can reasonably be done to prevent the property from being used to carry out unlawful activity, including

(i) promptly notifying appropriate law enforcement agencies whenever the person knows or ought to know that the property has been or is likely to be used to carry out unlawful activity, and
(ii) refusing or withdrawing any permission that the person has authority to give and that the person knows or ought to know has facilitated or is likely to facilitate the property being used to carry out unlawful activity;

(k) "terrorist act" has the same meaning as in the [Commonwealth Model Legislative Provisions on Measures to Combat Terrorism]

(l) "terrorist group" has the same meaning as in the [Commonwealth Model Legislative Provisions on Measures to Combat Terrorism]

(m) "terrorist property" means –

(i) proceeds from the commission of a terrorist act;
(ii) property which has been, is being, or is likely to be used to commit a terrorist act;
(iii) property which has been, is being, or is likely to be used by a terrorist group;
(iv) property owned or controlled by or on behalf of a terrorist group; or
(v) property which has been collected for the purpose of providing support to a terrorist group or funding a terrorist act.

(n) "unlawful activity" means an act or omission that, whether it occurred before or after this Act comes into force,

(i) would constitute an offence under a law of **[name of State]**; or
(ii) would constitute an offence under a law of a foreign State which, had it occurred in **[name of State]** would also have been an offence under a law of **[name of State]**

2. General Provisions

(1) An application under this Act for a restraining order or for a forfeiture order under this Act may be brought whether or not a person has been charged or convicted of an offence, and whether or not an application has been brought for a {confiscation order/pecuniary penalty order/forfeiture order} after a criminal conviction.

(2) **[The Court]** may, on application of the **[Attorney General] [Director of Public Prosecutions]** order that proceedings under this Act be postponed pending the outcome of proceedings under another Act if **[the Court]** is satisfied that to do so would clearly be in the interests of justice.

(3) The result of an application under this Act does not finally decide an issue between the parties for the purposes of any proceedings other than those for which the issue was decided.

Division 2 - Restraining Orders

3. Restraining Order

(1) The **[Attorney-General] [Director of Public Prosecutions]** may apply to **[the Court]** for a restraining order against property located inside or outside **[name of State]** that is:

(a) proceeds of unlawful activity;
(b) an instrumentality of unlawful activity; or
(c) terrorist property

(2) An application for a restraining order under **subsection (1)** may be made *ex parte* and shall be in writing and be accompanied by an affidavit in support of the application.

(3) **[The Court]** shall make a restraining order against the property if **[the Court]** is satisfied that there are reasonable grounds **to [suspect][believe]** that the property is proceeds of unlawful activity, an instrumentality of unlawful activity or terrorist property.

(4) The hearing of an application for a restraining order may be held *in camera.*

4. Ancillary orders - Receivers

(1) **[The Court]** may make ancillary orders, either concurrently with or after the making of the restraining order, that **[the Court]** considers necessary or expedient, including

(a) directing the **[public trustee]** or another person that **[the Court]** may appoint, to take care of, administer, manage or otherwise deal with the property, or a part of the property in accordance with any directions of **[the Court]** and where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;
(b) requiring any person having possession of the property to give possession of it to the **[public trustee]** or to the person appointed under **subsection (a)**; and
(c) permitting the person appointed under **subsection (a)** to liquidate any perishable property, or any other property that the person considers, on reasonable grounds, may rapidly decline in value or cost more to preserve than its realisable value.

(2) An application for an order under **subsection (1)** may be made *ex parte.*

5. Ancillary orders – Persons Affected by Restraining Orders

(1) Subject to subsections (2) and (3),**[the Court],** if satisfied that to do so clearly would be in the interests of justice, may make ancillary orders, either concurrently with or after making the restraining order, to make provision for meeting out of the property or part of it,

(a) the reasonable living expenses of any person affected by the order (including the reasonable living expenses of the person's dependants, if any); and
(b) a person's reasonable legal expenses in any proceedings under this Act.

(2) The Court shall not make an order under subsection (1) unless satisfied that

(i) the applicant could not otherwise meet the expenses; and
(ii) the applicant has disclosed **[under oath]** all interests in the property and submitted to **[the Court]** a **[sworn]** statement of all assets and liabilities.

(3) An order under subsection (1)(b) is subject to the following conditions:

(a) **[the Court]** must be satisfied that all other means, including the **[legal aid system]**, have been used by the person in order to limit the legal expenses;
(b) the amount ordered must not exceed the amount that would be paid for the legal work according to the **[tariff of legal aid];**
(c) the amount ordered must not, in any event, exceed **[----];** and
(d) if so ordered by **[the Court],** the amounts must first be taxed by the **[taxing authority]** of **[the Court].**

(4) An order under **subsection (1)** may be made subject to any conditions that **[the Court]** considers necessary or expedient.

6. Notice to be given

(1) When **[the Court]** makes a restraining order, it shall, as soon as possible, order that the **[Attorney General] [Director of Public Prosecutions]:**

(a) give notice of the order to all persons known to the **[Attorney General] [Director of Public Prosecutions]** to have an interest in property that is affected by the order, and any other person **[the Court]** directs; and
(b) publish in **[the Gazette or]** a newspaper published and circulating in **[name of State]** a notice of the order.

(2) **[The Court]** may also order service of the supporting affidavit if **[the Court]** is satisfied that to do so would clearly be in the interests of justice and that there is no over-riding public interest in it not being served at that time.

(3) **[The Court]** may order that notice not be given, or that notice be given at a later time, if **[the Court]** is satisfied that there is an over-riding public interest against notice being given at that time, such as

(a) endangering the life or physical safety of any person;
(b) flight from prosecution;
(c) destruction, dissipation or removal from the jurisdiction of property affected by the order;
(d) destruction of or tampering with evidence;

(e) intimidation of potential witnesses; or
(f) otherwise seriously jeopardising an investigation or unduly delaying a proceeding under this Act.

7. Duration of Restraining Order

A restraining order expires **[21] [90]** days after the date on which notice of the order is given under **section 6** or if no notice is given from the date of the order unless

(a) an application for a forfeiture order has been made in respect of the property that is affected by the restraining order; or
(b) the restraining order is revoked before the expiry of the **[21] [90]** days.

8. Registration of Restraining Order, etc.

(1) A copy of a restraining order - and of any relevant ancillary order - that affects lands in **[name of State]** shall be registered with the **[Registrar of Lands]**.

(2) An order is of no effect with respect to registered land unless it is registered as a charge under the **[Registration of Land Act]**.

(3) Where particulars of an order are registered under the **[Registration of Land Act]**, a person who subsequently deals with the property is deemed to have notice of the order at the time of the dealing.

9. Contravention of Restraining Order, etc.

(1) A person who knowingly contravenes a restraining order or ancillary order commits an offence punishable upon conviction by:

(a) a fine of **[.....]** or imprisonment for a period of **[.... years]** or both, in the case of a natural person; or
(b) a fine of **[5 times above figure]** in the case of a body corporate.

(2) The **[Attorney-General] [Director of Public Prosecutions]** may apply to **[the Court]** that made the restraining order for an order that a dealing with property be set aside if

(a) the property is dealt with in contravention of the restraining order; and
(b) the dealing was not for sufficient consideration or not in favour of a person who acted in good faith and without notice of the order.

Division 3 - Forfeiture Orders

10. Application for forfeiture order

(1) The **[Attorney-General] [Director of Public Prosecutions]** may apply to **[the Court]** for a forfeiture order against property located inside or outside **[name of State]** that is:

(a) proceeds of unlawful activity;
(b) an instrumentality of unlawful activity; or
(c) terrorist property.

(2) For greater certainty, an application for a forfeiture order may be made whether or not a restraining order has been made under section 3.

(3) The **[Attorney-General] [Director of Public Prosecutions]** shall

(a) give **[14]** days notice of an application under **subsection (1)** to all persons known to the **[Attorney General] [Director of Public Prosecutions]** to have an interest in property affected by the application; and

(b) publish in **[the Gazette or]** a newspaper published and circulating in **[name of State]** a notice of the application at least **[14]** days before the application is scheduled to be decided .

(4) A person who wishes to oppose the making of a forfeiture order with respect to property in which the person has an interest - or who wishes to exclude the person's interest from a forfeiture order - shall file an appearance within the **[14]** days mentioned in **subsection (2)**, although **[the Court]** may agree to accept an appearance at a later time.

(5) An application for a forfeiture order shall be in writing and be accompanied by an affidavit supporting it.

(6) **[The Court]** must set the matter down for hearing as soon as possible after expiry of the **[14]** days' notice of the date of the application.

(7) **[The Court]** must postpone the hearing of an application until the earlier of

(a) the completion of any investigative examination under **section ...** ; and
(b) [30 days]

unless **[the Court]** orders otherwise.

11. Forfeiture Order

(1) **[The Court]** shall make an order declaring that the property is forfeited to **[name of State]** if **[the Court]** is satisfied on a balance of probabilities that the property is proceeds of unlawful activity, an instrumentality of unlawful activity or terrorist property.

(2) For greater certainty, the validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings in respect of an offence with which the property concerned was in some way associated.

(3) For greater certainty, **[the Court]** need not be satisfied that the property was used or acquired in connection to any particular unlawful activity.

(4) If **[the Court]** does not grant an application to make a forfeiture order, it may revoke any restraining order that affects the same property.

(5) An order under **subsection (1)** takes effect on the later of

(a) the expiry of the period during which an appeal of the order may be taken **[under the general law of civil procedure]**; and
(b) the final disposition of the appeal.

12. Ancillary orders - receivers

(1) **[The Court]** may make ancillary orders, either concurrently with or after the making of the forfeiture order, that **[the Court]** considers necessary or expedient, including

(a) directing the **[public trustee]** or another person that **[the Court]** may appoint, to take care of, administer, manage or otherwise deal with the property, or a part of the property in accordance with any directions of **[the Court]** and where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;

(b) requiring any person having possession of the property to give possession of it to the **[public trustee]** or to the person appointed under **subsection (a)** to take custody of the property; and

(c) permitting the person appointed under **subsection (a)** to liquidate any perishable property or any other property that the person considers, on reasonable grounds, may rapidly decline in value or cost more to preserve than its realisable value.

(2) An application for an order under **subsection (1)** may be made *ex parte*.

13. Orders - Responsible Owner, Legitimate Owner and Lawful Owner

(1) Except where it would clearly not be in the interests of justice, if **[the Court]** is satisfied on a balance of probabilities that the property is the proceeds of unlawful activity and that a person is a legitimate owner, **[the Court]** shall make any order it considers necessary to protect the person's interest in the property.

(2) Except where it would clearly not be in the interests of justice, if **[the Court]** is satisfied on a balance of probabilities that the property is an instrumentality of unlawful activity and that a person is a responsible owner, **[the Court]** shall make any order it considers necessary to protect the person's interest in the property.

(3) Except where it would clearly not be in the interests of justice, if **[the Court]** is satisfied on a balance of probabilities that the property is terrorist property and that a person is a lawful owner, **[the Court]** shall make any order that it considers necessary to protect the person's interest in the property.

(4) No order may be made under subsection (1), (2) or (3) if

(a) the person is a fugitive from justice in **[name of State]** at the time the forfeiture order is made;

(b) the property is property that it is unlawful for the person to possess in **[name of State]**; or

(c) the interest that the person has in the property is in the nature of an unsecured interest or claim against someone else's property, or is the interest of a bailee or nominee.

(5) For greater certainty, the burden of satisfying **[the Court]** on a balance of probabilities that a person is a legitimate owner, a responsible owner or a lawful owner lies on the person claiming it.

14. Effect – Other Court Orders, etc.

(1) The restraint or forfeiture of property pursuant to an order made under this Act is effective despite any law of **[name of State]** relating to bankruptcy of a person or to the winding up of a company in relation to the property - as long as the order is made before the date the person was adjudged bankrupt or the company ordered wound up, or a restraining order was made in relation to the property before that date and remains in force.

(2) The forfeiture of property pursuant to an order made under this Act is effective despite any other court order affecting the property.

15. Application to Set Aside Dealings With Property

(1) The **[Attorney General] [Director of Public Prosecutions]** may apply to **[the Court]** to set aside a dealing with property that contravenes an order made under **section 11.**

(2) **[The Court]** shall set aside the dealing with the property from the day it occurred except if **[the Court]** is satisfied that to do so would clearly not be in the interests of justice, in which case it shall set aside the dealing as of the day on which the order is made and declare the rights of any persons who acquired interests in the property pursuant to the dealing.

16. Forfeiture Order – Effective Ownership

An order made under **section 11** may also contain provisions respecting who is the effective owner of property held by a body corporate or in trust.

17. Application to Set Aside Forfeiture Order

(1) A person who wishes to apply for an order to protect the person's interest in property and who meets the conditions of **section 13** may, not later than [two] years after the forfeiture order is made under **section 11,** apply to set aside the order even if the person did not appear in accordance with **subsection 10(4).**

(2) **[The Court]** shall grant the application under **subsection (1)** only if **[the Court]** is satisfied that to do so would clearly be in the interests of justice, that the person did not receive notice under **subsection 10(3)**, and that after first learning that the order had been applied for or made the person did not unreasonably delay applying to set it aside.

(3) For greater certainty, the order for the protection of a person's property under **subsection (2)** has no effect on the other parts of the forfeiture order made under **section 11.**

18. Limit on Purchase of Forfeited Property

No person who had possession of property or was entitled to possession of property that is affected by a forfeiture order under **section 11** immediately prior to the making of the order - and no person acting on behalf of such a person - shall purchase the property.

19. Contravention of Forfeiture Order

A person who knowingly contravenes a forfeiture order or ancillary order commits an offence punishable upon conviction by:

(a) a fine of [.....] or imprisonment for a period of [.... **years**] or both, in the case of a natural person; or
(b) a fine of [**5 times above figure**] in the case of a body corporate.

Division 4 - Compensation

20. Compensation Order

(1) [**The Court**] may, if satisfied that to do so would clearly be in the interests of justice, make a compensation order, on application to it by a person if

(a) a restraining order was made under this Act;
(b) an application for a forfeiture order under this Act was not granted and the restraining order was revoked; and
(c) the person suffered loss as a result of the operation of the restraining order.

(2) [**The Court**] may, if satisfied that to do so would clearly be in the interests of justice, make a compensation order, on application to it by a person if

(a) a forfeiture order relating to an instrumentality of unlawful activity was made under this Act that affects property in which the person had an interest immediately prior to the making of the order;
(b) in the opinion of [**the Court**], the value of the person's forfeited interest in the property far outweighs its value to the unlawful activity in question; and
(c) the person suffered loss because of the operation of the forfeiture order.

(3) An application under **subsection (1) or (2)** must be made no later than six months after the date of the restraining or forfeiture order and notice of the application must be given to the [**Attorney General**] [**Director of Public Prosecutions**].

Division 5 - Information Gathering

21. Examination Order

(1) The [**Attorney-General**] [**Director of Public Prosecutions**] may apply to [**the Court**] for an order for the examination of any person - and the production by the person of any document about:

(a) the nature, location and value of property that there are reasonable grounds to suspect is proceeds of unlawful activity, an instrumentality of unlawful activity or terrorist property;
(b) the affairs of that person or any other person, to the extent relevant to determining the manner and circumstances in which any person acquired, used, or disposed of the property.

(2) [**The Court**] shall make the order unless [**the Court**] is satisfied that to do so would clearly not be in the interests of justice and shall appoint an examiner to carry out the examination.

22. Examination Notice

(1) The examiner shall, as soon as possible after appointment, give to the person to be examined under **section 21** an examination notice requiring the person to attend at the appointed time and place to be examined by the examiner and to produce any document specified.

(2) The notice must be given no less than **[7 days]** before the time of the examination.

23. Examination

(1) The examination shall take place in private, with the only persons in attendance being the person being examined, his or her counsel, the **[Attorney General] [Director of Public Prosecutions]**, the examiner and any other person that **[the Court]** orders to be present.

(2) The person being examined shall answer all questions put to him or her **[after having taken an oath to tell the truth].**

(3) For greater certainty, a person may not refuse to answer a question or produce a document on the grounds that it might incriminate him or her or make the person liable to a penalty.

24. Admissibility of Answers

An answer given or a document produced in an examination is not admissible in evidence in civil or criminal proceedings against the person examined except

(a) in criminal proceedings for false or misleading information;
(b) in proceedings on an application under this Act;
(c) in proceedings ancillary to an application under this Act;
(d) in proceedings for enforcement of a restraining order or forfeiture order; or
(e) in the case of a document, in civil proceedings in respect of a right or liability conferred or imposed by the document.

25. Offences

(1) A person who fails to attend an examination at the time and place specified in an examination notice that he or she has received commits an offence punishable upon conviction by a fine of **[.....]** or imprisonment for a period of **[..... years]** or both.

(2) A person attending an examination who does any of the following things commits an offence punishable upon conviction by a fine of **[.....]** or imprisonment for a period of **[..... years]** or both:

(a) refusing or failing to [be sworn];
(b) refusing or failing to answer a question that the examiner requires the person to answer;
(c) refusing or failing to produce at the examination a document specified in the examination notice or otherwise required by the examiner; or
(d) leaving the examination before being excused by the examiner.

(3) No offence is committed under **subsection (2)(b) or (c)** if the person could not, in proceedings before a court in **[name of State]** be compelled to answer the question or produce the document, *except if the person could not be compelled for one or more of the following reasons:*

[(a) the person is a [member of a legal profession] and the answer would therefore be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of legal professional privilege; or
[(b) the answer or document would, under a law of **[name of State]** relating to the law of evidence, be inadmissible in legal proceedings for a reason other than because:

(i) the answer would be privileged from being disclosed; or
(ii) the document would be privileged from being produced.][2]

26. Production Orders

(1) A **[police officer/investigating authority]** may apply *ex parte* and in writing to a **[judge in chambers]**, for an order for the production of a document, where there are reasonable grounds to believe that the document exists at a place that is relevant to

(a) identifying, locating or quantifying property that there are reasonable grounds to suspect is the proceeds of unlawful activity, an instrumentality of unlawful activity or terrorist property; or
(b) identifying or locating a document necessary for the transfer of such property.

(2) An application under this section shall be supported by an affidavit.

(3) **[The judge]** may, if he or she considers there are reasonable grounds for so doing, make an order that the document be produced to a **[police officer/investigating authority]**, at a time and place specified in the order.

(4) A **[police officer/investigating authority]** to whom documents are produced may:

(a) inspect the documents;
(b) make copies of the documents; or
(c) retain the documents for so long as is reasonably necessary for the purposes of this Act.

(5) Where a **[police officer/investigating authority]** retains documents produced to him or her, he or she shall make a copy of the documents available to the person who produced them.

(6) A person is not entitled to refuse to produce documents ordered to be produced under this section on the ground that:

(a) the document might tend to incriminate the person or make the person liable to a penalty; or
(b) the production of the document would be in breach of an obligation (whether imposed by a law of **[name of State]** or otherwise) of the person not to disclose either the existence or contents, or both, of the document.

27. Evidential value of information

(1) The production of a document pursuant to an order under **section 26** - or any information, document or thing obtained as a direct or indirect consequence of the production of the document - is not admissible against the person producing it in any criminal proceedings except proceedings under **section 28.**

(2) For the purposes of **subsection (1)**, proceedings on an application for a restraining order, a confiscation order, a forfeiture order or a pecuniary penalty order are not criminal proceedings.

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[2] Please note the section in italics is optional and can be removed on agreement.

28. Failure to comply with a production order

Where a person is required by a production order to produce a document to a [police officer], the person is guilty of an offence against this section if he or she:

(a) contravenes the order without reasonable cause; or
(b) in purported compliance with the order, produces or makes available a document known to the person to be false or misleading in a material particular and does not so indicate to the police officer and provide to the police officer any correct information of which the person is in possession.

Penalty: in the case of a natural person, imprisonment for a maximum of **[.... years]** or a maximum fine of **[.....]**, or both, and in the case of a body corporate **[five times]** the fine.

29. Search Warrant

(1) In respect of an investigation or proceeding under this Act, a **[police officer/investigating authority]** may make an application supported by information **[on oath]** to a **[magistrate/judge]** for a search warrant for a place.

(2) Where an application is made under subsection (1) for a search warrant, the **[magistrate/judge]** may, *subject to subsection (4)*, issue the search warrant if satisfied that there are reasonable grounds to believe that there may be found on or in such place any document or thing:

(a) relevant to identifying, locating or quantifying any property;
(b) relevant to identifying or locating a document necessary for the transfer of property;
(c) which may afford evidence of unlawful activity or the connection between unlawful activity and property

relevant to an investigation or proceeding under this Act.

(3) A search warrant issued under subsection (2) authorises a **[police officer/investigating authority]** (whether or not named in the warrant), with such assistance and by such force as is necessary and reasonable:

(a) to enter in or on the place and to search for any document or thing described in subsection (2); and
(b) to seize any document or thing found in the course of the search that the **[police officer/investigating authority]** believes on reasonable grounds to be a document or thing described in subsection (2).

(4) Where a search warrant is sought for documents described in subsection 26(1), a **[magistrate/judge]** shall not issue a warrant under **subsection (2)** unless he or she is satisfied that

(a) a production order has been given and has not been complied with;
(b) a production order would be unlikely to be effective;
(c) the investigation or proceeding for the purposes of which the search warrant is being sought might be seriously prejudiced if the **[police officer/investigating authority]** does not gain immediate access to the document without any notice to any person; or

(d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained.

(5) A warrant issued under this section shall state:

(a) the purpose for which it is issued;
(b) a description of the kind of documents or things authorised to be searched for or seized;
(c) a time at which the warrant ceases to be in force; and
(d) whether entry is authorised to be made at any time of the day or night or during specified hours.

30. Notice to Financial Institutions

(1) **[A police officer]** who believes on reasonable grounds that a financial institution may have information or documents of a type listed below that would be relevant to deciding whether proceedings ought to be taken under this Act may give written notice to a financial institution directing it to give such information or documents to him or her, namely documents that would be relevant to determining

(a) whether an account is held by a specified person with the financial institution;
(b) whether a particular person is a signatory to an account; and
(c) if a person holds an account with the institution, the current balance of the account.

(2) Despite any other law, a financial institution that has been given a notice under **this section** shall comply with the notice and shall produce the information and documents not later than **[14 days]** after receiving the notice.

31. Offences

(1) Where a financial institution that has been given a notice **under section 31**, knowingly:

(a) fails to comply with the notice; or
(b) provides false or misleading information in purported compliance with the notice,

the institution commits an offence against this **subsection.**

Penalty: in the case of a natural person, imprisonment for a maximum of **[.... years]** or a maximum fine of **[.....]**, or both, and in the case of a body corporate **[five times]** the fine.

(2) A financial institution that has been given a notice under **section 31** shall not disclose the existence or operation of the notice to any person except:

(a) an officer or agent of the institution for the purpose of complying with the notice;
(b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the notice; or
(c) a police officer authorised in writing to receive the information.

Penalty: in the case of a natural person, imprisonment for a maximum of **[.... years]** or a maximum fine of **[.....]**, or both, and in the case of a body corporate **[five times]** the fine.

(3) A person described in **subsection (2)(a), (b) or (c)** shall not disclose the existence or operation of the notice except to another such person, and may do so only for the purposes of the performance of the person's duties or functions.

Penalty: imprisonment for a maximum of **[.... years]** or a maximum fine of **[.....]**, or both.

Division 6 - Evidentiary Provision

32. Conviction Evidence of Unlawful Activity

For greater certainty, the fact that a person has been convicted of an offence is proof, in the absence of evidence to the contrary, that there was unlawful activity.

33. Effect of a person's death

(1) Any notice authorised or required to be given to a person under this Act is, if the person has died, sufficiently given if given to the person's legal personal representative.

(2) A reference in this Act to a person's interest in property is, if the person has died, a reference to an interest in the property that the person had immediately before his or her death.

(3) An order can be applied for and made under this Act:

(a) in respect of a person's interest in property even if the person has died, and

(b) on the basis of the activities of a person who has died.

Division 7 - Confiscated and Forfeited Assets Fund

34. Establishment of the Fund

(1) There is hereby established in the accounts of **[name of State]** an account to be known as the **[name of State Confiscated and Forfeited Assets Fund.]**

35. Receipts and Disbursements

(1) There shall be credited to the Fund :

(a) all moneys derived from the fulfilment of confiscation orders under this Act;

(b) any sums of money allocated to the Fund from time to time by parliamentary appropriation;

(c) any voluntary payment, grant or gift made by any person for the purposes of the Fund; and

(d) any income derived from the investment of any amount standing to the credit of the Fund.

(2) **[The Minister of Justice] [Cabinet]** may authorise payments out of the Fund to

(a) compensate victims who suffered losses as a result of [criminal offences], [terrorism][unlawful activity];

(b) satisfy a compensation order under **section 59.20 or 69**;

(c) enable the appropriate law enforcement agencies to continue their fight against serious offences, terrorism and unlawful activities;

(d) share confiscated property with foreign States pursuant to any relevant treaties or arrangements.

36. Annual Report to Parliament

The **[Minister of Justice]** shall table a report in Parliament, not later than the first sitting day after the expiry of 90 days from the **[end of the fiscal year]** detailing

(a) the amounts credited to the Fund;
(b) the investments made with the amounts credited to the Fund; and
(c) the payments made from the Fund, including the specific purpose for which each payment was made and to whom it was made.

ENHANCING LEGAL CO-OPERATION WITHIN THE COMMONWEALTH: PROPOSAL FOR THE ESTABLISHMENT OF THE COMMONWEALTH NETWORK OF CONTACT PERSONS

Paper by the Commonwealth Secretariat

INTRODUCTION

1. Senior Officials of Commonwealth Law Ministries in their meeting on 18 October 2004 considered the possibility of setting up a Commonwealth Network of Contact Persons (CNCP), including Prosecutors and Competent Authorities, for effective co-operation in criminal matters amongst the members of the Commonwealth. This idea has been taken forward by Paul Wilkins, a Crown Advocate from Guernsey. The purpose of this paper is to outline how a CNCP could work in practice.

2. It is granted that to ensure an effective system of international co-operation in criminal matters, it is essential that there is proper communication between countries. In spite of having proper legislative frameworks, quite often members are not able to effectively co-operate with each other because of lack of information about the legislative and procedural requirements in other countries. This is further inhibited because of the absence of central authorities in many countries or ignorance about the existence of such authorities. In order to get over these difficulties some countries have set up networks of contact persons to enhance co-operation amongst countries in their region by closer and direct interaction with each other. A good example to consider in this regard is the European Judicial Network (EJN) that has been put in place in the European Union to enhance mutual assistance in that region. Following the success of the EJN, similar networks have been set up in South America and between the Portuguese speaking jurisdictions in the world.

BACKGROUND OF OTHER NETWORKS

European Judicial Network

3. The EJN was created by way of a Joint Action on 29 June 1998. Article 2 of the Joint Action provides for the appointment of one or more contact points from each Member State. The number of contact points varies greatly between members. For example, in the Republic of Ireland there are three contact points - two based at the Ministry of Justice in Dublin and one at the Garda Police Headquarters. In the United Kingdom and the Crown Dependencies, there are contact points at the United Kingdom Central Authority at the Home Office, Crown Prosecution Service, Serious Fraud Office, HM Customs and Excise, Metropolitan Police, the Crown Office in Edinburgh, the office of the Director of Prosecutions in Northern Ireland and one contact each for the Crown Dependencies of Guernsey, Jersey and the Isle of Man.

4. France has 49 contact points and Italy has 58 because their legal systems require contact points for each of the major court centres. However, assistance as to which contact point should receive a Letter of Request for Mutual Legal Assistance can be obtained from the respective Ministries of Justice of these countries.

5. The functions of contact points of the EJN are primarily to facilitate *"judicial co-operation between member states, particularly in action to combat forms of serious crime."* Additionally, the EJN indicates that "they shall be available to enable local judicial authorities and other competent

authorities in their own country and to contact points and judicial and other competent authorities in other countries to establish the most appropriate direct contact."

6. The EJN contact points under Article 4 of their establishment "*provide the legal and practical information necessary to the local judicial authorities in their own country, to the contact points and judicial authorities in other countries to enable them to prepare an effective request for judicial co-operation or to improve judicial co-operation in general.*"

7. The purpose of meetings of the Network is to allow the contact points to get to know each other and exchange experiences, particularly concerning the operation of the Network. Additionally, they "*provide a forum for discussion of practical and legal problems encountered by the member states in the context of judicial co-operation, particularly with regard to the implementation of measures adopted by the European Union.* Obligations of information sharing regarding possible legislative changes for improving international judicial co-operation are also a feature of the EJN.

8. In each of the 25 countries that make up the European Union there are a number of contact persons who are responsible for giving advice firstly, to their colleagues as to how to make requests for evidence to other jurisdictions and secondly, to contact persons in other jurisdictions. There are also contact persons in the Crown Dependencies of Guernsey, Jersey and the Isle of Man.

9. In practice, the Network meets for a day every year in Brussels, either in February or March and they discuss, *inter alia*, proposals for EU legislation that may affect the Network. Each year there are two other meetings of the contact persons. These meetings are held in the country holding the presidency of the EU at the time. These gatherings allow contact persons to learn about developments in mutual legal assistance and provide an opportunity to gain knowledge of the legal systems in other states. More importantly, it provides a good platform for the contact persons to get to know each other.

10. Before the establishment of the EJN and the appointment of the contact points, there were many instances when requests for assistance were not made due to ignorance of the mutual legal assistance scheme in another jurisdiction or lack of knowledge about the person to be contacted.

11. Article 8 of the Joint Action requires that each of the contact points must have full details of their colleagues in other member states, access to a simplified list of the judicial authorities and a directory of local authorities in each member state. In addition, there is a requirement that information should be available to contact points concerning the mutual legal assistance legislation and procedure in each member state and access to the text of the relevant Convention. The EJN has developed a website in which details of all the Mutual Legal Assistance Regimes of the member jurisdictions are available for viewing. In addition, following an initiative during the recent Spanish Presidency, there is now a glossary of legal terms available from the EJN website.

12. Article 10 sets out a requirement for consideration to be given to linking contact points by a separate telecommunications network.

13. The EJN has a small Secretariat which has offices at the Eurojust building in the Hague. This is staffed by a prosecutor from Spain, an IT expert and a personal assistant. The EU sets aside approximately Euro250,000 to pay for the Secretariat and a contribution towards the three meetings each year and the website.

The Spanish and Portuguese Speaking Network

14. Following the success of the EJN, on the initiative of the Spanish Ministry of Justice, a Judicial Network was set up between Spain and the Spanish speaking states of South America. The South American Network is closely based upon the one in place in the European Union. More

recently, a similar network was set up between Portugal and the Portuguese speaking jurisdictions around the world.

THE COMMONWEALTH NETWORK – THE PROPOSED SCHEME

15. Practically, it may not be a viable proposition to emulate the exact model of the European Union within the Commonwealth as the geographical expanse of the Commonwealth would not allow for the frequency of the meetings that are held by the EU. However, it may be possible to establish a similar kind of network amongst Commonwealth states and organise meetings on a regional basis or on the fringes of the SOLM meeting. The list of contact persons in the network could be shared with other organisations such as the EJN and a separate web page could be created within the existing website of the Commonwealth for greater co-operation amongst the member countries. This would be very useful to countries with limited resources, particularly the smaller states.

OBJECTIVE OF THE NETWORK

16. The objective of the Commonwealth Network would be to improve mutual legal assistance between the criminal jurisdictions of the Commonwealth. This would be particularly useful in cases of terrorism, organised crime, drug trafficking, corruption and trafficking in human beings.

COMPOSITION

17. Some European jurisdictions have multiple contact points; this has led to a great deal of confusion. In view of this, as far as the Commonwealth is concerned, it would perhaps be better to keep the number of contact points to a minimum. However, the United Kingdom has three separate criminal jurisdictions within its own jurisdiction plus the three Crown Dependencies and the overseas territories. There may well be other Commonwealth countries that are divided up into several separate jurisdictions as far as criminal matters are concerned. Ministers are invited to consider this issue. It would therefore, appear sensible that there should be one contact point for each separate criminal jurisdiction within the Commonwealth.

FUNCTIONS OF THE NETWORK

18. The contact points shall be active intermediaries entrusted with the task of facilitating mutual legal assistance in criminal matters between the criminal jurisdictions of the Commonwealth. They shall be available to facilitate co-operation between the prosecution agencies and other competent authorities in their own criminal jurisdiction and contact points and competent authorities in other criminal jurisdictions in the Commonwealth.

19. The contact points shall provide the legal and practical information necessary to the prosecuting and other competent authorities in their own criminal jurisdictions or to the contact points in other Commonwealth criminal jurisdictions to enable them to prepare an effective request for mutual legal assistance and to improve mutual legal assistance in general. They will improve co-ordination of mutual legal assistance in criminal cases where requests from the prosecution authorities in a Commonwealth criminal jurisdiction necessitate co-ordinated action in other Commonwealth criminal jurisdictions.

FUNCTIONS OF THE CONTACT POINTS

20. The functions of the contact points of the EJN as detailed in Article 4 of the Joint Action of 29 June 1998 have worked well. It would be sensible for the Commonwealth contact points to have similar functions.

MEETINGS OF THE CONTACT POINTS IN THE NETWORK

21. The Commonwealth has two major advantages over the EJN. In the first place, English is the first language of most of its member jurisdictions or at least it is understood by many and secondly, most members have legal systems that have their origins in English common law. The main problem, however, is that the jurisdictions are spread across the globe and as a result it would be both impracticable and expensive to have meetings on a regular basis. There is no doubt about the fact that the meetings of contact points of other Networks have proved to be very useful, when contact points exchange experiences, discuss problems, issues and learn about developments in other jurisdictions. The Commonwealth may, therefore, consider meeting the contact persons on the fringes of the meetings of Senior Officials of Law Ministries and on a regional basis during other meetings or programmes of the Commonwealth. But the network can be really beneficial and cost effective if the contact points make best use of the web site through virtual meetings through the internet.

WEB PAGE AND LIST OF CONTACT POINTS

22. Considering the limited resources, there may not be a separate secretariat for the CNCP. But one person in the Legal and Constitutional Affairs Division of the Commonwealth Secretariat may be designated for the purpose of co-ordination within the member countries. For any network to work properly, it is essential that an up-to-date list of contact points be available. The responsibility of maintaining and distributing the list of contact points may rest with the Criminal Law Section of the Commonwealth Secretariat. To make the network more useful, the information should be put up on a separate web page and this should be maintained and updated regularly. It is envisaged that the Commonwealth Secretariat would devote a web page to the activities of the CNCP. It is the responsibility of each contact point to pass on information relating to changes in laws, procedures, telephone and other contact details and particularly the change of contact persons. Since there is no system of training for the new contact points, the outgoing contact point should explain everything about the Commonwealth network to the new person. An up-to-date and interactive web page could, to some extent, serve the purpose of real meetings. This would be the real answer to the problem of resources and if used properly, the network would advance mutual co-operation.

23. It would also be useful to have an updated list of central authorities, with contact particulars that could then be posted on the web page and distributed to member countries periodically. Clause 4 of the Harare Scheme provides, "Each country shall designate a Central Authority to transmit and to receive requests for assistance under this Scheme" and Clause 31 requires that the Secretary-General be notified of the designated Central Authority for the Scheme. But many countries have yet to designate central authorities and the notification of such designation has not been very encouraging. Such a list would also assist the Secretariat in responding to requests for contact authorities.

CONTACTS WITH OTHER NETWORKS AND COUNTRIES

24. In order to make the network interact with countries outside the Commonwealth, it is essential to establish a good working relationship with other networks and maintain regular contacts with them. The Commonwealth Secretariat may request other networks to allow one of its representatives to attend their meetings as an observer and similar offers may be given to them to interact with the Commonwealth.

25. It would be unfortunate if no effort were made by the Commonwealth network to establish contact with the EJN and the Spanish and Portuguese Networks. Contact could be established via the EJN Secretariat in the Hague which would be able to assist in establishing contact with appropriate contact points in the Spanish and Portuguese speaking world as and when required. In order to establish a good working relationship with the other networks it would be advisable if one of

the European Commonwealth contact points visited the EJN Secretariat in The Hague soon after the establishment of the Commonwealth network.

26. In addition to making contact with other networks, the justice ministries in large jurisdictions that are not part of any network, for example the United States of America, should perhaps be contacted and made aware of the existence of the Commonwealth network.

COST

27. Since there will not be a permanent secretariat and the web page can be put up on the existing Commonwealth website, the cost of establishing the network and running it should not be prohibitive. The travel and other incidental expenses for attending meetings of other networks may be met from out of the normal travel budget of the Commonwealth Secretariat and efforts may be made to combine it with other meetings. Donor countries may be approached to fund regional meetings. One member of the Commonwealth Secretariat's staff could have responsibility for maintaining the list of contact points and disseminating details of new procedures and legislation notified by member jurisdiction.

SENIOR OFFICIALS

28. Senior Officials saw value in the development of a network, similar in concept to the EJN but adapted to Commonwealth circumstances, to facilitate the whole mutual assistance process. They asked the Commonwealth Secretariat to develop this proposal and also to consider model legislation or other material or programmes that could assist with the enhancement of the effectiveness of the Scheme. It was noted that following the adoption of mutual assistance legislation, small jurisdictions could face a flood of requests which could overwhelm an office with limited resources. Senior Officials requested the Secretariat to consider ways in which it could assist small states in this respect through the development of the CNCP and by devising programmes that would assist with the capacity building and management of the system.

SUMMARY

(i) Given the success of the EJN, it forms a good precedent for the CNCP but there will be a need to take account of the wide geographical spread of the Commonwealth.
(ii) The functions of the CNCP should be based upon those detailed in Article 4 of the Joint Action of the European Council of 28 June 1998 that established the EJN.
(iii) Each criminal jurisdiction should have at least one contact point.
(iv) The Commonwealth Secretariat shall be responsible for maintaining the list of contact points and distributing information on national developments provided to it by the contact points.

29. Law Ministers are invited to consider the operation of a CNCP as outlined herein. A draft framework for the CNCP is attached at Annex. If Law Ministers consider that such a network should be established, they may also wish to mandate the Secretariat to implement the proposed scheme, with any other suggestions that would be most appropriate to the Commonwealth.

COMMONWEALTH NETWORK OF CONTACT PERSONS (CNCP)
FRAMEWORK OF THE CNCP

Article 1

Establishment

A network of contact persons, including prosecutors and competent authorities shall be established amongst the criminal jurisdictions of the Commonwealth hereinafter referred to as the Commonwealth Network of Contact Persons (CNCP).

Article 2

Objective

The objective of the CNCP is to improve and enhance mutual legal assistance and co-operation amongst the criminal jurisdictions of the Commonwealth.

Article 3

Composition

1. The CNCP shall comprise of at least one contact point from each of the criminal jurisdictions of the Commonwealth.

2. The Commonwealth Secretariat shall designate one of its officials to co-ordinate the activities of the CNCP.

Article 4

Functions of the Network

The CNCP shall, in particular:

(a) facilitate the establishment of appropriate contacts between contact points in the various criminal jurisdictions of the Commonwealth in order to carry out the functions laid down in Article 5;
(b) meet periodically, as arranged by the Commonwealth Secretariat, to review activities;
(c) make every effort to collaborate with other Networks; and
(d) contact points, through the Commonwealth Secretariat, shall distribute any changes in legislation or procedure introduced within their jurisdiction

Article 5

Functions of Contact Points

1. The contact points shall facilitate mutual legal assistance in criminal matters between the criminal jurisdictions of the Commonwealth. They shall enable the most appropriate direct contacts between prosecution agencies, other competent authorities and contact points in Commonwealth criminal jurisdictions.

   They may if necessary travel to meet other contact points, on the basis of an agreement between the administrations concerned.

2. The contact points shall provide legal and practical information to prosecution agencies, other competent authorities and contact points in Commonwealth criminal jurisdictions to improve mutual legal assistance.

3. They shall aim to improve co-ordination of mutual legal assistance in criminal cases where a series of requests from a Commonwealth criminal jurisdiction necessitates co-ordinated action in another Commonwealth criminal jurisdiction.

Article 7

Meetings

1. Contact points shall endeavour to meet periodically to revise the activities of the CNCP.

2. The aims of the periodic meetings of the Commonwealth Prosecutors Network shall be as follows:

   (a) to allow the contact points to get to know each other and exchange experiences;
   (b) to provide a forum for discussion of practical and legal problems encountered in member jurisdictions in connection with the provision of mutual legal assistance in criminal matters.
   (c) through the Chairperson the meeting of contact points may pass to the Commonwealth Secretariat any information or collective opinions which may assist the Secretariat in its work.

Article 8

Election of Chairperson of Meetings

At the start of each meeting of contact points a chairperson for the meeting shall be elected. Each candidate for election as chairperson must be proposed and seconded by contact points. In the event of the chair being contested there shall be a vote by secret ballot and the person having the most votes will be elected.

Article 9

Role of the Commonwealth Secretariat

Activities of the network should be co-ordinated by the Commonwealth Secretariat which duties will include, *inter alia*:

1. to maintain an up-to-date list of Contact Points;
2. to maintain an up-to-date web page concerning the activities of the CNCP;
3. to facilitate meetings of Contact Points;
4. to disseminate information amongst Contact Points.

FURTHER INITIATIVES IN CAPACITY BUILDING TO COMBAT TERRORISM

Paper by the Commonwealth Secretariat

BACKGROUND

1. At their Meeting in St. Vincent and the Grenadines, Law Ministers had mandated the Commonwealth Secretariat to assist member countries in the implementation of the United Nations Security Council Resolution 1373 (UNSCR 1373) in carrying on with its programme of developing legislative provisions on Counter Terrorism and the training of prosecutors and law enforcement officers. They specifically identified the need to develop law enforcement networks for exchange of information and co-operation and asked the Commonwealth Secretariat to arrange relevant training programmes. In response to this mandate, training programmes for prosecutors and law enforcement officials have been carried out over the past year.

2. Law Ministers had highlighted some critical issues concerning: (i) abuse of technology; (ii) tracking and disrupting the movement of terrorists and preventing abuse of travel documents; and (iii) the abuse of refugee systems. They asked the Commonwealth Secretariat to undertake further work in this area. They had also mandated Senior Officials to consider how member countries could be assisted with training and capacity building in enforcement contexts such as border control and the prevention of counterfeiting of identity papers and travel documents and to look into appropriate measures that may be put in place for preventing the abuse of refugee systems by terrorists and persons planning terrorist activities.

3. Senior Officials recalled the relevant recommendations of the Commonwealth Expert Group on the implementation of UNSCR 1373 including those on the abuse of refugee systems and border control but noted that many small and developing countries lacked the means to meet the heightened technological requirements, for example for machine-readable passports. They agreed to recommend to Law Ministers that the Commonwealth Secretariat should seek to take initiatives in this field including work to develop programmes for training relevant personnel and best practice guidelines and to assist in the development of co-operation, regionally and sub-regionally, on the sharing of information. The importance of ensuring appropriate co-ordination and avoiding duplication with existing initiatives was also noted.

4. At their meeting in London, Senior Officials considered these issues and recommended placing the initiatives before Law Ministers.

INITIATIVES

Abuse of Technology

5. There can be little doubt of the serious threat posed by possible acts of terrorism involving the abuse of technology or aimed at the disruption or destruction of technology systems. There are several examples of how technology such as cellular phones, computers and computer systems and other electronic devices can be employed to carry out terrorist acts. Also, there is a very real danger that terrorists may carry out acts aimed at crippling essential services, infrastructures or communications systems by attacking the underlying technology that supports these systems and structures.

6. At their Meeting in 2002, Law Ministers had commended the Commonwealth Model Law on Computer and Computer-Related Crime (MLCCRC) to member states for use in developing domestic laws in this area. At the same time they had also mandated Senior Officials to keep the MLCCRC under review to ensure that it was kept up to date with regard to emerging technology and investigative techniques.

7. While the adoption of a solid legislative base is important, there is an equally important need to enhance the capacity of law enforcement and prosecution authorities through training programmes in this field.

8. Similar considerations arise with respect to preventing acts of terrorism aimed at technology. The Commonwealth Model Legislative provisions on Measures to Combat Terrorism address this issue by including the following language in the definition of a "terrorist act":

> "an act or threat of action in or outside ..... (name of country) which –
>
> (a) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;"

Action Sought

A1. Law Ministers may wish to consider further work that can be undertaken by the Secretariat to enhance the capacity of member countries to combat the abuse of technology and to prevent terrorist acts aimed at such technology and may also wish to consider that further work be undertaken to review the content of this model law in terms of any recent changes or developments. They may also consider if any additional legislation is required to address the broader issue of abuse of technology generally.

A2. Some possible areas for consideration are highlighted below.

(i) To organise workshops for legislative drafters to help those countries that do not have the relevant legislation.

(ii) To organise workshops for law enforcement officers and prosecutors to enhance their capacity to investigate and prosecute these crimes, in tune with international best practices.

Tracking and Disrupting the Movement of Terrorists and Preventing Abuse of Travel Documents

9. Terrorist activities are mostly clandestine. International terrorism has a wide transnational reach which necessitates travel to target countries to carry out terrorist operations and escape from those countries after acts have been committed. There is also a need for members of terrorist groups to meet and plan their activities which also involves international travel. Terrorists can use illegal means to facilitate their movements across borders and within states or, as in the case of the 11 September hijackers, they may travel legally as ordinary passengers. The use of both legal and illegal methods creates particular challenges for law enforcement authorities attempting to track their movements. To effectively prevent and combat terrorism, particularly international terrorism, the importance of tracking and disrupting the movement of terrorists cannot be over emphasised. If travel plans can be detected and disrupted, this can successfully thwart a terrorist attack.

10. Alien terrorists are adept at identifying and taking advantage of weaknesses in immigration and refugee systems to gain entry into other states and as such they can easily "slip the net", without alerting the law enforcement system. Similarly, there are many countries where flaws in travel

documentation and the review systems allow for easy forgery of papers or the undetected use of fraudulent documents. These failings can be exploited by terrorists to facilitate their activities.

11. The necessity for countries to have effective border controls to prevent free movement of terrorists was highlighted in the UN Security Council when they considered Resolution 1373. Article 2(g) of the Resolution provides:

> "Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;"

12. In the development of model legislative provisions, aimed at assisting countries with the implementation of the Resolution, a Commonwealth Expert Group meeting was held to consider the relevant issues and to prepare drafting instructions for that model. The Expert Group issued a report which contained, *inter alia*, recommendations for measures to effectively implement the Resolution.

13. In considering the obligation in Article 2(g), the Commonwealth Expert Group recommended various measures that could be adopted. These included providing for the transmission of passenger information from private industry, in particular airline companies, to relevant government authorities, ensuring adequate powers for the sharing of information by border control officers and reviewing existing laws relating to:

(i) the counterfeiting or forging travel or identity documents;
(ii) the fraudulent use of travel or identity documents;

to ensure that they are sufficient and that all of the offences carry appropriate penalties.

14. They were of the view that each country would have to adopt an approach that was most appropriate, within the particular context of the country and region and taking into account resource and capacity restrictions. The Group also noted that careful consideration would have to be given to the relationship between these provisions and any applicable privacy/data protection laws and an appropriate balance be struck in that regard.

15. With respect to any legislation allowing for the dissemination of information, particularly information held by private industry, the Group highlighted the need for legislative protection in terms of use, limitations, confidentiality and the scope of information available. The Secretariat has captured this recommendation in the model legislative provisions that it has prepared and made available to member countries. The Secretariat has also taken steps through its workshop programme and specific technical assistance to help member countries adopt the legislative provisions or adapt them to their needs, as part of capacity building in this area.

16. However, the obligations arising from Article 2(g) of UNSCR 1373 are not met only through legislative enactments. There is more, outside the legislative framework, that countries need to do to achieve their goals. The Group also recognised this and made the following additional recommendations to member countries.

- Review and enhance procedures for border checks and the issuance and examination of travel documents, including, if possible, using centralised data bases for checks by immigration, customs and law enforcement authorities and improving the quality of immigration documents such that it is more difficult to forge them.

- Adopt, or improve, arrangements with other countries for exchange of information relating to border checks.

Action sought

A3. To assist member countries in realising these objectives, Law Ministers may wish to consider action that could be undertaken by the Secretariat. Some possible areas for consideration are highlighted below.

- **To develop training programmes directed at enhanced capacity to provide adequate security at border posts.**
- **To train immigration officials to detect counterfeit documents.**
- **To train airport security personnel in detecting counterfeit documents and in identifying travellers.**
- **To facilitate the transfer of technology and technical assistance for sophisticated equipments to enable verification of authenticity of travel documents.**
- **To undertake a review of immigration laws in the Commonwealth and to make model legislative provisions aimed at rationalising and harmonising laws and procedures to make them in tune with the requirement of modern times. This may be undertaken jointly with the International Organisation for Migration (IOM) and the UNHCR.**
- **To undertake a review of laws governing the movement of cash and other instruments across borders and to make model legislative provisions aimed at rationalising and harmonising laws and procedures to make them in tune with the requirement of modern times, particularly Special Recommendation IX of the Financial Action Task Force (FATF) relating to the Financing of Terrorism.**
- **To train customs and other law enforcement officials in the detection of illegal movements of cash and other instruments across international borders.**
- **To facilitate, as part of the Criminal Law Section's programme of attachments and secondments, the inclusion of immigration officers.**

<u>Abuse of Refugee Systems</u>

17. It is clear that refugee systems can be misused by terrorists seeking to gain entry to a country. At the same time, there are sensitive and difficult issues that need to be considered in the development of measures to prevent such abuse. There is an understandable need for countries to enhance security safeguards against the abuse of international asylum regimes, but it would be a terrible irony if those who flee terror become the unwitting victims of the fight against terrorism.

18. It must be recognised that the overwhelming majority of asylum seekers have nothing to do with terrorism and terrorists acts. It is essential to maintain and strengthen the international protection regime that has long existed to protect genuine refugees and the fight against terrorism should not result in the weakening of that system. But it is equally clear that terrorists can use refugee systems and a claim of refugee status to facilitate cross border movements. The perpetrators of terrorism can join refugees fleeing into neighbouring countries. A claim of refugee status can be orchestrated to gain access to a target country. There is also the very real danger that persons who are granted asylum from political persecution may continue to organise terrorist activities from the country of asylum and use their status as a shield against any efforts to bring them to justice.

19. Therefore, in addressing concerns regarding the refugee system, a balance needs to be achieved between effective and fair protection for refugees and safeguards against abuse and misuse.

20. UNSCR 1373 raises the issue of abuse of refugee/asylum systems by terrorists and recognises the need for a balanced approach that takes into account the mandates of national and international law and human rights standards as well as security concerns. Articles 3(f) and (g):

> "Calls upon all States to:
>
> (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
>
> (g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts....."

21. The Group also considered this issue in their deliberations and highlighted as well the need to strike a balance between the various important interests and obligations involved. Member countries needed to respect and fulfil obligations to refugee claimants under applicable international conventions, while at the same time ensuring that the refugee process was not misused by individuals involved in terrorist activities to obtain safe haven.

22. The Group went on to consider and recommend some possible legislative provisions that would better safeguard the process against abuse, including an executive power to preclude consideration of a refugee claim where the authority was of the view that the individual had, is, or would be involved in terrorist activity. This power would serve to protect the public and prevent safe havens. At the same time, judicial review could be employed to protect the rights of the individual in such cases. A legislative provision to this effect has been incorporated into the Commonwealth model.

23. The Group also recommended that, if applicable, member countries:

- review and, where necessary, enhance procedures for the consideration and determination of refugee status;
- enhance the training of personnel responsible to process and consider refugee applications.

24. These recommendations identify some practical measures that can be undertaken by the Secretariat to advance the mandate of Law Ministers.

- Consideration could be given to the development of tools such as a best practice guide that would assist member countries in the review and enhancement of refugee status provisions.
- To implement the recommendations on training, a wide, holistic approach would probably be the most effective. Training of persons involved in vetting asylum seekers, though central to the point, is not the only solution. Other personnel involved in the administration of asylum applications and control of borders should also receive the training.
- Relationships with neighbouring countries from which or through which asylum seekers enter applicant countries could also be looked at. Methods for effective sharing of information, particularly on a regional basis, could be examined. This work could be carried out in partnership with relevant regional and sub-regional bodies.

Action sought

A4. Law Ministers may wish to consider action that can be undertaken by the Secretariat to assist countries in preventing the abuse of refugee systems possibly including:

- **the development of best practice guidelines for refugee system procedures;**
- **the training of immigration and related personnel on the application of refugee conventions and laws;**
- **facilitating co-operation, regionally and sub-regionally, on the sharing of information to assist in the identification and tracing of persons suspected of involvement in terrorist activities or groups or the movement of terrorist funds;**
- **establishing and/or strengthening channels of communication between competent authorities and agencies to facilitate rapid exchange of information.**

<u>Abuse of Charities or Non-Profit/Non-Governmental Organisations</u>

25. The NGO sector, comprising Charities or Non-Profit/Non-Governmental Organisations, has been identified as the most vulnerable sector that may be abused by criminals and terrorist organisations. This concern has been articulated in such documents as FATF Special Recommendation VIII. Charities or Non-Profit/Non-Governmental Organisations may be used by terrorists or terrorist organisations for the movement of funds or for funding terrorist activities in the guise of legitimate entities. Many countries do not have any regulatory framework in place and many of those who have, are not clear as to how a regulator should behave. There is also a lack of understanding relating to supportive activities that ensure that the NGO sector is positively developed and not inhibited by excessive regulation. It is, therefore, essential that a proper Code of Conduct, for regulating both the Charities/NP/NGOs and also the Regulators, is framed for Commonwealth countries.

Action Sought

A5. Law Ministers may consider asking the Secretariat to undertake a programme to develop a Code of Conduct, based on international best practices. The Code should aim at improving the capacity of states to effectively regulate NGOs whilst at the same time ensuring that the growth of this sector is not adversely affected.

REVISED COMMONWEALTH STATEMENT OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME

Paper by the Commonwealth Secretariat

1. At their last Meeting in Kingstown in 2002, Law Ministers considered a draft Commonwealth Statement presented to them by the Commonwealth Secretariat, and referred it to Senior Officials for further consideration and refinement. In preparation for the Senior Officials Meeting (London 2004) the Secretariat wrote to all Commonwealth Law Ministries requesting comments on the draft. Based on the responses received, the Secretariat prepared a number of possible amendments to the Kingstown Draft which it presented to Senior Officials for their consideration.

2. In considering the proposed amendments to the draft Statement, Senior Officials discussed *inter alia*, the following issues:

- the need to strike an appropriate balance between the need to protect the interests of victims and the need to ensure that the rights of accused persons are not overridden;
- the need to ensure that the role of the prosecutor remains impartial;
- in respect of parole hearings, the need to allow for flexibility in the wording such that victims have a choice as to whether or not they want to make representations and also to take into account the fact that not all countries have provisions for parole hearings;
- the need to limit the scope of the Statement to cover serious crime only and not all crimes;
- in respect of Restitution Orders, the issue of the time that this could take and the need perhaps to limit such orders to uncontroversial cases or uncontested quantum of damages;
- the possibility of making specific reference to the rights or interests of vulnerable victims, for example children, and in particular children who have been the subject of abuse or victims of sexual crime;
- the need for sensitisation of judicial officers on the issues covered by the Statement.

3. Senior Officials decided to constitute a small working group to consider in detail the Statement and agree on the detail and wording of the amendments to be made to the Statement. The Working Group produced a re-drafted Statement which was then agreed to by the plenary of the Senior Officials Meeting.

4. Senior Officials then decided to recommend to Law Ministers a revised Draft Statement as annexed to this paper. Law Ministers are asked to consider and adopt the Draft Statement in its revised form.

ANNEX

DRAFT COMMONWEALTH STATEMENT OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIMES

Commonwealth Law Ministers recall the adoption by the United Nations General Assembly of Resolution 40/34 which recognised "that the victims of crime and the victims of abuse of power, and also frequently their families, and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders", and the adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Basic Principles);

Commonwealth Law Ministers reaffirm the principle that victims must be treated with courtesy, compassion and respect for personal dignity.

To express their commitment to the Basic Principles, Ministers agree that member countries would give consideration to the national implementation of measures designed to give practical effect to these Principles, in particular for serious crime. They believe that:-

1. Guidelines and training programmes should be developed to ensure that Police:

- are sensitive to the needs of victims;
- are informed, knowledgeable, and supportive of existing social services and programmes for victims;
- introduce, to the extent possible, procedures consistent with legal requirements to allow for the prompt return of property to victims, including the consideration of alternative methods of retaining and introducing evidence such as the use of photographs; and
- establish procedures to ensure that, to the extent possible, victims of crime requiring information are periodically informed of the general status of investigations, taking into consideration the need to ensure the proper administration of justice.

2. Prosecutors, in the exercise of their powers and performance of their duties as officers of the court, should:

- be sensitised to the fact that public interest should specifically take into consideration the views of victims, including consideration of pre-trial sessions with victims for this purpose, if possible and appropriate;
- endeavour to provide information to victims – either directly or through another authority - about the status of the case such as scheduling, progress, final outcomes and general reasons for those outcomes;
- to the extent possible and appropriate taking into account all of the relevant fair trial interests, bring to the attention of the court the views, if any, of victims of serious, in particular violent crime, on bail decisions, postponements, sentencing and restitution;
- take appropriate action with respect to any persons who harass, threaten, injure or otherwise attempt to intimidate or retaliate against victims or witnesses, including referring the matter to the police or considering seeking the withdrawal of bail or the revocation of parole;
- use a victim and witness on-call system, where practicable, to ensure that victims do not waste time unnecessarily in court;
- to the extent possible, introduce procedures consistent with legal requirements to allow for the prompt return of property to victims, including the consideration of

alternative methods of retaining and introducing evidence such as the use of photographs;
- establish and maintain liaison with victim support structures; and
- be sensitised to the trauma and well being of victims of serious crimes.

3. Parole Boards and other similar mechanisms, in the performance of their functions, should, to the extent possible and appropriate, give consideration to allowing victims of crime, their families, or their representatives to make known the effect of the offender's crime on them.

4. Law Ministers may propose for the consideration of the Chief Justices and other members of the Judiciary of their respective jurisdictions, the following suggestions that they believe will assist in the achievement of national adherence to the Basic Principles:

- encouraging participation in a training programme sensitising judges to the needs and interests of victims of crime in relation to the judicial process;
- allowing victims and witnesses to be on-call for court proceedings where practicable;
- in so far as possible, ensuring that their court officials establish separate waiting rooms for prosecution and defence witnesses;
- means by which members of the judiciary can bear their share of responsibility for reducing court congestion by ensuring that all participants fully and responsibly utilise court time;
- to allow, to the extent possible and appropriate taking into account all of the relevant fair trial interests, the views, if any, of victims to be made known to the court at bail hearings, postponements, sentencing and restitution hearings;
- sensitising judges, where applicable, to consider ordering restitution to the victim in appropriate cases where such orders are possible;
- ensuring that, after having given any evidence, the victim's attendance at the trial is facilitated if he or she so wishes and, as requested, a member of the victim's family as well; and
- giving substantial weight to the victim's interest in the speedy return of property before trial in ruling on the admissibility of photographs of that property as being sufficient evidence.

5. Ministers also agree that they will give consideration to the passage, where necessary or appropriate, of legislation that will assist in the realisation of adherence to the Basic Principles. They further agreed that national consideration should be given to the development of appropriate mechanisms designed to provide assistance to the victims. They recognise that the precise form that such mechanisms could take must remain a matter for national decision, taking into account economic, social and cultural norms of each member country.

JUSTICE AND GOOD GOVERNANCE ISSUES

EXPLANATORY MEMORANDUM TO THE DRAFT MODEL BILL ON THE PROTECTION OF PERSONAL INFORMATION AND THE RECOMMENDATION FROM SENIOR OFFICIALS TO LAW MINISTERS

1. At the 2002 Commonwealth Law Ministers and Senior Officials Meeting in Kingstown, St. Vincent and the Grenadines, Senior Officials agreed that the Model Bill on the Protection of Personal Information needed more reflection on the balance between privacy and the legitimate needs of governments in respect of law enforcement and security. Senior Officials therefore recommended that Law Ministers refer back the matter for further consideration and asked the Secretariat to prepare an amended draft in light of written comments from governments. On the basis of this request, the Commonwealth Secretariat sought expert views from the UK Information Commissioners Office. The following analysis was received from them and is based on UK legislation (the UK Data Protection Act 1998).

2. The UK's Data Protection Act 1998 is based on a set of enforceable standards for handling personal information, 'the data protection principles', and on a set of individuals' rights. The standards for handling personal information require that personal information be:

- obtained and handled fairly and lawfully;
- obtained for specified and lawful purposes;
- adequate, relevant and not excessive;
- accurate and up-to-date;
- not kept for longer than is necessary;
- processed in accordance with individuals' rights;
- kept secure;
- not transferred overseas unless there is adequacy of protection.

3. The Data Protection Act 1998 gives the individual a right to:

- gain access to information held about him or her;
- prevent records being used for direct marketing;
- appeal decisions made solely by automatic means;
- obtain compensation in certain circumstances;
- have records rectified, blocked or erased in certain circumstances.

4. The Act also contains certain 'conditions for processing'. These are essentially 'gateways' that restrict the purposes for which personal information can be processed. These have a particular effect on the processing of sensitive personal information, such as that concerning the offences that a person has committed. The way the legislation works in the UK is that all the information standards must be adhered to, and all the individuals' rights delivered, unless a particular exemption applies. However, the Act contains several exemptions that can be applied in the contexts of law enforcement and national security.

Law Enforcement

5. Personal information processed for the prevention of crime or for the apprehension or prosecution of offenders, such as information contained in intelligence records held by the police, is exempt from the requirement to obtain information fairly and lawfully. The normal standard under data protection law is for the individual to be informed when and why information about him or her

is being collected. Clearly it would not be possible for policing to be carried out effectively should law enforcement agencies always be required to tell individuals that information about them has been obtained, for example as part of an on-going policing operation. However, the exemption only applies to the extent to which the requirement to information fairly and lawfully would *prejudice* the purposes of crime prevention or the apprehension or prosecution of offenders. This means in practice that law enforcement agencies are, in some circumstances, free to collect information about individuals covertly but are, in general, bound by the legislation's transparency provisions.

6. As mentioned above, the UK legislation contains certain 'conditions for processing' which, in effect, places additional restrictions on the processing of personal information, particularly sensitive information. However, there is a condition that can be satisfied where the processing is necessary for the administration of justice, for the exercise of functions conferred under an enactment or for the exercise of crown or governmental functions. In general, the processing of personal information done by law enforcement agencies as part of their official duties will fall within the terms of this condition for processing. This aspect of compliance with the law is not, therefore, generally a problem for law enforcement agencies.

7. There is also an exemption from the right of subject access in circumstances where to grant access would prejudice the purposes of crime prevention or the apprehension or prosecution of offenders. In practice, this means that where an individual applies for access to records held by a law enforcement agency, the agency must make a careful assessment of the personal information it holds about the applicant and must decide whether or not to release some, all or none of the information. Typically an individual will be provided with his or her criminal record and with some locally held intelligence data. The individual will not, though, be provided with information about on-going cases where its provision would prejudice crime prevention or the apprehension or prosecution of offenders.

8. It should be noted that the UK Information Commissioner receives a considerable number of complaints and queries about access to, and the contents of, law enforcement agencies' records. They often detect problems, for example where access has been denied where there is no proper basis for doing so, or where one person's file has been confused with that of another. They frequently encounter problems to do with the timeliness and quality of intelligence data held by law enforcement agencies. In the UK certain offences become 'spent' for the purposes of the Rehabilitation of Offenders Act 1974, yet sometimes police forces fail to record properly that an offence has become spent; this can clearly have a very serious effect on the individual. They also encounter problems where details about an individual's offences have simply been recorded wrongly, or where an unsubstantiated allegation is recorded as if proven fact. Given these problems, it seems that a statutory right of access to law enforcement agencies' files, and the adherence to good information handling standards by law enforcement agencies, make these agencies more transparent and accountable than they would otherwise be. Ultimately law enforcement agencies' compliance with the rules of data protection is a key safeguard for the functioning of a democracy. There seems to be no evidence to suggest that the application of the Data Protection Act 1998 to law enforcement agencies prevents their effective functioning. As explained earlier, there are exemptions that allow a proper balance to be struck between the law enforcement agencies' need to collect and use information about individuals and individuals' rights in respect of information kept about them. There is no reason why these exemptions should not be replicated in law to be used in Commonwealth countries.

9. To summarise, the UK Data Protection Act 1998 contains exemptions from:

- the 1st data protection principle (fair/lawful processing, including obtaining);
- the right of subject access; and
- the Act's non-disclosure provisions.

These exemptions are qualified by a 'prejudice test'. This means, for example, that subject access should normally be granted, but can be withheld where to provide access would prejudice the prevention or detection of crime or the apprehension or prosecution of offenders. It seems that our model law broadly replicates the provisions found in the UK law - see for example s.11(c) of our model law, although the prejudice test is absent. Similarly s.13(1)(f)(i),(ii) of our model law will have an effect similar to that of s.29(3)(a) of the UK law, and it does contain a test of necessity, which though different to a test of prejudice, could have a similar effect. It is clear from the UK law that exemptions relating to security and law enforcement need not be particularly complicated or elaborated. In short, the exemptions in the UK law negate the transparency provisions (fair notice, access rights) and the provisions prohibiting the disclosure of information where the application of those provisions would prejudice the purposes of law enforcement.

National Security

10. The UK's National Security agencies enjoy very wide exemption from the provisions of the Data Protection Act 1998 where exemption is required for the purpose of safeguarding national security. There is exemption from all the data protection principles, from all the individuals' rights, from the Information Commissioner's powers of enforcement and from the Act's prohibition on obtaining personal information unlawfully. Cumulatively, the effect of these exemptions is that the Data Protection Act 1998 has no significant impact on the work of the UK's National Security agencies.

11. **Note: The UK Data Protection Act 1998 deals with the private and public sectors.** The draft model law on the protection of personal information applies only to the private sector. Law enforcement and security agencies are normally public sector bodies. The main data protection rules applying to policing and security agencies are set out in the Model Law on Privacy, which applies to the public sector. The Draft Model Bill on the Protection of Personal Information does not therefore deal with the activities of policing and security agencies to any great extent, nor need it, given that these agencies are not private sector bodies. However, on occasion private sector bodies do become involved in security and law enforcement matters, for example where a private company finds evidence of crime and needs to disclose personal information to the police for law enforcement purposes.

12. On the basis of these findings, Senior Officials of Commonwealth Law Ministries at their meeting in London, 18-20 October 2004, raised points of clarification on the rationale for the definition of the word 'individual' and enquired into the legal basis for having provisions regarding information kept extending to deceased persons. Questions were also asked to clarify the reasons why the model law should be extended to cover unstructured files and whether information would be disclosed to a third party having parental authority over a minor. The delegates also raised questions about whether it would be worthwhile to adopt a consolidated law instead of two separate model laws, one for the public and private sector. One of the concerns raised by countries was over the issue of striking a balance between preserving a police investigation and the rights and interests of an individual who may need to preserve evidence to prove his innocence.

13. It was noted that the decision of whether provisions regarding information should be extended to unstructured information was a decision for individual member countries. Delegates were cautioned however that definitions should be comprehensible and workable in practice, and that information to which the Act applied needed to be useful information, or information which has some power to it, hence the need for its protection. Members were also advised that there were no hard and fast rules regarding disclosure but that decisions should be made based on the circumstances of each situation and what was reasonable in the circumstances. It was acknowledged that some areas of the law required a balancing test, but that UK law usually acted in favour of the

police in situations where giving information to a person would likely prejudice the prevention or detection of crime.

14. With reference to suggestions made for consolidation of information, it was acknowledged that there was need for public and private sector legislation to be compatible in their ability to work together but at the same time recognising the different regulatory needs of institutions in each sector.

15. Senior Officials recognised the need to encourage global harmonisation of privacy laws in order to ensure that the expectation of citizens to have their personal information protected, regardless of where they travel, was realised. Overall, there was wide support for the proposed bill in that its provisions successfully balanced the interests of law enforcement and national security organisations.

16. Law Ministers are invited to approve the attached model bill **(Annex)**.

ANNEX

DRAFT MODEL LEGISLATIVE PROVISIONS
PROTECTION OF PERSONAL INFORMATION ACT *[.....]*

Arrangement of Sections

PART I

PRELIMINARY

Section

PART II

PROCESSING OF PERSONAL INFORMATION

PART III

DUTIES OF ORGANISATIONS WITH RESPECT TO RECORDS OF PERSONAL INFORMATION

PART IV

ACCESS TO PERSONAL INFORMATION

PART V

INVESTIGATION OF COMPLAINTS

BILL

for

AN ACT to make provision for the recognition of the privacy of individuals by protecting personal information processed by private organisations, and for connected matters.

BE IT ENACTED by the Parliament of *[name of country]* as follows:

PART I

PRELIMINARY

Short title

1. This Act may be cited as the Protection of Personal Information Act, *[year of enactment]*.

Commencement

2. This Act shall come into operation on a day to be appointed by the Minister, by Order published in the *Gazette*.

Object of Act

3. The object of this Act is to regulate the processing of personal information by private organisations in a manner that recognises the right of privacy of individuals with respect to their personal information and the need of those organisations to process personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Interpretation

4. In this Act -

"agent", in relation to an organisation, means a person, whether or not the person is employed by the organisation and whether or not the person is being remunerated, when the person acts for or on behalf of the organisation in performing functions with respect to personal information;

"collect", in relation to actions of an organisation that has custody or control of personal information means to gather, acquire or obtain the information by any means from any source outside the organisation or its agents, and "collection" has a corresponding meaning;

"correct", in relation to personal information, means to alter that information by way of correction, deletion, or addition; and "correction" has a corresponding meaning;

"data" means information which -

(a) is recorded with the intention that it should be processed; or
(b) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system;

"de-identify", in relation to personal information of an individual, means to remove any information that –

(a) identifies the individual;

(b) can be manipulated by a reasonably foreseeable method to identify the individual; or
(c) can be linked by a reasonably foreseeable method to other information that identifies the individual or that can be used or manipulated by a reasonably foreseeable method to identify the individual;

"disclose", in relation to personal information in the custody or under the control of an organisation, means to make the information available to an organisation that is not an agent of the disclosing organisation, and "disclosure" has a corresponding meaning;

"individual" means, in relation to personal information, the individual, whether living or deceased, with respect to whom the information is or was collected, used or disclosed;

"head" in relation to an organisation means the person responsible for the overall management of the organisation including its policies and practices;

"information practices" in relation to an organisation, means the policy of the organisation for actions in relation to personal information, including -

(a) when, how and the purposes for which the organisation is to collect, use, modify, disclose, retain or dispose of personal information;
(b) the administrative, technical and physical safeguards and practices that the organisation maintains with respect to the information;

"investigative body" means a prescribed person or body that is legally authorised in *[name of country]* to carry out any investigation relating to the enforcement of law;

"Minister" means the Minister who has been assigned responsibility for *[information/public administration]* under the Constitution;

"organisation" includes a body corporate, an individual, a partnership or unincorporated association;

"personal information" means information or data about an identifiable individual whether or not recorded in any form, including, without restricting the generality of the foregoing –

(a) information relating to the race, national or ethnic origin, religion, age or marital status of the individual;
(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;
(e) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;
(f) correspondence sent by the individual that is explicitly or implicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence;
(g) the views or opinions of any other person about the individual;
(h) information that can be manipulated by a reasonably foreseeable method to identify the individual; or
(i) information that can be linked by a reasonably foreseeable method to other information that identifies the individual or that can be manipulated by a reasonably foreseeable method to identify the individual;

"prescribed" means prescribed by regulation made under this Act;

"process", in relation to information or data, means obtain, record or hold the information or data or carry out any operation or set of operations on the information or data, including -

(a) organisation, adaptation or alteration of the information or data;
(b) retrieval, consultation or use of the information or data;
(c) disclosure of the information or data by transmission, dissemination or otherwise making available; or
(d) alignment, combination, blocking, erasure or destruction of the information or data;

and "processed" "processes" and "processing" shall be construed accordingly;

"relevant filing system" means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible;

"record" means a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record;

"use", in relation to actions of an organisation that has custody or control of personal information or data, means to handle or deal with the information or data, including to transfer the information or data, to an agent of the organisation, but does not include to disclose the information or data;

"Privacy Commissioner" means the Privacy Commissioner appointed under section 16 of the Privacy Act, *[year of enactment]*;

Application of Act

5.(1) This Act shall apply to every private organisation in respect of personal information that –

(a) the organisation processes in the normal course of its business or for professional or commercial purposes;
(b) is about an employee of the organisation and that the organisation processes in connection with its business.

(2) This Act shall not apply to –

(a) any public authority to which the Privacy Act *[year of enactment]* applies;
(b) any individual in respect of personal information that the individual processes for personal or domestic purposes and does not process for any other purpose;
(c) any organisation in respect of personal information that the organisation processes for journalistic, artistic or literary purposes and does not process for any other purpose.

Saving of certain other enactments

6. This Act shall not affect the operation of any enactment that makes provision with respect to the processing of personal information and is capable of operating concurrently with this Act.

PART II

PROCESSING OF PERSONAL INFORMATION

Appropriate purpose

7. An organisation may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances.

Requirement of knowledge and consent

8.(1) Subject to sections 11, 12 and 13, an organisation shall not collect, use or disclose personal information about any individual without the knowledge and consent of that individual.

(2) An individual may, with reasonable notice in writing, withdraw the consent referred to in subsection (1) at any time, subject to legal and contractual restrictions. The organisation shall inform the individual of the implication of such withdrawal.

Collection of personal information

9.(1) An organisation shall identify the purpose for which it collects personal information at or before the time such information is collected.

(2) An organisation shall document the purposes for which personal information is collected in order to comply with section 21(5)(d).

(3) An organisation shall not collect personal information unless –

(a) the information is collected for a lawful purpose directly related to a function or activity of the organisation; and
(b) the collection of the information is necessary for, or directly related to, that purpose.

(4) An organisation shall not collect personal information –

(a) by unlawful means; or
(b) by means that, in the circumstances of the case –
  (i) are unfair; or
  (ii) intrude to an unreasonable extent upon the personal affairs of the individual concerned.

Source of personal information

10.(1) An organisation shall collect personal information directly from the individual concerned, unless –

(a) the individual consents to having the organisation collect the information from the person who has custody or control of it;
(b) the individual consents to having the organisation that has custody or control of the information disclose it;
(c) the person who has custody or control of the information is authorised at law to act on behalf of the individual and consents to the disclosure of the information to the organisation;
(d) this Act authorises the organisation to collect the information; or
(e) the organisation is authorised by another Act or at law to collect the information in a manner other than directly from the individual.

(2) At or before the time, or if that is not practicable, as soon as practicable after, an organisation collects personal information from an individual under subsection (1), the organisation shall take such steps as are, in the circumstances, reasonable to ensure that the individual concerned is aware of –

(a) the purpose for which the information is being collected;
(b) the fact that the collection of the information is authorised or required by or under law, if such collection is so authorised or required; and
(c) the intended recipients of the information.

Collection without knowledge or consent

11. An organisation may collect personal information without the knowledge or consent of the individual, where –

(a) the collection is clearly in the interests of the individual and consent cannot be obtained in a timely manner;
(b) it is reasonable to expect that the collection with the knowledge and consent of the individual will prejudice the purpose of the collection or compromise the availability or accuracy of the information;
(c) the collection is reasonable for purposes relating to the investigation of the breach of the law or an agreement;
(d) the collection is solely for journalistic, artistic or literary purposes; or
(e) the information is publicly available information.

Limits on use of personal information

12.(1) Where an organisation holds personal information that was collected in connection with a particular purpose, it shall not use that information for any other purpose unless –

(a) the individual concerned authorises the use of the information for that other purpose;

(b) use of the information for that other purpose is authorised or required by or under law;

(c) the purpose for which the information is used is directly related to the purpose for which the information was collected;

(d) the information is used -

(i) in a form in which the individual concerned is not identified; or

(ii) for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned;

(e) the organisation believes on reasonable grounds that use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or other person, or to public health or safety; or

(f) use of the information for that other purpose is necessary -

(i) for the prevention, detection, investigation, prosecution or punishment of any offence or breach of law; or

(ii) for the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal.

(2) Where an organisation uses personal information for a new purpose, it shall document that purpose in order to comply with section 21(5)(d).

Limits on disclosure of personal information

13.(1) Where an organisation holds personal information, it shall not disclose the information to another person, body or agency (other than the individual concerned), unless –

(a) the individual concerned has expressly or impliedly consented to the disclosure;

(b) the disclosure of the information is required or authorised by or under law;

(c) the disclosure of the information is one of the purposes in connection with which the information was collected, or is directly connected to that purpose;

(d) the individual concerned is reasonably likely to have been aware or made aware under section 10(2)(c) that information of that kind is usually passed on to that person, body or agency;

(e) the information is to be disclosed -

(i) in a form in which the individual concerned is not identified; or

(ii) for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the individual concerned; or

(f) the organisation believes on reasonable grounds that disclosure of the information is necessary –

(i) to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or other person, or to public health or safety;

(ii) for the prevention, detection, investigation, prosecution or punishment of any offence or breach of law; or

(iii) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal.

(2) Any person, body or agency to whom personal information is disclosed under subsection (1) shall not use or disclose the information for a purpose other than the purpose for which the information was given to that person, body or agency.

Condition for use or disclosure of personal information

14. An organisation shall only use or disclose personal information under section 12 or section 13, where such use or disclosure would not amount to an unreasonable invasion of privacy of the individual concerned, taking into account the specific nature of the personal information and the specific purpose for which it is to be so used or disclosed.

Use of personal information outside *[name of country]*

15.(1) An organisation shall not use, outside *[name of country]* personal information collected in *[name of country]* unless the organisation -

(a) would be permitted under this Act to make the same use of that information in *[name of country]*; and
(b) takes appropriate steps to preserve the confidentiality of the information and to protect the privacy of individuals.

(2) Nothing in this section affects the use of personal information that is required or authorised to be made under another Act.

Disclosure of personal information outside *[name of country]*

16.(1) An organisation shall not disclose personal information collected in *[name of country]* to an organisation outside *[name of country]* unless –

(a) the organisation receiving the information performs functions comparable to the functions performed by a person to whom this Act would permit disclosure by the organisation disclosing the information in *[name of country]*; and
(b) the organisation disclosing the information believes on reasonable grounds that the organisation receiving the information will take appropriate steps to preserve the confidentiality of the information.

(2) Nothing in this section affects a disclosure of personal information that is required or authorised to be made under another Act.

PART III

DUTIES OF ORGANISATIONS WITH RESPECT TO RECORDS OF PERSONAL INFORMATION

Accuracy of information

17.(1) An organisation that collects, uses or discloses personal information about an individual shall –

(a) take all reasonable steps to ensure that whatever record it makes of the information is as accurate, complete and up-to-date as is necessary for the purposes for which it collects, uses or discloses the information, as the case may be;
(b) take all reasonable steps to minimise the possibility that an organisation will use inaccurate personal information to make a decision about the individual.

(2) The organisation shall not update a record of personal information about an individual unless –

(a) doing so is necessary to fulfil the purpose for which the organisation collected the information;
(b) the individual consents to the updating; or
(c) this Act or another law permits the updating.

Security of information

18.(1) An organisation shall take reasonable steps to ensure that personal information in its custody or control is protected against unauthorised use or disclosure and to ensure that the records containing the information are protected against unauthorised copying, modification or destruction.

(2) An organisation is responsible for personal information in its custody or control, including information that has been transferred to a third-party for processing. The organisation shall use contractual or other means to provide a comparable level of protection while the information is being processed by the third party.

(3) The question of what protection constitutes compliance with subsection (1) shall be determined in light of all the circumstances, including the sensitivity of the information, the amount of information and the format in which it is stored.

(4) Upon request, the organisation shall make available to any person a general description of the safeguards that it uses to protect personal information and to fulfil its obligations under subsection (1).

Note of uses and disclosures without consent

19.(1) An organisation shall make a note of all uses and disclosures that it makes of personal information about an individual without the individual's consent except if the individual would not be entitled to access to the information under section 22(1) or a record of the information under section 25(1).

(2) The organisation shall keep the note as part of the records of personal information about the individual that it has in its custody or under its control or in a form that is linked to those records.

Retention of records

20.(1) Subject to subsection (2), an organisation shall not retain a record of personal information after the purpose for which the organisation collected the information has been fulfilled unless –

(a) another law requires the organisation to retain the record;
(b) the organisation reasonably requires the record for purposes related to its operation; or
(c) the regulations authorise the organisation to retain it.

(2) An organisation that has used a record of personal information about an individual to make a decision about the individual shall retain the record for such period of time as may be prescribed after making the decision, to allow the individual a reasonable opportunity to request access to the information.

(3) An organisation shall destroy or delete a record of personal information or de-identify it as soon as it is no longer authorised to retain the record under subsection (1).

Information practices

21.(1) An organisation that has custody or control of personal information shall have in place information practices that comply with the requirements of this Act and the regulations made thereunder.

(2) The organisation shall act in conformity with its information practices unless otherwise permitted by law.

(3) The organisation shall designate, as a contact person, an individual or individuals who are resident in *[name of country]* and who are employed by or in the service of the organisation or an agent of the organisation, to –

(a) facilitate the organisation's compliance with this Act;
(b) ensure that all persons who are employed by or in the service of the organisation are appropriately informed of their duties under this Act while employed by or in the service of the organisation;
(c) respond to inquiries from the public about the organisation's information practices.

(4) An organisation shall make readily available to any person, in a form that is generally understandable, specific information about its policies and practices relating to the management of personal information.

(5) The information made available under subsection (4) shall include –

(a) the name, address and other contact details of the organisation;
(b) the name or title of the person or persons accountable for the organisation's policies and practices;
(c) the means of gaining access to personal information held by the organisation;
(d) a description of the type of personal information held by the organisation, including a general account of its use;
(e) what personal information is made available to related organisations;
(f) a copy of any brochures or other information that explain the organisations policies and practices or codes; and
(g) the name or title of the person or persons designated under subsection (3), to whom any inquiry in relation to this Act can be forwarded.

PART IV

ACCESS TO PERSONAL INFORMATION

Right of access to personal information

22.(1) Subject to this Part, an individual is entitled, in accordance with this Part, to access to personal information about the individual that is in the custody or under the control of an organisation, including information on its use and disclosure, unless –

(a) the information relates to having an investigative body enforce any law or by-law, carry out an investigation relating to the enforcement of that law or by-law or gather information or intelligence for the purpose of enforcing that law or by-law;
(b) the organisation is prohibited under subsection (6) from granting the individual access to the information;
(c) the organisation has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of any law that has been, is being or is about to be committed;
(d) the information is subject to legal privilege;
(e) the information is collected or put together for the purpose of determining whether to commence a proceeding or for the purpose of conducting a proceeding or enforcing a judgment, order or award made in a proceeding;
(f) granting the access could reasonably be expected to threaten the life or security of another individual;
(g) granting the access would reveal confidential organisational information that could reasonably be expected to harm the organisation;
(h) granting the access would be likely to reveal personal information of another individual who does not consent to granting the access and it is not possible to sever the requested information from the personal information of the other individual.

(2) If an organisation receives a request from an individual under section 23 for access to personal information that the organisation has previously disclosed to the government, an agent of that government or to an investigative body, the organisation shall, without delay, give written notice to the person or body who received disclosure of the information stating that the individual has made the request.

(3) Within thirty days of receiving the notice, the person or body who receives the notice shall notify the organisation whether it objects to having the organisation grant the individual's request for access.

(4) An investigative body which received disclosure of the information may object to having the organisation grant the individual's request for access only if it is of the opinion that granting the request could reasonably be expected to be injurious to the enforcement of any law or the gathering of intelligence for the purpose of enforcing that law.

(5) The organisation shall not, under section 23(3), respond to the individual's request for access until the earlier of –

(a) the day on which it receives notification of an objection made under subsection (4); or
(b) thirty days from the time of giving the notice described in subsection (3).

(6) If a person or body, objects to having the organisation grant the individual's request for access under subsection (5), the organisation shall not grant the individual access to the requested personal information.

Procedure for access

23.(1) To exercise a right to access to personal information under subsection 22(1), including information on its use and disclosure, an individual shall make a written request for access to the organisation that has custody or control of the information.

(2) If the individual requests the organisation for assistance in preparing the request for access, the organisation shall assist the individual.

(3) Subject to subsection (4) and to section 24, as soon as possible in the circumstances but not later than thirty days after receiving the request, the organisation shall –

(a) grant the individual access to the requested personal information in a generally understandable format unless the organisation believes, on reasonable grounds, that the individual is not entitled under this Act to access to the information;
(b) give a written notice to the individual stating that the organisation does not have custody or control of the requested personal information, if that is the case, and specifying the identity of the organisation that has custody or control of the information, if that is known; or
(c) give a written notice to the individual stating that the organisation is refusing the request, in whole or in part, specifying the reason for the refusal and stating that the individual is entitled to make a complaint about the refusal to the *[Privacy Commissioner]*.

(4) Within thirty days after receiving the request, the organisation may extend the time limit set out in subsection (3) for a further period of time of not more than thirty days if –

(a) meeting the time limit would unreasonably interfere with the activities of the organisation; or
(b) the time required to undertake the consultations necessary to reply to the request would make it not reasonably practical to meet the time limit.

(5) If the organisation extends the time limit under subsection (4), the organisation shall give the individual a written notice of the extension before the time limit set out in subsection (3) expires, setting out the length of the extension and the reason for the extension.

(6) An organisation that reasonably believes that a request for access to personal information is frivolous or vexatious or made in bad faith may refuse to grant the individual access to the requested information.

(7) An organisation that does not grant an individual access to personal information under this section because it believes, on reasonable grounds, that the individual is not entitled under this Act to access to the information may state in the notice that it is required to give under subsection (3)(c) that it refuses to confirm or deny that the information exists.

(8) If the organisation does not reply to the request within the time limit or before the extension, if any, expires, the organisation shall be deemed to have refused the individual's request for access.

(9) If the organisation refuses or is deemed to have refused the request, in whole or in part, the individual is entitled to make a complaint about the refusal to the *[Privacy Commissioner]* under Part VI.

(10) An organisation shall not grant an individual access to personal information under this section without first taking reasonable steps to be satisfied as to the individual's identity.

Fees for access

24. (1) As a condition of granting the access to personal information that an individual requests under this section, an organisation may require the individual to pay a reasonable fee determined in accordance with the regulations if –

(a) it informs the individual of the approximate amount of the prescribed fee before granting the access;
(b) within a reasonable time of receiving the information mentioned in clause (a), the individual does not notify the organisation that he or she withdraws the request; and
(c) the organisation has not used the personal information to deny the individual a benefit or to increase any charge that the organisation imposes on the individual in dealing with the individual.

(2) The organisation shall waive the payment of all or part of the fee, where the organisation determines that it is fair and equitable to do so after considering –

(a) whether the payment will cause financial hardship for the applicant; and
(b) all other matters relating to fees that may be prescribed.

Copy of record

25.(1) If an organisation grants an individual access to personal information under this section and if the organisation has made a record of the information, it shall, at the time of granting the access, give the individual a copy of the record or an opportunity to examine the record.

(2) If, after exercising an opportunity to examine the record under subsection (1), the individual requests a copy of part or all of the record, the organisation shall give the individual a copy of those portions of the record that it would be reasonably practical to reproduce, given their length and nature.

Sensory disability

26. (1) An organisation shall give access to personal information in an alternative format to an individual with a sensory disability who has a right of access to personal information under this Part and who requests that it be transmitted in the alternative format if –

(a) a version of the information already exists in that format; or
(b) its conversion into that format is reasonable and necessary in order for the individual to be able to exercise rights under this Part.

(2) In this section, "alternative format" with respect to personal information means a format that allows a person with a sensory disability to read or listen to the personal information.

Duty to sever

27. (1) An organisation shall not give an individual access to personal information if doing so would be likely to reveal personal information about a third party. However, if the information about the third party is severable from the record containing the information about the individual, the organisation shall sever the information about the third party before giving the individual access.

(2) Subsection (1) does not apply if the third party consents to the access or the individual needs the information because of a threat to the individual's life, health or security.

Correction of personal information

28. (1) Where the record of an organisation to which access has been given under this Act contains personal information of a person and that person claims that the information is incomplete, incorrect or misleading, the organisation may, subject to subsection (2), on the application of that person, correct the information upon being satisfied of the claim.

(2) An application under subsection (1) shall –

(a) be in writing; and
(b) as far as practicable, specify –
  (i) the record of personal information that is claimed to require correction;
  (ii) the information that is claimed to be incomplete, incorrect or misleading;
  (iii) whether the information is claimed to be incomplete, incorrect or misleading;
  (iv) the applicant's reasons for so claiming; and
  (v) the correction requested by the applicant.

(3) To the extent that it is practicable to do so, the organisation shall, when making any correction under this section to personal information in a record, ensure that it does not obliterate the text of the record as it existed prior to the correction.

(4) Where an organisation is not satisfied with the reasons for an application under subsection (1), it may refuse to make any correction to the information and inform the applicant of its refusal together with its reasons for so doing.

PART V

INVESTIGATION OF COMPLAINTS

Receipt and investigation of complaints

29. (1) Subject to this Act, the *[Privacy Commissioner]* shall receive and investigate a complaint from any person in respect of any matter relating to –

(a) the collection, retention or disposal of personal information by an organisation;
(b) the use or disclosure of personal information held by an organisation;
(c) the refusal by an organisation to grant access to personal information under this Act; or
(d) the refusal by an organisation of an application to correct the information.

(2) Nothing in this Act precludes the *[Privacy Commissioner]* from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorised by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorised.

(3) Where the *[Privacy Commissioner]* is satisfied that there are reasonable grounds to investigate a matter under this Act, the *[Commissioner]* may initiate a complaint in respect thereof.

Mode of complaint

30.(1) A complaint under this Act shall be made to the *[Privacy Commissioner]* in writing unless the *[Commissioner]* authorises otherwise.

(2) The *[Privacy Commissioner]* shall give such reasonable assistance as is necessary in the circumstances to enable any person who wishes to make a complaint to the *[Commissioner]*, to put the complaint in writing.

Notice of investigation

31. Before commencing an investigation of a complaint under this Act, the *[Privacy Commissioner]* shall notify the head of the organisation concerned of the intention to carry out the investigation and shall inform such head of the substance of the complaint.

Regulation of procedure

32.(1) Subject to this Act, the *[Privacy Commissioner]* may determine the procedure to be followed in the discharge of any duty or the performance of any function of the *[Commissioner]* under this Act.

(2) The functions of the Privacy Commissioner set out in section 21 of the Privacy Act, *[year of enactment]* shall, *mutatis mutandis*, be the functions of the *[Commissioner]* under this Act.*]*

Investigations in private

33.(1) Every investigation of a complaint under this Act by the *[Privacy Commissioner]* shall be conducted in private.

(2) In the course of an investigation of a complaint under this Act by the *[Privacy Commissioner]*, the person who made the complaint and the head of the organisation concerned shall be given an opportunity to make representations to the *[Commissioner]*, but no one is entitled as of right to be present during, to have access to, or to comment on, representations made to the *[Commissioner]* by any other person.

Powers of *[Privacy Commissioner]* in carrying out investigations

34.(1) The *[Privacy Commissioner]* has, in relation to the carrying out of the investigation of any complaint under this Act, power -

(a) to summon and enforce the appearance of persons before the *[Commissioner]* and compel them to give oral or written evidence on oath and to produce such documents and things as the *[Commissioner]* deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;
(b) to administer oaths;
(c) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the *[Commissioner]* sees fit, whether or not the evidence or information is or would be admissible in a court of law;
(d) to enter any premises occupied by an organisation on satisfying any security requirements of the organisation relating to the premises;
(e) to converse in private with any person in any premises entered pursuant to paragraph(d) and otherwise carry out therein such inquiries within the power of the *[Commissioner]* under this Act as the *[Commissioner]* sees fit; and
(f) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph(d) containing any matter relevant to the investigation.

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the *[Privacy Commissioner]* may, during the investigation of any complaint under this Act, examine any information recorded in any form held by an organisation and no information that the *[Commissioner]* may examine under this subsection may be withheld from the *[Commissioner]* on any grounds.

(3) Any document or thing produced pursuant to this section by any person or organisation shall be returned by the *[Privacy Commissioner]* within ten days after a request is made to the *[Commissioner]* by that person or organisation, but nothing in this subsection precludes the *[Commissioner]* from again requiring its production in accordance with this section.

Dispute resolution

35. Where, in the course of an investigation of a complaint under this Act by the *[Privacy Commissioner]*, the *[Commissioner]* is of the view that it may be possible to secure a settlement between any of the parties concerned and, if appropriate, a satisfactory assurance against the repetition of any action that is the subject matter of the complaint or the doing of further actions of a similar kind by the person or organisation concerned, the *[Commissioner]* may, without investigating the complaint further, use his or her best endeavours to secure such a settlement and assurance.

Findings and recommendations of *[Privacy Commissioner]*

36.(1) If, on investigating a complaint under this Act, in recommendations in respect of personal information, the *[Privacy Commissioner]* finds that the complaint is well-founded, the *[Commissioner]* shall provide the head of the organisation that has control of the personal information with a report containing –

(a) the terms of any settlement reached by virtue of section 35; or
(b) the finding of the investigation and any recommendations that the *[Commissioner]* considers appropriate; and
(c) where appropriate, a request that, within a time specified therein, notice be given to the *[Commissioner]* of any action taken or proposed to be taken to implement the terms of settlement or recommendations as the case may be, contained in the report or reasons why no such action has been or is proposed to be taken.

(2) The *[Privacy Commissioner]* shall, after investigating a complaint under this Act, report to the complainant the results of the investigation, but where a notice has been requested under paragraph (1)(c), no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the *[Commissioner]*.

(3) Where a notice has been requested under paragraph (1)(c) but no such notice is received by the *[Commissioner]* within the time specified therefore or the action described in the notice is, in the opinion of the *[Commissioner]*, inadequate or inappropriate or will not be taken in a reasonable time, the *[Commissioner]* shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

(4) Where, following the investigation of a complaint, the *[Privacy Commissioner]* has made recommendations to an organisation under subsection (1), and the decision of the organisation is –

(a) not to implement the recommendations; or
(b) to implement the recommendations, but, in the opinion of the *[Commissioner]*, not within a reasonable time or in a manner that is inadequate or inappropriate,

the complainant is entitled to seek judicial review of the decision of the organisation.

Review of compliance with certain provisions

37.(1) The *[Privacy Commissioner]* may, from time to time at the discretion of the *[Commissioner]*, carry out an investigation in respect of personal information under the control of an organisation to ensure compliance with this Act.

(2) Sections 31 to 34 apply, where appropriate and with such modifications as the circumstances require, in respect of investigations carried out under subsection (1).

(3) If, following an investigation under subsection (1), the *[Privacy Commissioner]* considers that an organisation has not complied with the provisions of this Act, the *[Commissioner]* shall provide the head of the organisation with a report containing the findings of the investigation and any recommendations that the *[Commissioner]* considers appropriate.

(4) Any report made by the *[Privacy Commissioner]* under subsection (3) shall be included in a report made to Parliament pursuant to this Act.

Report to Parliament

38. The *[Privacy Commissioner]* shall, as soon as practicable after the thirty-first of December of each year, prepare a report on the activities of the office under this Act during that year and cause a copy of the report to be laid before Parliament.

Security requirements

39. The *[Privacy Commissioner]* and every person acting on behalf or under the direction of the *[Commissioner]* who receives or obtains information relating to any investigation under this Act or any other Act of Parliament shall, with respect to the use of that information, satisfy any security requirements applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to and use of that information.

Confidentiality

40. Subject to this Act, the *[Privacy Commissioner]* and every person acting on behalf or under the direction of the *[*Commissioner*]* shall not disclose any information that comes to their knowledge in carrying out duties and performing functions under this Act.

Protection of *[Commissioner]* etc from criminal or civil proceedings

41.(1) Notwithstanding the provisions of section 44, no criminal or civil proceedings lie against the *[Privacy Commissioner]*, or against any person acting on behalf or under the direction of the *[Commissioner]*, for anything done, reported or said in good faith in the course of the exercise, discharge or performance or purported exercise, discharge, or performance of any power, duty or function of the *[Commissioner]* under this Act.

(2) For the purposes of any law relating to libel or slander –

(a) anything said, any information supplied or any document or thing produced in good faith in the course of an investigation carried out by or on behalf of the *[Privacy Commissioner]* under this Act is privileged; and

(b) any report made in good faith by the *[Privacy Commissioner]* under this Act is privileged.

Obstruction

42.(1) No person shall obstruct the *[Privacy Commissioner]* or any person acting on behalf or under the direction of the *[Commissioner]* in the discharge and performance the *[Commissioner's]* duties and functions under this Act.

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding .....

PART VI

MISCELLANEOUS

Delegation by head of organisation

43. The head of an organisation may, by order, designate one or more officers or employees of that authority to exercise, discharge or perform any of the power, duties or functions of the head under this Act that are specified in the order.

Regulations

44.(1) The Minister may make regulations for giving effect to the purpose of this Act and for prescribing anything required or authorised by this Act to be prescribed.

(2) Notwithstanding the generality of subsection (1), regulations made under this section may prescribe –

(a) guidelines for the retention of records for the purposes of section 20(1) and (2);
(b) guidelines for the disposal of personal information held by an organisation;
(c) maximum amount of fees payable for access to personal information under this Act; and
(d) guidelines for information practices of an organisation.

(3) All regulations made under this Act shall be laid before Parliament as soon as may be after the making thereof and shall be subject to *[negative/affirmative]* resolution.

LEGAL DEVELOPMENT ISSUES

REVISED MODEL BILL ON COMPETITION

Paper by the Commonwealth Secretariat

EXPLANATORY MEMORANDUM TO THE MODEL BILL ON COMPETITION

INTRODUCTION

1. At their Meeting in Durban in 1999 Commonwealth Heads of Government (CHOGM) emphasised the importance of a robust competition atmosphere in a global economy. CHOGM requested the Secretariat to explore ways and means to promote consensus on international trade which includes competition law. The main objective of competition policy and law is to preserve and promote competition as a means of ensuring the efficient allocation of resources in an economy. This should result in lower prices and adequate supplies for consumers and, it is hoped, faster growth and a more equitable distribution of income. By lowering barriers to the entry of new firms into an industry, competition policy helps to create an enabling environment for entrepreneurial development, an essential prerequisite for a vibrant economy (OECD and Khemani 1998).

2. As Law Ministers will recall, in response to this request, the Legal and Constitutional Affairs Division (LCAD) of the Secretariat developed a model bill and submitted the same to the Commonwealth Law Ministers Meeting (LMM) in St Vincent and the Grenadines in 2002. After careful consideration, the LMM instructed LCAD to revise the (2002) model bill to take into account the needs of small and vulnerable sectors of the economy that have been systematically disenfranchised from meaningful competition activities.

3. In light of this directive the (2002) model bill was referred for initial redraft, an exercise which was undertaken and finalised in September 2003. The Law Development Section (LDS) of LCAD then distributed copies of the Bill to Law Ministers for their comments. Expert Groups were then convened in each region of the Commonwealth to seek views on the possibility of further amendment to the Bill where necessary.

4. The first of the Expert Group Meetings took place from 10-14 May 2004, in Singapore. The countries represented were India, Malaysia, Maldives, Mauritius, Seychelles, Singapore and Sri Lanka.

5. The LDS conducted its Pacific meeting from 8-12 November, in Apia, Samoa. The countries represented were Cook Islands, Fiji, Kiribati, Papua New Guinea, Samoa, Tonga and Tuvalu.

6. The third of these series of Expert Group Meetings was held in Nassau, the Bahamas from 13-17 December. Representatives at that meeting hailed from the Bahamas, Belize, CARICOM, Jamaica, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines.

7. The fourth regional session was held in Seychelles from 4-8 April, for the African region. With representatives from most of Commonwealth Africa, that meeting brought delegates from Botswana, Cameroon, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Namibia, Seychelles, Sierra Leone, South Africa, Swaziland, Uganda and Zambia. The meeting also benefited from the input of the Special Advisory Services Division(SASD) as well as delegates from the Secretariats of the Common Market for Eastern and Southern Africa (COMESA), Economic Community for West African States (ECOWAS) and the UN Conference on Trade and Development (UNCTAD).

8. The redraft of the Model Bill presented to Law Ministers is therefore the culmination of the composite thoughts of these regional experts. In a Final Expert Group Meeting on the Competition Bill, which took place at the Commonwealth Secretariat, Marlborough House, from 25-29 July, the Bill was fine tuned by a blend of experts culled from the series of regional meetings.

9. Submitted as **Annex I** is the rationale from some of the regional experts for a robust Competition Bill, particularly in small developing economies.

10. Submitted as **Annex II** is a chart representing the Investigation and Hearing Procedure contemplated by the Model Bill.

THE DRAFT MODEL LAW

THE LONG TITLE

11. The long title sets out the scope of the Bill, namely to promote, maintain and encourage competition, to prohibit anti-competitive activities and unfair practices, to establish a Competition Commission, to promote the interests and welfare of consumers and for matters connected therewith and incidental thereto.

PART 1 - PRELIMINARY

CLAUSE 2 - Interpretation

12. Sub-clause (1) contains the definitions of terms used in the Bill:

"acquire" is defined in wide terms in relation to goods and services and includes in relation to goods a right or interest by way of a purchase, lease, gift, contest, exchange, hire, hire purchase, and in relation to services the acceptance of the rendering of services;

"agreement" means an agreement between enterprises, irrespective of the form in which it is made (would include arrangement or understanding) and whether or not it is intended to be legally enforceable;

"business" includes activities which are all encompassing as it includes all commercial or economic activities relating to goods or services but such activities must be for gain or reward and would therefore exclude charitable organisations;

"consumer" is also defined in wide terms to include a person being an individual or a body corporate or an unincorporated body of persons acquiring goods or services for any purpose;

"control" is defined as the power of a person holding voting or other power in a body corporate enabling him to decide the manner in which the commercial activities of the body corporate is run;

"document" is defined to cater for information recorded in any form;

"enterprise" encompasses an individual, partnership or other body (corporate or unincorporated) which is engaged in business;

"goods" is defined to include all kinds of property except real property, money, securities or choses in action;

"service" is widely defined to embrace all types of services, whether industrial, professional, or otherwise;

"supply" is defined in relation to goods that are supplied by way of sales, exchange, lease, hire and hire-purchase of the goods and in relation to services it covers the provision of services by way of sales, rent or a grant of the services;
Sub-clause (2) provides that the references to the lessening of competition include hindering or preventing competition;

Sub-clause (3) sets out the method of determining the effect on competition in a market, by taking account of all the factors that affect competition in that market, including actual or potential competition from products supplied or likely to be supplied by non-residents or persons who do not carry on business in the particular country;

CLAUSE 3 - Objects

13. This clause states the objects of the law. Clause 3 as drafted initially has been amended to address the concerns of member states. It now provides that in addition to the objectives set out under sub-clauses (a) to (e), small and medium enterprises should be able to compete effectively in a market and that the promotion of competition should not take place at the expense of small and medium enterprises.

CLAUSE 4 - Application

14. This clause provides for the scope of the application of the Act in relation to business activities (any commercial or economic activity relating to goods and services for gain or for reward) and refers to the First Schedule which lists the activities which are excluded from the ambit of the law.

PART II –THE COMPETITION COMMISSION

CLAUSE 5 - Establishment of Commission

15. The Competition Commission is established as a body corporate. The constitution and conduct of business of the Commission are set out in the Second Schedule.

CLAUSE 9 - Functions and duties of Commission

16. The Commission is vested with wide-ranging functions and duties:

- on-going review of business activities in order to identify activities which may adversely affect consumers' economic interests;
- eliminate and control anti-competitive activities;
- act nationally and internationally in respect of competition consumer protection matters;
- advise the Minister on the operation of the Act and assist the Minister with any matter he may wish to be enlightened on concerning the application of the Act;
- conducting investigations to determine whether any enterprise is engaging in anti-competitive practices or unfair practices, and such other investigations as it may think fit in connection with matters within the scope of the law;
- generally carry out such functions as are required to give effect to the Act.

CLAUSE 10 - Delegation of powers

17. The Commission is given powers to delegate, if it so decides, any of its powers either to its Executive Director or such other employee as it deems appropriate.

18. The powers of delegation under sub-clause (1) are not applicable in the instances listed under sub-clause (2).

CLAUSE 11 - Appointment of Executive Director and other employees

19. Under sub-clause (1) the Commission may appoint an Executive Director on such terms and conditions as it may determine save for the duration of the employment specified under sub-clause (2).

20. Sub-clause (3) provides that the Executive Director shall be responsible for the proper administration and management of the affairs of the Commission and sub-clause (4) deals with a situation of where the Executive Director is temporarily absent or temporarily incapacitated in which case the Commission may appoint another person to replace him.

21. Sub-clause (5) makes provision for the Commission to appoint such other employees, consultants and agents as the Commission may consider necessary for the performance of its functions and the discharge of its duties. Moreover it will be possible under sub-clause (6) to appoint any officer in the service of government to any office with the Commission.

PART III - FINANCIAL PROVISIONS, ACCOUNTS AND ANNUAL REPORT

CLAUSES 12 TO 16 - Funds of Commission, Power to levy fees, Loans and Financial penalties, Financial Year and annual estimates, Accounts and audits

22. Clauses 12 to 16 set out the source of the funding of the Commission, its power to levy fees for any services rendered by it and to raise loans from the government for the performance of its functions and the discharge of its duties. The Commission has a duty to pay all penalties collected under the Act, into the Consolidated Fund. The estimates of the Commission's income and expenditure will have to be approved by the Minister, whose decision shall be final and binding. The accounts of the Commission shall be audited by the Auditor General or such auditor as may be approved by the Auditor General. Clause 16 provides that the auditor or any of its employees shall have free and unhindered access to all the records relating to the financial transactions of the Commission and list down such matters as the auditor shall take into consideration for the purposes of his report. It shall also be an offence for any person, who, without any reasonable excuse, fails or refuses access to the auditor or any person authorised by the auditor, to have access to any accounting or other records in the custody of that person.

CLAUSE 17 - Annual report

23. Clause 17 provides for the Commission to transmit to the Minister an annual report dealing generally with the activities of the Commission during the preceding financial year and containing information relating to the proceedings and policy of the Commission. The audited accounts of the Commission and the report of the auditor shall be included in the annual report. The Minister shall as soon as practicable cause a copy of the report to be presented to the Parliament.

24. Under sub-clause (4), the Commission is given the power to submit a report to the Minister on any particular matter under investigation which in its opinion requires the special attention of the Minister.

PART IV - ANTI COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANT POSTION

CLAUSE 18 - Anti-competitive agreements

25. Sub-clause (1) prohibits and declares void all agreements between enterprises that result or are likely to result in the prevention, restriction or distortion of competition in a market.
26. Sub-clause (2) sets out examples of the types of prohibited agreements containing provisions which:

- directly or indirectly fix purchase or selling prices or determine any other business activity;
- limit or control production, markets, technical development or investment;
- share markets or supply sources;
- constitute bid-rigging;
- apply dissimilar conditions to equivalent transactions with other trading parties, thus placing them at a competitive disadvantage;
- impose extraneous obligations on other parties as a condition for concluding contracts.

27. Sub-clause (3) sets out the types of agreements which are excluded from sub-clauses (1) and (2), namely:

- agreements authorised by the Commission under Part V;
- those which contribute to improvement in production or distribution of products, promotion of technical or economic progress and at the same time, confer a benefit on consumers;
- agreements which only impose the type of restrictions on enterprises that are necessary for attaining the above objectives;
- agreements which do not afford an opportunity for enterprises to eliminate competition in relation to a substantial proportion of the relevant products.

28. Sub-clause (4) enables a court to sever any provision of any agreement or any decision prohibited under sub-clause (1) from the whole agreement or decision.

29. Sub-clause (5) provides for a provision of this Act which is expressly applicable to or related to an agreement to be read as applying with the necessary modification to a decision by an association of enterprises or a concerted practice by enterprises which have as their object or effect the prevention, restriction or distortion of competition.

30. Sub-clause (6) describes the circumstances that would constitute bid-rigging in the form of collusive agreements and provides that bid-rigging shall not apply where the parties to the agreement are inter-connected parties or the person making the call for or requests for bids is made aware of the agreement.

CLAUSE 19 - Dominant position

31. This clause sets out the circumstances in which an enterprise is regarded as holding a dominant position in a market, by virtue of the fact that the enterprise, by itself or together with one or more enterprises, occupies such a position of economic strength as to enable it to exclude competition, control prices or behave independently of its competitors, potential competitors, customers or suppliers. It should be pointed out that no threshold in respect of the percentage of the market power of an enterprise has been laid down. The Expert Group agreed that it will be up to individual member states to decide on the need to impose a threshold and the method to be adopted for the determination of such threshold.

CLAUSE 20 - Identification of relevant market

32. In order to identify a relevant market, clause 20 sets out the criteria that need to be considered namely, the geographical boundaries within which groups of sellers and buyers of goods or services compete for those goods or services, whether the goods or services are regarded as interchangeable or substitutable by the consumer taking into account the prices and characteristics of those goods and services and the suppliers to which the consumers may turn in the event of an abuse of dominance.

CLAUSE 21 - Abuse of dominant position

33. Sub-clause (1) prohibits conduct which amounts to abuse of dominant position.

34. Sub-clause (2) sets out examples of abuse of a dominant position such as:

- restricting any other person from entering the market;
- preventing or deterring any other person from engaging in competitive conduct in a market;
- eliminating or removing any person from any market;
- imposing unfair purchase or selling prices;
- limiting production of products to the prejudice of consumers;
- imposing extraneous supplementary obligations on parties to agreements as conditions of acceptance of the agreements;
- engaging in exclusive dealing, market restriction or tied selling.

35. Sub-clause (4) defines the terms "exclusive dealing", "market restriction" and "tied selling".

36. Sub-clause (5) contains exceptions to sub-clause (2), where:

- the conduct is the subject of an authorisation under Part VI;
- the conduct of the enterprise was exclusively aimed at improving the production or distribution of products or promoting technical or economic progress and consumers received a fair share of the resulting benefits;
- the enterprise enforces or seeks to enforce copyright, patent registered design or trade mark rights;
- the effect of the enterprise's conduct in the market results from its superior competitive performance.

PART V - MERGERS AND ACQUISITIONS

CLAUSES 22 and 23 - Mergers prohibited and Substantial lessening of competition

37. Clause 22 defines the conditions under which a merger is prohibited and the circumstances which would be construed as constituting a merger. As in the case of abuse of dominance no threshold is provided as it will be left to individual member states to determine whether a merger should be defined by reference to a threshold based on the annual turnover or assets, or a combination of both in relation to specific industries. Sub-clause (3) provides for the manner in which a merger can be achieved.

38. Clause 23 lists the factors that the Commission may take into account for the purpose of determining whether a merger is likely to constitute a substantial lessening of competition.

PART VI - AUTHORISATIONS AND EXEMPTIONS

CLAUSE 24 - Grant of authorisation

39. Sub-clause (1) requires an enterprise to apply to the Commission for permission where it proposes to become a party to an agreement, a conduct or a merger prohibited under sections 18, 21 and 22.

40. Sub-clause (2) lists the factors that the Commission is required to take into account before determining the application. It is noteworthy that many states expressed concern about the impact that an agreement, conduct or merger may have on small and medium enterprises. Under clause 22(2)(b) the Commission has the duty to consider the effect of an authorisation on the ability of small and medium size enterprises to compete effectively.

CLAUSE 25 - Effect of authorisation

41. While an authorisation is in force, the enterprise to which it is granted is not prevented by any provision of the law from giving effect to any agreement or engaging in any conduct or merger to which the authorisation relates.

CLAUSE 26 - Revocation of authorisation

42. Sub-clause (1) empowers the Commission to revoke or amend the authorisation if satisfied that it was granted on false or misleading information or if there is a breach of any term or condition attached thereto.

43. Sub-clause (2) requires the Commission to give notice of an intended revocation to the person concerned and of the person's right to be heard by the Commission on the matter.

CLAUSE 27 - Register of authorisations

44. The Commission is required to keep a register which shall be available to members of the public for inspection at all reasonable times.

CLAUSE 28 - Block Exemptions

45. Under clause 28 the Commission is given the power to exempt any particular category of agreements from the prohibition under clause 18. The exemption should be read as applying to decisions by an association of enterprises and to concerted practices in virtue of clause 18(5). Under clause 45 regulations may provide for the category of agreements that shall be eligible for block exemptions and the factors that may be taken into consideration before granting a block exemption.

PART VII - CONSUMER PROTECTION

CLAUSES 29 AND 30 - Unfair practice and Consumer transactions

46. Clause 29 prohibits an unfair practice and defines in wide terms what constitutes an unfair practice in relation to a consumer transaction. An unfair practice may occur before, during or after a consumer transaction or may consist of a single act or omission. A number of specific unfair practices are provided for in the Third Schedule.

47. Clause 30 defines consumer transaction as being either a direct transaction between an enterprise and a consumer or a transaction on behalf of a consumer entered between an enterprise

and another consumer. In either case the transaction relates to the supply of goods or services as a result of a purchase, lease, gift, contest or other arrangement. The Fourth Schedule lists exceptions to a consumer transaction which are normally dealt with under other enactments. The Commission has also the discretion to exclude such transactions as it may consider appropriate after consultation with the Minister.

PART VIII - INVESTIGATION AND HEARING

CLAUSE 31 - Complaints and requests

48. Clause 31 lays down the procedures in respect of an investigation carried out by the Commission where it has reason to believe that an enterprise is a party to an anti-competitive activity or an unfair practice under Parts IV, V and VII of the Act. The investigation may be triggered following a complaint or a request or at the initiative of the Commission subject to the complaint not being frivolous or vexatious. The Commission may for the purpose of its investigation appoint the Executive Officer or such other employee as it thinks fit as investigating officer.

49. In the conduct of an investigation the Commission has been vested with wide powers for evidence gathering. It may serve a notice in writing to seek any specified document or information from any person or request the person to attend at a specified place and answer questions of the investigating officer. Once the Commission decides that there is prima facie evidence of an alleged infringement of an anti-competitive activity or unfair practice as the case may be, the Commission shall inform the party and give the party the opportunity to make representations in connection with the alleged infringement. The Commission may then proceed to carry out further investigation or hold a hearing. Annex II shows the various stages of an investigation before a decision is reached by the Commission.

CLAUSE 32 - Discontinuance of investigation or inquiry

50. The Commission has discretion to discontinue an investigation or inquiry if it is of the opinion that no further investigation is justified.

CLAUSE 33 - Interim measures

51. The Commission has power under clause 33 to act swiftly to prevent threatened or continuing anti-competitive activities or unfair practices if it has reasonable grounds to believe that serious or irreparable damage is likely to occur to a particular person or category of persons. The Commission may also apply for an interim measure to prevent a person from hindering or impeding an investigation.

CLAUSES 34 TO 38 - Examination of witnesses, Immunity and privileges, Witnesses refusing to comply, Procedures for hearing, Power to prohibit disclosure of information, documents and evidence

52. Clauses 34 to 38 are standard clauses dealing with the conduct of a hearing by the Commission and in particular the examination of witnesses by the Commission.

CLAUSE 39 - Power of entry and search

53. Sub-clauses (1) and (2) deal with the power of entry and search by an investigating officer where the Commission thinks necessary in order to ascertain whether there is contravention of the law. The powers of entry and search are exercised under the authority of a warrant issued by a Magistrate.

54. Sub-clauses (3) to (7):

- set out the conditions for the issue of the warrant by the Magistrate;
- limit the period for retention of documents;
- oblige the investigating officer to produce evidence of his authority and identity on entering premises and to leave a receipt listing documents that are removed;
- oblige the occupier or person in charge of the premises to facilitate the authorised officer in carrying out his duties;
- prescribe a penalty for obstructing or impeding the authorised officer.

PART IX - ENFORCEMENT

CLAUSE 40 – Enforcement of decisions of the Commission

55. Under Clause 40 the Commission has a range of enforcement powers aimed at eliminating the harmful effect of anti-competitive activities and unfair practices under Parts IV, V and VII of the Bill. These include:

- a direction in relation to a prohibited agreement under clause 18 for the parties to modify or terminate the agreement;
- a direction in relation to a conduct prohibited under clause 21, for the enterprise to modify or cease the conduct;
- a direction to a merger prohibited under clause 22, for a merger to be dissolved or modified as the Commission may direct;
- a direction in relation to an unfair practice prohibited under clause 29, for an enterprise to cease the unfair practices and where appropriate restitute any money, property or other consideration furnished by the consumer;
- a financial penalty as the Commission deems fit to impose;
- an order for a party to furnish a performance bond or guarantee or other forms of security acceptable to the Commission.

56. The prime concern of the Commission in policing the prohibited activities under Parts IV, V and VII will be the public interest in the protection of the integrity and efficiency of markets. The effective use of the powers of the Commission will assist in achieving the Commission's statutory objectives of deterring anti-competitive activities and unfair practices and requiring those who engage in such activities or practices to remedy the prejudice that they cause to other market participants or the consumer.

57. The Bill provides for a civil regime of fines. It was agreed by the Expert Group to leave it to individual members to decide whether the civil regime should complement an existing criminal regime or replace it.

58. Under Clause 41 of the Bill the Commission may apply to the court to have its direction registered in the manner provided by the Rules of Court in which case the direction shall have the same force and effect as if it was a direction given by the court for enforcement purposes.

59. Under Clause 42, any person who has been prejudiced as a consequence of a prohibited activity or practice shall have the right to enter a civil action against the enterprise responsible for the infringement. However the action can only be lodged after a finding of the Commission or after the final determination of an appeal where the finding is the subject of an appeal.

PART X- APPEALS

60. Clause 43 provides for any person aggrieved by a decision of the Commission to appeal to the Judge in Chambers or to the High Court and lists the powers of the appellate court when determining an appeal.

PART XI- MISCELLANEOUS

CLAUSE 45 - Regulations

61. Under Clause 45 the Minister (or the Commission with the approval of the Minister) may make regulations for carrying out the purposes and provisions of this Act generally and in particular to provide for the procedures to be followed in respect of applications and notices to proceedings of the Commission, the form and manner in which a request for an investigation is to be made and for the fees to be charged by the Commission in respect of anything done or any services rendered by the Commission.

CLAUSE 46 - Guidelines

62. In order to give further guidance and certainty to those affected by the regime set out in the model legislative provisions the Commission is vested with powers to promulgate guidelines that will indicate in broad terms the policy approach to any matter within the jurisdiction of the Act. The Commission may, for instance, publish guidelines in the Gazette to indicate the types of conduct or practice which are likely to fall foul of the law and the types of conduct and practice which are not.

CLAUSE 47- Acts of employee or agent

63. Clause 47 provides for the vicarious liability of an enterprise as a result of the act or omission of its employee or agent arising in the course of the employee's employment with the enterprise or an agent exercising the powers or performing the duties on behalf of the enterprise within the scope of his authority.

CLAUSE 48 - Protection from personal liability

64. This clause protects the Commission, its members, employees or agents and any person whether on secondment or appointed by the Commission to perform its functions or discharge its duties for anything done in good faith in the exercise of any power or purported power under this Act or any other enactment.

CLAUSE 49 - Confidentiality

65. Under clause 49 it shall be the duty of every person listed under sub-clause (3) to preserve secrecy with regards to any matter that has been classified as confidential by the Commission unless the disclosure or communication of such information is necessary for the performance of his function or discharge of his duty or is lawfully required by a court. Any unauthorised disclosure would constitute an offence punishable by a fine and imprisonment.

COMPETITION LAW
(A view from the Pacific)

"...industrial power should be decentralised so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self appointed men." Justice Douglas in US v Columbia Steel [1948]

1.0 INTRODUCTION

In our small Pacific Island economies, market is one of the principal mechanisms by which scarce resources are allocated to fulfil the buyers' wants and desires. A market which is free of traders' manipulation, restrictions or other anti-competitive distortions will most effectively and equitably distribute those resources to both the rich and poor in our community. Whilst competition in a market place is supposed to be regulated by the economic forces in this context of efficient and equitable distribution of resources, it is important to ensure that dominant enterprises do not undermine the vulnerable sectors. Economic reality does not foster this due to many other extraneous factors. Consequently, legislative intervention is necessary to foster a competitive market economy. A market must be encouraged to perform efficiently. A comprehensive law must facilitate the functions of those market factors to optimise the performance ensuring greater public benefit and enhancing economic development.

The Commonwealth Model Competition Bill is drafted to optimise public benefit and enhance economic development. It incorporates the participation of a large number of small enterprises in a market, whilst ensuring that a monopolistic trader in so much as rejuvenating economic activity, does not overly influence the price or product thus eliminating competition or attempts to phase out small and medium enterprises.

2.0 WHY IS THERE A NEED TO HAVE COMPETITION LAW IN PACIFIC ISLAND COUNTRIES?

One of the most commonly advanced reasons opposing an instructive Competition legislation has been that any such legislation will adversely affect the participation of monopolies in the economic development. The reason is supported by theories such as small consumer base, high administrative costs, lower investment returns for monopolies, etc.

In spite of the above, during the meeting of the Pacific region in Apia, Samoa, in November, 2004 the participants of the *Commonwealth Expert Group Meeting on Draft Model Bill on Competition for the Pacific Region*, were unanimous in their view that Pacific Island countries each need legislation governing competition.

Many developed countries now have some form of competition legislation. This has been undertaken after a considerable research, consultation and thought. There are many vivid reasons for promulgation and implementation of instructive competition legislation.

Some of those reasons are:

a) Common Law Insufficient

In the absence of any legislative regime, the only means for prohibiting any restrictive trade or monopolistic practice was left to the Courts. Over a period of time, the Court developed common law principles such as restraint of trade, etc. Generally Pacific Island countries derived and adopted the common law of the United Kingdom. The United States, the United Kingdom, and

our neighbours Australia and New Zealand, experienced that common law has not been effective in eliminating anti-competitive practices. It was further established that lack of or ineffective competition resulted in stagnant economic development. Common law doctrines and remedies failed in that they did not adequately vindicate the public interest, which subsequent competition legislation set out to achieve. Some notable shortcomings encountered were:

- apart from declaring any restrictive agreements illegal under the restraint of trade doctrine, the Court could not provide adequate remedy;

- a third party injured by any such restrictive trade practice was left without a remedy. Any violating agreement is applied with considerable vigour and success between the vendors and purchasers of business and not third parties;

- there was a general judicial reluctance to meddle with controversial and uncertain matters familiar to the parties involved;

- although certain torts attracted some economic relationships, the law of tort provided little comfort for traders adversely affected by restrictive trade practice or monopolistic behaviour.

During the Pacific meeting it was revealed that many countries did not have competition legislation. A *fortiori* the above apprehension of common law applies to those countries. Common law will also have to evolve taking into account recent developments in law and technology.

The smaller Pacific Island countries' judicial systems are largely influenced by their neighbours, Australia and New Zealand. Judges and Justices of Appeal are appointed to serve in superior and appellate courts. Both these countries have a comprehensive competition law. Australia promulgated its legislation in 1974 followed by New Zealand in 1986. Due to the legislative regime, the Judges presiding do not have the requisite common law background. It is likely that the common law which these Judges will develop would be more aligned to the legislative provisions of their countries which have a totally different social, cultural and economic background.

It is most humbly submitted that Pacific Island countries should promulgate and implement competition legislation to avoid it being enmeshed by a mixture of common law and legislation from other countries.

b) Changing Economy

Traditionally, the Pacific Island countries would not have been concerned with competition due to considerable reliance on a subsistence economy. This has rapidly changed over the last 50 or so years. Declining subsistence economy resulted in greater economic dependence on other countries, particularly Australia and New Zealand. As Pacific Island countries join this global market, as a matter of economic reality, they should concurrently introduce the necessary legislative reforms to ensure they play an active and important role in the market.

c) Competition Enhances Investment

An effective Competition Law will undoubtedly attract investment both local and foreign. An inclusive competition law will encourage small and medium scale investors as opposed to monopolies that thrive in an unregulated market. Many Pacific Island countries depend on investment for a stable macro-economic environment to succeed in the global economy. A

generic competition legislation that provides for a level playing field for small, medium and large enterprises to compete on an equal footing will provide the impetus for more investments and a conducive trading environment. Investors will not fear being driven out by monopolies or oligopolies by unfair competition.

d) **Innovation and Technology**

The snowball effect of investment, particularly foreign, is likely to bring in innovation and technology, which is largely lacking in our jurisdiction. Competition legislation for the region no doubt will result in the transfer of this technology regionally; an overall gain for the region.

e) **Human Resource Development**

Market competition brings in efficiency, innovation and an increase in economic activity. Increased economic activity results in engagement of more human resources. The residual effect of this increased economic activity will be an advantage for the region in that there will be human resources development and capacity building.

f) **Public Benefit**

A competitive market backed-up by comprehensive competition legislation will bring in direct benefit to the consumers through lower prices and higher output. Further, the competitors would be more efficient, innovative and responsive to consumer needs. Overall this should strengthen individual countries economic competitiveness. If all the countries of the region are able to implement the legislation, the Pacific as a region will enjoy a better position in the global market.

g) **Public Sector Reforms**

A number of Pacific Island countries are currently reforming the public sector. These reforms will eventually result in government-owned services being made corporate, which will include private sector participation in varying degrees. All such services will be subject to open competition as opposed to the current government protection. As many of the government-controlled services are freed up, more competition is likely to be generated.

However, it is to be noted the certain government services will still have to be retained and possibly be excluded from the Competition Law. The draft Bill provides for exemptions.

h) **Assist in Implementation of Regional and International Trade Related Treaties and Instruments.**

The Pacific region itself has many regional and international instruments regulating trade. The ratification of these instruments has opened up sectors of the economy to market competition domestically, regionally and internationally. At least this provides a greater impetus for the promulgation and implementation of competition legislation.

The above is not an exhaustive list of the reasons why Pacific Island countries should consider adopting competition legislation. It is urged that the draft Competition Bill with the explanatory note by the Commonwealth Secretariat be read together.

3.0 WHAT DOES THE BILL CONTAIN?

The draft Model Bill regulates both competition and provides a limited degree of consumer protection.

On the competition front, the Bill regulates:

a) abuse of dominant positions;
b) restrictive trade agreements;
c) mergers.

a) Abuse of Dominant Positions

Monopolies and large enterprises are a hallmark of many small island states in the Pacific. During the consultation process, it was felt that monopolies would still play a vital role for the economic development of small island states. In light of their importance, the Bill does not from the outset prohibit the existence or practice of monopolies. However, the Bill primarily restricts any abuse of the dominant position that a monopoly enjoys. As long as the monopolies do not distort competition, they will be behaving in accordance with the law. Therefore there is no immediate fear of existing monopolies being driven out from a country or the region. These monopolies have played and will continue to play a crucial role in the development of the small island countries albeit sharing the market with their competitors.

The monopolies will have to adjust and be responsible in allowing other competitors to emerge.

b) Restrictive Trade Agreements

Any agreement between enterprises, which is likely to cause any appreciable adverse effect on competition in a market is prohibited. The model competition law prohibits any agreement that has the effect of lessening competition. These are agreements which:

- directly or indirectly fixed prices;
- control production, market, technical development or investment;
- provide for artificial dividing up of markets or sources of supply ;
- affect tenders;
- apply dissimilar conditions to equivalent transactions;
- condition the conclusion of contracts with supplementary obligations.

c) Mergers

During the meeting in London, the Group felt it important to include mergers. This was not discussed in the meeting in Apia. However, merger is an integral part of the Law of Competition. Its inclusion became necessary after a thorough discussion.

There are limited enterprises in the Pacific Island countries. Any merger is a real threat to any effective competition in the market place. Accordingly, any merger has to be monitored and approved by a regulatory body. The Bill vests this power to the Competition Commission.

However, it is to be noted that the Bill only prohibits a merger that is likely to adversely affect competition.

4.0 PROMOTION OF COMPETITION IN SMALL AND MEDIUM ENTERPRISES

One of the key objectives of the Bill is to promote and enhance the ability of small and medium enterprises to compete effectively. At the Apia meeting, the participants felt it important that some small enterprises should be excluded from the Bill.

This has now become part of the Bill. Small and vulnerable sectors are protected under the Bill. This includes affirmative action programmes. The underlying objective of this provision is to regulate competition whilst protecting small and developing enterprises, which is categorically common in the Pacific Region.

There is provision for block exemptions of certain businesses to be gazetted by the Minister. In addition to the exemptions, provision is also made for authorisation of certain business activities by the Competition Commission.

5.0 ESTABLISHMENT OF A COMMISSION

In order to enforce the Competition Law, a Commission needs to be established. Due to economic and human resources demand, the Bill proposes to establish a Commission which will have part time members. It will also perform dual functions: Investigation and Adjudication.

A precise procedure and structure has been created to ensure that small island countries will be able to establish a Commission with minimum administrative and financial disruption.

An administrative fine (financial penalty) is the penalty for breach of any of the provisions relating to competition.

6.0 CONSUMER PROTECTION

Whilst provisions relating to consumer protection are not directly relevant to the regulation of competition in a market place, it was felt that this should be incorporated in the Bill. The reason for the incorporation was that in many smaller countries particularly, it may be difficult to legislate on both competition and consumer protection. Acceptance of the Model Competition Law will cater for both these areas of law.

7.0 CONCLUSION

During the Pacific Regional Meeting, it was revealed that Fiji and Papua New Guinea had comprehensive competitive legislation. Samoa and Cook Islands were in the process of drafting their laws. Generally, all the countries had some competition policies. A common reason for the policies was to enhance economic activity and to provide the consumers with better value for their money.

The draft Model Bill vividly and very comprehensively encapsulates the collective view of the region. The Bill in its current form is laudable for the region. The Commonwealth Secretariat should be commended for its effort. With confidence, it can be said that the Bill with necessary modification is ideal for those countries that do not have any competition legislation. Further, the Bill will also generate discussion amongst countries having competition legislation and this may be an opportune time to review the same.

COMPETITION LAW
(A View from the Caribbean)

1. Competition law is considered to be vital to modern economies, that is, market led, export driven economies. The aim and objective in having a comprehensive law on governing market-based activities is to control or eliminate restrictive practices or abuse dominant positions of market power which limit access to markets or otherwise unduly restrain competitions adversely affecting domestic, international trade or economic development.

2. The Caribbean region is comprised mainly of independent, developing states whose economies rely heavily on trade and local and foreign investment. Recently, important steps have been made toward the establishment of the Caribbean Court of Justice, which will assist in the resolution of trade disputes; and regimes supporting the movement of factors and skilled persons and competition under CARICOM Agreements, all of which will assist with the promotion, enhancement, and furtherance of national, regional, and international trade.

3. Against this background, the Model Competition Bill made for interesting discussion at the Commonwealth Expert Group Meeting in December, 2004, since its main purpose was the furtherance of competition through controlling or restricting activities which limit market access, restrain competition, or otherwise adversely affect domestic or international trade and economic development. This was particularly so since, with the exception of Jamaica, Caribbean states have largely opted for sectoral rather than generic legislation or regulation to deal specifically with competition issues.

4. One of the main concerns of the countries represented was to ensure that the provisions of the Draft Bill harmonised with the provisions relating to competition regime in the Revised Treaty of Chaguaramas and promoted growth and development of the region that was consistent with their unique challenges. It was therefore anticipated that great strides would be taken by Caribbean states in drafting and enacting domestic legislation in accordance with the Draft Bill.

(1) Main Principles of the Bill

5. To further its purpose, the main principles of the Bill are as follows:

(a) provide for competition and encourage same in small and medium business enterprises;
(b) control or elimination of all restrictive agreements or arrangements among businesses, including mergers, acquisitions, or cartels which amount to abuse of dominant positions;
(c) establish an independent competition commission to administer competition law and policy;
(d) enhance consumer welfare and protection of consumer interests;
(e) criminalisation of price fixing, conspiracy, bid-rigging, misleading advertising, double ticketing, and other anti-competitive or unfair practices;
(f) improve transparency.

(2) How the main principles of the Bill have been applied in selected states in the Caribbean region

6. Jamaica is the only Caribbean state, which presently has a generic competition law regime addressing each of the main tenets of the Bill aforementioned. For most other states, i.e. Belize, the Bahamas, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines, issues of competition law and policy are dealt with by sectoral regulation, which has evidently been a popular tool in prioritising the interest of small or local enterprises in certain key sectors whilst taking advantage of market incentives and competitive dynamics.

Jamaica

7. The Jamaican delegation explained that, guided by a clear economic liberalisation policy, generic competition legislation was central to the creation of a competitive environment. Thus the Fair Competition Act (FCA), 1993, the Telecommunications Act, 2000, and the Consumer Protection Act, 2004 were enacted. The FCA was enacted to: (i) provide for competition in markets and to secure economic efficiency in trade and commerce; (ii) promote consumer welfare and protect consumer interest; and (iii) open markets and guard against the undue concentration of economic power. In the telecommunications industry, this issue was dealt with specifically by the Telecommunications Act aforementioned, one of the main objects being the promotion and protection of the interest of the public by promoting fair and open competition in the provision of specified services and telecommunications equipment (section 3, Telecommunications Act).

8. The control or elimination of restrictive agreements or arrangements which amount to abuse of dominant positions is achieved through the restriction of agreements which contain provisions which have as their purpose or effect the substantial lessening of competition (Part III, FCA). These include, for instance, exclusionary provisions that prevent, restrict or limit the supply or acquisition of goods and services; resale price maintenance, exclusive dealing, tied selling or market restriction.

9. To give teeth to these restrictive provisions, the FCA also established a Fair Trading Commission, which has the authority under section 5 to carry out investigations either on its own initiative or at the request of a complainant or a portfolio Minister, or any person adversely affected by abuse of a dominant position of an enterprise. The Commission is garbed with extensive investigative powers, including the power to administer oaths, require an authorised officer to enter and search premises, remove documents which evince any contravention of the Act, and summon and examine witnesses to that end (sections 7 and 10).

10. Consumer welfare and protection is also achieved by the FCA which has as a primary objective the elimination of industry-wide practices that systematically victimise the consumer. These are discussed in some detail at (e) below. The Consumer Protection Act also enhances the protection and promotion of consumer interests in the supply of goods and services as it makes broader provision for redress where the rights of a consumer are infringed.

11. It is therefore an offence under the FCA to engage in competitor collaborative activities, which have the effect of price-fixing, bid-rigging, market division, limiting output, misleading advertising, double-ticketing, or otherwise eliminating competition and/or jeopardising the interest of the consumer. Under the Consumer Protection Act, additional redress is available for breaches of consumer rights, including against misleading and deceptive conduct, false representations and unfair and unsafe practices by providers of goods and services.

12. One of the greatest indices of improved transparency in the competition law regime in Jamaica is the Telecommunications Act. It can be said that while this Act is sector specific, it conforms to the tenor of the FCA and is tailor made to deal with the particular requirements of the telecommunications industry and to revolutionise the telecommunications monopoly system. Under the All Island Electricity Licence, 2001 the generation aspect of electricity production was unbundled making way for competition in the production of electricity. The Office of Utilities Regulation is also mandated to regulate these industries and in the exercise of its functions, to have regard to whether specified services are likely to promote or inhibit competition (section 4).

St Vincent and the Grenadines

13. The competition law regime of St Vincent and the Grenadines does not appear to have taken the sector-specific approach although it's Fair Trade Competition Act (1999), which is very

similar to the Fair Competition Act of Jamaica, has not yet been proclaimed. Thus the main priority seems to be the control of prices and distribution of goods by virtue of the Price and Distribution of Goods Act (1975).

14. Under this Act, the Permanent Secretary of the Ministry responsible for Trade is the Licensing Authority. The Minister responsible for Trade is also empowered to restrain price increases or situations where prices may be affected. The Governor-General would in any case be required to make an order before any action can be taken. Under the Act, the Governor-General may by order prescribe the price of goods, any mark-up or maximum price, and offences and punishments in relation to the contravention of orders made under the Act. At present, Price Control Orders exist, among other things, to regulate the price of goods such as bread, cement and gasoline.

15. The Telecommunications Industry has also been liberalised under the Telecommunications Act, 2001. Under this Act, the Minister responsible must ensure open entry, market liberalisation and competition; fair pricing and the use of cost-based pricing methods; and fair competition practices by telecommunications providers. The Minister has the ultimate decision whether to grant a license to an applicant. The industry is regulated by the National Telecommunication Regulatory Commission, which advises the Minister on the formulation of national policies on telecommunications matters and regulates prices for the provision of telecommunications services.

The Bahamas

16. Competition laws have played a minimal role in the Bahamas because of the limited areas in which competition issues apply. Where competition matters apply, it is largely dealt with by sector-specific legislation, and a policy of safeguarding the interest of the state and its citizens is evident. For instance, the provision of electricity is state owned, and approval of the Minister is required under the Electricity Act (1956) for the installation or operation of any power station with capacity exceeding 250 kilowatts on the island of New Providence. Under the Out Islands Electricity Act (1969), installation or operation of power stations with capacity exceeding 25 kilowatts is prohibited except where the Minister is satisfied that the energy required cannot be produced by the state-owned electrical corporation.

17. The import sector has been largely characterized by exclusive arrangements, the utilities sector i.e. electricity, telephone, water and waste disposal are natural monopolies, and are government owned. Transportation services, particularly marine transportation have been characterised by Government-sanctioned arrangements.

18. The Telecommunications Act (2000) attempts to achieve a compromise by providing specifically for competition while still securing to the state-owned telecommunications company, the rights granted to it in accordance with the state's sector policy. A Public Utilities Commission is in place to regulate the business operations of public utilities and advise the Minister on matters relating to the telecommunications sector.

19. By a National Investment Policy, investment in and ownership of certain businesses is still restricted to Bahamians. These include inter-island cargo services; domestic newspapers and magazine publications; security services; public transportation; and wholesale and retail operations.

Belize

20. In the case of certain sectors of Belize, a clear policy of safeguarding a comfortable domestic market before encouraging competition is discernible. This is most clearly expressed in the agricultural industry, which is a key contributor to employment and export revenue in Belize. This policy is realised through the requirement of a license for the importation of locally produced items.

This license is granted on a discretionary basis, which in effect has enabled local producers to have a comfortable market while allowing the importation of such goods in the event that the demand cannot be met locally. Traces of this policy also appear in the tourism industry, in which certain national ownership requirements are still imposed on operators of tourism-related businesses, and in the services industry where the only foreign workers who automatically enjoy national treatment are senior and technical staff not available on the local labour market.

21. Nonetheless, other properly regulated sectors seem to conform to the tenor of the Draft Model Competition Bill. For instance, the Telecommunications Act (Cap. 229, Laws of Belize) does not restrict the telecommunications industry to monopoly ownership. In fact, there are presently two functional holders of licenses for the provision of telecommunications services. The Public Utilities Commission is also mandated to regulate all activities in this area, and for example, it has broad powers to impose limits on potential profits if it deems it necessary in order to prevent unfair business practices in a competitive market. Also, service providers in this industry cannot compete as majority owners in other utility markets or control more than 25 per cent of any company in those sectors.

22. Further, while the Electricity Act does not explicitly deal with competition, it is noted that no national ownership requirements are imposed. Electricity services are also tightly regulated by the Public Utilities Commission, which is mandated to secure the interest of the consumer. Thus far the Public Utilities Commission has established a tariff and rate setting methodology for the regulation of charges on consumers and the actual services for which fees can be charged. Thus the interest of the consumer is given priority.

St Kitts and Nevis

23. Competition law and policy in St Kitts and Nevis is also applied by way of sectoral regulation. Essential public utilities such as electricity and water are state-owned monopolies, so the Government sets the water and electricity rates. Nonetheless, there is healthy competition in the bottled water industry.

24. The Telecommunications Industry has also been liberalised since the granting of licenses to two other telephone companies. It is anticipated that with the added service providers telephone rates would improve and the sector would be better regulated. A National Telecommunications Regulations Commission is in place to regulate this industry.

25. The retail services sector is considered one of the main sectors in the island and exclusive arrangements are quite evident. This sector is still dominated by two conglomerates both of which trade in cars, building materials, furniture, appliances, cement, and many other products. The interesting feature of these conglomerates though is that they largely trade in different product brands of cars, for instance, and are the only importers of products such as cement. In this regard, a virtual monopoly exists. There is some competition between these two companies in the supply of furniture and appliances.

St Lucia

26. Competition policy in St. Lucia is on a sectoral basis because the Government has seen the middle ground approach as being more conducive to maintaining quality and developing the necessary economies of scale.

27. The telecommunications market has also been liberalised by virtue of the Telecommunications Act, 2000, which ended a monopoly system and provided instead for open entry, market liberalisation and competition in telecommunications; ensuring wide access to

telecommunications at affordable rates; and fair competition practices. A National Telecommunications Regulatory Commission is also established under the Act for the regulation of prices and monitoring anti-competitive practices within the industry (section 3). This development is buttressed by the Eastern Caribbean Telecommunications Authority Act (2000), which establishes the Telecommunications Authority that is charged with promoting open markets and fair competition in the OECS.

28. Recently, the monopoly of the Banana Growers Association has also been dissolved by the Banana Growers Association (Dissolution) Act, 1998. There is now no prohibition on participation in this industry.

29. We note however that with a view to ensuring quality and efficient production, the monopoly established under the Electricity Act (1994) is retained; and under the Water and Sewerage Act (1999) any other license for the provision of water services are granted subject to the state-owned water company's license.

(3) How the main principles of the Draft Model Bill might be modified

30. It can be seen that even though there is largely no generic competition legislation, the main principles of the Draft Model Bill are expressed in the treatment of the sectors concerned. The states of the Caribbean region are limited by virtue of geographic size and hence their markets are relatively small. The failure to enact generic competition legislation is largely due to the fear of fully liberalising markets to the detriment of local producers of goods and services. Nonetheless, there are clear benefits to the enactment of generic competition legislation; these include certainty and foreseeability, which is crucial to investors. It is therefore hoped that the treatment of these principles would be modified by them and subsumed under generic competition legislation.

31. With the impact of WTO agreements on the region and the region's current involvement in the process of forming a single market and economy (the Caribbean Single Market and Economy), an increase in cross-border trading regionally and internationally is unavoidable. It is foreseeable that with globalisation and the Caribbean Single Market and Economy the need to enact comprehensive competition legislation is inevitable. Therefore, it is important that the relevant market be adequately defined in competition legislation. The objective of defining the relevant market is to identify the companies that compete with each other within a given product and geographical area and whether the products in question can be substituted so as to determine whether a firm exercises monopolist behaviour.

32. In each Caribbean territory, intellectual property rights are fully protected by legislation and they are fully respected under the Draft Model Bill. It is expected that this will also be maintained in the respective competition legislations.

33. Within the expanded market issues of cartelisation and enterprises engaging in predatory and/or discriminatory behaviour with or without affiliate enterprises and abusing dominant positions will figure more prominently in time. The definitions of dominance in the market, that is, the degree of actual or potential control of the market by an entity and anti-competitive practices and the goods and services covered may also be tailored in order to suit the socio-economic reality of the state concerned. With respect to the determination of dominant positions some states may opt to define dominance on the basis of market percentage market share that an entity must hold in order to be considered to be in a dominant position or monopolistic or to initiate investigations.

34. A state may limit the ambit of anti-competitive practices or may restrict it to horizontal and vertical agreements or arrangements that are intended to be binding. Whether the agreement or arrangement should be in writing would be left to the state to decide depending on its particular

circumstances. However, the general trend is to include oral or informal agreement so as to effectively cure the mischief although this may cause more legal controversy.

35. Further provisions dealing with exclusive dealing and arrangements which involves a manufacturer and restricts either a buyer or retailer from dealing in goods of a competitor, will be of increasing importance.

THE COMPETITION ACT
ARRANGMENT OF SECTIONS

MODEL LAW ON COMPETITION

An Act to promote, maintain and encourage competition, to prohibit anti-competitive activities and unfair practices, to establish a Competition Commission, to promote the welfare and interests of consumers in [*name of state*] and for matters connected therewith and incidental thereto.

WHEREAS the Government of [*name of state*] recognises that-

the economy must be efficient and competitive in order to promote development; an effective competition regulation environment is necessary for the economy; and the protection of vulnerable sectors through the effective implementation of competition law is consistent with international best practices and is in the national interest

NOW THEREFORE be it enacted by the Parliament of [*name of state*] as follows-

PART I - PRELIMINARY

Short title **1.** This Act may be cited as the Competition Act, [*year*]

Interpretation **2.** (1) In this Act, unless the context otherwise requires-

"acquire" in relation to-

a) goods includes the obtention of a right or interest by way of a purchase, lease, gift, contest, exchange, hire or hire purchase, or other arrangement;

b) services, includes the acceptance of the rendering of any service;

"agreement" means an agreement, between enterprises, which is implemented or intended to be implemented in [*name of state*] irrespective of the form in which it is made and whether or not legally enforceable;

"business" means any commercial or economic activity relating to goods or services for gain or reward;

"Commission" means the Competition Commission established under section 5;

"concerted practice" means a practice involving direct or indirect contacts between competitors falling short of an actual agreement;

"consumer" means a person, charitable organization, association, body corporate or an unincorporated body of persons, acquiring goods or services for any purpose;

"control" in relation to a body corporate, means the power of a person to secure by means of-

a) the holding of shares or the possession of voting power in relation to that body corporate; or

b) any other power conferred by the constituent documents of the body corporate or other document regulating the manner in which the body corporate is run,

so that the commercial activities of the body corporate are conducted in accordance with the wishes of that person or its nominee;

"document" includes information recorded in any form;

"dominant position" is as defined in section 19;

"enterprise" means a person being an individual, association, partnership, a body corporate, or an unincorporated body of persons engaged in business;

"goods" includes all forms of property [other than real property, money, securities or choses choices in action];

"investigating officer" means an officer appointed as such by the Commission for the purposes of this Act;

"market" means a market in [name of state] or in any part of [name of state];

"minister" means the minister to whom the responsibility for the subject of competition has been assigned;

"person" includes an enterprise;

"price" includes any charge or fee or valuable consideration of any description;

"prohibited activity" means any of the activities prohibited under sections 18,21,22 and 29;

"relevant market" is as defined in section 20;

"service" means a service of any description, whether industrial, professional or otherwise;

"supply" includes, in relation to-

a) goods, the supply by way of sales, exchange, lease, hire or hire-purchase of the goods; and

b) services, the provision by way of sale, rent, or grant of the services.

and "supplier" shall be construed accordingly;

"trade" includes business.

(2) Every reference in this Act to the lessening of competition shall, unless the context otherwise requires, include references to the hindrance or prevention of competition.

(3) For the purposes of this Act, the effect on competition in a relevant market shall be determined by reference to all factors that affect, or may potentially affect competition in that market, including the supply or likely supply of goods or services by any enterprise not resident or carrying on business in [*name of state*].

Objects of Act **3.** The objects of this Act are to-

a) promote, maintain and encourage competition;

b) prohibit anti-competitive activities which prevent, restrict or distort competition or constitute an abuse of dominant position in any market;

c) enhance economic efficiency in production, trade and commerce;

d) promote the welfare and the interests of consumers, and provide consumers with competitive prices and a wide choice of goods or services;

e) expand opportunities for domestic enterprises to participate in world markets; and

f) promote and thereby enhance the ability of small and medium enterprises to compete effectively in a market.

Application of Act **4.** (1) This Act applies to all business activities within, or having an effect within, [ ] except for those matters listed in the First Schedule.

PART II – THE COMPETITION COMMISSION

Establishment of Commission **5.** There is hereby established for the purposes of this Act, a body to be known as the Competition Commission which shall be a body corporate with perpetual succession and shall, as such be capable of-

a) suing and being sued;

b) acquiring, owning, holding and developing or disposing of property, both movable and immovable; and

c) doing and suffering such other act or things as bodies corporate may lawfully do and suffer.

Common seal **6.** (1) The Commission shall have a common seal and such seal may from time to time be broken, changed, altered or made anew as the Commission thinks fit.

(2) All deeds and other documents requiring the seal of the Commission shall be sealed with the common seal of the Commission.

(3) All courts, judges and persons acting judicially, shall take judicial notice of the common seal of the Commission affixed to a document and shall presume that it was duly affixed.

Independence of Commission

7. The Commission shall be an independent institution and shall at all times discharge its functions in an impartial manner.

Constitution of Commission

8. (1) The Commission shall consist of such number of persons, not being less than ( ) nor more than ( ) as the Minister may appoint.

(2) The Second Schedule shall have effect with respect to the Commission, its conduct of business, its members and proceedings.

Functions and duties of Commission

9. (1) Subject to the provisions of this Act, the functions and duties of the Commission shall be to-

a) keep under review, business activities in [*name of state*] with a view to identifying activities which may prevent, restrict or distort competition and adversely affect the economic interests of consumers;

b) eliminate or control activities having adverse effects on competition in [*name of state*] generally;

c) advise the Minister on such matters relating to the operation of this Act as it thinks fit or as may be requested by the Minister;

d) act nationally and internationally as the body representative of [*name of state*] in respect of competition and consumer protection matters;

e) conduct investigations to determine whether any enterprise is engaged in anti-competitive activities, unfair practices or for such other reason as it thinks fit; and

f) carry out such other functions as are required to give effect to this Act.

(2) In performing its functions and discharging its duties pursuant to subsection (1), the Commission shall have regard to the nature of various markets in [*name of state*] and the need to ensure that vulnerable sectors of the economy are not unfairly disadvantaged.

(3) The Commission may undertake such other functions and duties as the Minister may assign in writing to the Commission and in so doing, the Commission shall be deemed to be fulfilling the purposes of this Act, and the provisions of this Act shall apply to the Commission in respect of such functions and duties.

Delegation of powers

10. (1) The Commission may, subject to the conditions or restrictions it thinks fit, delegate the performance of any of the functions, duties and powers assigned to it by this Act or any other enactment to its

Executive Director or such other employee of the Commission as it deems appropriate.

(2) Notwithstanding subsection (1), the Commission shall not delegate the power to –

a) levy fees and borrow money;

b) discontinue an investigation;

c) hold a hearing; and

d) issue a direction, or to impose a penalty.

Appointment of Executive Director and other employees

11. (1) The Commission shall, subject to the provisions of the section, appoint an Executive Director on such terms and conditions as the Commission may determine.

(2) The duration of the employment of the Executive Director shall be for an initial period of [ ] years and his employment may be renewed for a further period not exceeding [ ] years.

(3) The Executive Director shall be responsible to the Commission for the proper administration and management of the affairs of the Commission in accordance with the policy laid down by the Commission.

(4) Where the Executive Director is temporarily absent from [*name of state*] or temporarily incapacitated by reason of illness or for any other reason, another person may be appointed by the Commission to act in the place of the Executive Director during his absence.

(5) The Commission may appoint and employ on such terms and conditions as the Commission may determine a secretary and such other employees, consultants and agents as may be necessary for the effective performance of its functions and the discharge of its duties.

(6) The [*Governor General/President*] may subject to such condition as he may impose, approve the appointment of any officer in the service of the Government to any office with the Commission.

PART III – FINANCIAL PROVISIONS, ACCOUNTS AND ANNUAL REPORT

Funds of Commission

12. The funds of the Commission shall consist of-

a) such sums as may be appropriated by Parliament for the purposes of this Act; and

b) fees collected pursuant to section 13 and any other moneys which may become payable to or vested in the Commission in respect of any matter incidental to its functions.

Power to levy fees

13. (1) The Commission may levy fees for any services rendered by it.

(2) Such fees shall be used by the Commission to defray its expenses.

Loans and financial penalties

14. (1) For the performance of its functions or the discharge of its duties under this Act or under any other enactment, the Commission may from time to time raise loans from the Government.

(2) All financial penalties collected under this Act shall be paid into the Consolidated Fund.

Financial year and annual estimates

15. (1) The financial year of the Commission shall begin on ( ) of each year and end on ( ) of the succeeding year except that the first financial year of the Commission shall begin on the appointed day and end on the ( ) of the succeeding year.

(2) The Commission shall in every financial year, prepare or cause to be prepared and shall adopt annual estimates of its income and expenditure for the ensuing year.

(3) The Commission may adopt supplementary estimates at any of its meetings.

(4) Upon adoption by the Commission, a copy of all annual estimates shall forthwith be sent to the Minister.

(5) The Minister may approve or disallow any item in the estimates submitted to him by the Commission, and the Commission shall be bound by the decision of the Minister.

Accounts and audit

16. (1) The accounts of the Commission shall be audited annually by the [Auditor General] or by any auditor approved by the [Auditor General] for that purpose.

(2) The Commission shall, as soon as practicable after the close of the financial year, prepare and submit financial statements in respect of that year to the auditor who shall audit and report on them.

(3) The auditor or any person authorised by him shall be entitled at all reasonable times to unhindered access to all accounting and other records relating directly or indirectly to all financial transactions of the Commission.

(4) Any person who, without reasonable excuse, refuses or fails to allow the auditor or any person authorised by the auditor access to any accounting or other records in his custody or power shall be guilty of an offence and shall be liable on conviction to a fine not exceeding [ ].

(5) The auditor shall in his report state whether-

a) the financial statements fairly state the affairs of the Commission and reflect the financial transactions undertaken by it;

b) proper accounting and other records have been kept, including records of all assets and liabilities of the Commission; and

c) such other matters arising from the audit as he considers necessary.

(6) The Commission shall, as soon as its accounts and financial statements have been audited, send a copy of the audited financial statements together with the report of the auditor to the Minister.

Annual report

17. (1) The Commission shall, within [three] months after the end of each financial year, or within such longer period as the Minister may in special circumstances allow, cause to be made and submitted to the Minister, an annual report dealing generally with the activities of the Commission during the preceding financial year and containing information relating to the proceedings and policy of the Commission.

(2) There shall be included in the annual report, the audited financial statements of the Commission and the report of the auditor.

(3) The Minister shall as soon as practicable cause a copy of the annual report submitted under subsection (1) to be presented to Parliament.

(4) Notwithstanding the provisions of this section, the Commission may from time to time furnish to the Minister, a report relating to any particular matter investigated or the subject of an investigation, being a matter which in its opinion, requires the special attention of the Minister.

PART IV – ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANT POSITION

Anti-competitive agreements

18. (1) Any agreement between enterprises, decision by associations of enterprises or concerted practice which has as its object or effect the prevention, restriction or distortion of competition in *[name of state]* is prohibited.

(2) Without prejudice to the generality of subsection (1), agreements, decisions and concerted practices may in particular have the object or effect of preventing, restricting or distorting competition, if they contain provisions which-

a) directly or indirectly fix purchase or selling prices or determine any other business activity;

b) limit or control production, markets, technical development or investment;

c) share markets or sources of supply;

d) constitute a bid-rigging agreement;

e) apply dissimilar conditions to equivalent transactions with trading parties, thereby placing the trading parties at a competitive disadvantage; or

f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the said contracts.

(3) An agreement, decision or concerted practice under subsection (1) shall not be prohibited-

a) if it falls within an agreement, decision or concerted practice or a category of agreements, decisions or concerted practices, for which an authorisation has been duly granted by the Commission under Part VI; or

b) if in the opinion of the Commission it-

(i) contributes to the improvement of production or distribution of goods or services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit; and

(ii) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of objectives mentioned in sub-paragraph (i); and

(iii) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

(4) Any provision of any agreement or any decision which is prohibited by subsection (1) shall be void to the extent that it infringes that subsection.

(5) Unless the context otherwise requires, a provision of this Act which is expressed to apply to, or in relation to an agreement shall be read with the necessary modifications, as applying equally to, or in relation to, a decision by an association of enterprises or a concerted practice.

(6) For the purposes of this section, a bid-rigging agreement having as object or effect the prevention, restriction or distortion of competition, exists between two or more enterprises where-

a) one of the parties to the agreement agrees not to submit a bid or tender in response to a call or request for bids or tenders; or

b) the parties to the agreement agree on the price, terms and conditions of the bid or tender to be submitted in response to a call or request for bids or tenders.

(7) Subsection (6) does not apply where-

a) the enterprises to an agreement are inter-connected bodies corporate; or

b) the person making the call or requests for bids or tenders is made aware of the terms of the agreement before the making of a bid or tender by a party to the agreement.

(8) For the purposes of this section any two bodies corporate are to be treated as inter-connected if one of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.

Dominant position

19. An enterprise holds a dominant position in a relevant market if, by itself or together with one or more enterprises, it is in a position to exclude competition, control prices or to behave to an appreciable extent independently of its competitors, potential competitors, customers or suppliers.

Identification of relevant market

20. For the purpose of identifying the relevant market under this Part, the Commission shall take into account, inter alia-

a) the geographical boundaries that have been applied to identify groups of sellers and buyers of goods or services within which competition is likely to be restrained;

b) all goods or services which are regarded as interchangeable or substitutable by the consumer, by reason of the characteristics of the goods or services, the prices and the intended use; and

c) all suppliers to which consumers may turn in the short term, if the abuse of dominance leads to a significant increase in price or to other detrimental effects upon the consumer.

Abuse of dominant position

21. (1) Any conduct on the part of one or more enterprises which amounts to the abuse of a dominant position in a relevant market is prohibited.

(2) A dominant enterprise abuses its position if it acts in a manner that impedes the maintenance or development of effective competition in a relevant market.

(3) Without prejudice to the generality of subsection (2), the following acts may in particular amount to an abuse of dominant position-

a) restricting any other enterprise from entering the market;

b) preventing or deterring any other enterprise from engaging in competitive conduct in a market;

c) eliminating or removing an enterprise from a market;

d) directly or indirectly imposing unfair purchase or selling prices or other unfair trading.conditions;

e) limiting production, supply of goods or services, markets or technical development to the prejudice of consumers;

f) applying dissimilar conditions to equivalent transactions with trading parties, thereby placing the trading parties at a competitive disadvantage;

g) engaging in exclusive dealing, market restriction or tying; or

h) generally making the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.

(4) For the purposes of this Part-

a) "exclusive dealing" includes any practice whereby a supplier of goods or services –

(i) as a condition of supplying the goods or services to a consumer requires the consumer to –

a. deal only or primarily in goods or services supplied by or designated by the supplier or his nominee;

b. refrain from dealing in a specified class or kind of goods or services except for the goods or services supplied by the supplier or his nominee;

(ii) induces a consumer to meet a condition referred to in paragraph (a) by offering to supply the goods or services to the consumer on more favourable terms or conditions, if the consumer agrees to meet that condition;

b) "market restriction" means any practice whereby a supplier of goods or services, as a condition of supplying those goods or services to the consumer, requires the consumer to supply the goods or services only in a defined market or exacts a penalty of any kind from the consumer if the consumer supplies any goods or services outside that market;

c) "tying" means any practice whereby a supplier of goods or services–

(i) as a condition of supplying the goods or services (hereinafter referred to as tying) to a consumer, requires the consumer to–

a. acquire any other goods or services from the supplier or his nominee; or

b. refrain from using or distributing, in conjunction with the tying, any other goods or services that are not of a brand or manufacture designated by the supplier or their nominee; and

(ii) induces a customer to meet a condition set out in paragraph (i) by offering to supply the goods or services to the consumer on more favourable terms or conditions if the consumer agrees to meet that condition.

(5) Any conduct of a dominant enterprise shall not be prohibited if-

a) it is the subject of an authorisation granted by the Commission under Part VI; or

b) it contributes to the improvement of production or distribution of goods or services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit.

PART V – MERGERS AND ACQUISITIONS

Mergers prohibited

22. (1) Any merger that has resulted, or is likely to result, in a substantial lessening of competition within any market in [name of state] for goods or services is prohibited.

(2) A merger occurs when one or more enterprises directly or indirectly acquire or establish direct or indirect control over the whole or part of the business activities of another enterprise.

(3) A merger may be achieved in any manner, including through-

a) purchasing, leasing or otherwise acquiring the shares, an interest or the assets of the other enterprise in question; or

b) effecting an amalgamation or other combination with the other enterprise in question.

Substantial lessening of competition

23. (1) The Commission may, when deciding whether a merger is likely to result in a substantial lessening of competition, with regard to goods or services take into account any of the following considerations-

a) the actual and potential level of import competition in the market;

b) the ease of entry into the market, including tariff and regulatory barriers;

c) whether the merger will result in the removal of an effective competitor;

d) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and

whether the merger can or cannot be justified on any exceptional and compelling reason of public policy.

PART VI – AUTHORISATIONS AND EXEMPTIONS

Grant of authorisation

24. (1) Any enterprise which proposes to become a party to an agreement, a conduct, or a merger prohibited under sections 18, 21 and 22 may apply to the Commission for an authorisation to become a party to the agreement, conduct or merger.

(2) In determining an application under subsection (1), the Commission shall consult the Minister and take into account the following-

a) the vulnerability of the sector concerned;

b) the effect of the agreement, conduct or merger on the ability of small and medium sized enterprises to compete effectively;

c) the promotion of the establishment and development of domestic industries;

d) the promotion of economic development of other sectors of the economy; or

e) any other exceptional and compelling reasons of public policy.

(3) The Commission may grant an authorisation for a specified term and impose such terms and conditions as it deems fit.

(4) The Commission may refuse to grant an authorisation and shall inform the applicant in writing of the reasons for the refusal.

Effect of authorisation

25. While an authorisation under section 24 is in force, nothing in this Act shall prevent the enterprise to whom such authorisation is granted from giving effect to any agreement or engaging in any conduct or merger to which the authorisation relates.

Revocation of authorisation

26. (1) Subject to subsection (2), the Commission may revoke or amend an authorisation granted under section 24 if it is satisfied that-

a) the authorisation was granted on information that was false or misleading;

b) there has been a breach of any terms or conditions subject to which the authorisation was granted; or

c) there has been a material change of circumstance since the grant of the authorisation.

(2) Before revoking or amending the authorisation, the Commission shall notify the enterprise in writing and specifying the reasons for the proposed revocation or amendment and give the enterprise an opportunity to make representations to the Commission within [ ] days from the date of the notification.

Register of authorisations

27. (1) The Commission shall keep, in such form as it may determine, a register of authorisations granted under this Part.

(2) The register shall be kept at the office of the Commission and be available upon payment of the prescribed fee for inspection by members of the public at all reasonable times.

Block exemptions

28. The Commission may by [order] published in the gazette, exempt any particular category of agreements, decisions and concerted practices from the prohibitions referred to in section 18.

PART VII – CONSUMER PROTECTION

Unfair practice

29. (1) Any unfair practice on the part of the enterprise is prohibited.

(2) An unfair practice occurs when in relation to a consumer transaction, an enterprise-

a) does or says anything, or omits to do or say anything, as a result of which a consumer may reasonably be deceived or misled;

b) makes a false claim;

c) takes advantage of a consumer where it knows or ought reasonably to know that the consumer-

(i) is not in a position to protect his own interest; or

(ii) is not reasonably able to understand the character, nature, language or effect of the of the transaction; or

d) without limiting the generality of paragraphs (a) to (c) does anything specified in the Third Schedule.

(3) An unfair practice referred to in subsection (2), may occur before, during or after a consumer transaction, or may consist of a single act or omission.

Consumer transaction

30. For the purposes of this Part, consumer transaction means-

a) the supply of goods or services by an enterprise to a consumer as a result of a purchase, lease, gift, contest or other arrangement; or

b) an agreement between an enterprise and a consumer, as a result of a purchase, lease, gift, contest or other arrangement in which the enterprise is to supply goods or services to another consumer specified in the agreement, but does not include any transaction specified in the Fourth Schedule.

PART VIII – INVESTIGATION AND HEARING

Complaints and requests

31. (1) Where, following a complaint or a request made to the Commission by any person, or at the Commission's own initiative, the Commission has reasonable grounds to believe that an enterprise has engaged or is engaging in one or more of the prohibited activities under Parts IV, V and VII of this Act, the Commission may conduct an investigation.

(2) For the purposes of an investigation under subsection (1), the Commission may appoint its Executive Director or such other employees as it considers appropriate, to be an investigating officer and may appoint or employ any other person to assist the investigating officer.

(3) The Commission may, where it decides to conduct an investigation, by notice in writing to any person require that person to-

a) produce to the Commission a specified document or provide it with a specified information, relevant to the investigation within such time as may be stated in the notice; and

b) attend at a specified place and time, to answer questions of the investigating officer and provide him with information or produce any document he may have in his possession or custody in relation to the investigation.

(4) The Commission may specify in the notice served pursuant to subsection 3(a), the time and place any document is to be produced or any information is to be provided and the manner and form in which it is to be produced or provided.

(5) The power under this section to require a person to produce a document includes the power to take copies or extracts from any document produced.

(6) Where an investigation reveals an alleged infringement of any one or more of the prohibited activities under this Act, the Commission shall inform the enterprise in writing of the alleged infringement and invite the enterprise to make representations in connection with the alleged infringement.

(7) The Commission shall, where the enterprise admits the alleged infringement, give such directions as it considers appropriate to remedy the infringement and may impose a financial penalty.

(8) Where the enterprise denies the alleged infringement or makes representations which the Commission considers to be unsatisfactory, the Commission shall convene a hearing and inform the parties accordingly.

(9) The Commission may conduct further investigations for the purposes of the hearing.

(10) Upon conclusion of the hearing, the Commission shall, where it finds-

a) that there was an infringement of a prohibited activity, issue such direction and may impose such financial penalty as it considers appropriate; or
b) that no infringement of a prohibited activity has taken place, inform the parties forthwith.

(11) The Commission shall before issuing a direction or imposing a financial penalty, give an opportunity to the party affected by the findings of the Commission, to make representations in mitigation.

Investigation discontinued

32. (1) At any stage of an investigation or a hearing under this Act, if the Commission is of the opinion that the matter being investigated or subject of a hearing does not justify further investigation or hearing, the Commission may discontinue the investigation or hearing.

(2) Where the Commission decides to discontinue an investigation or a hearing under subsection (1), it shall inform the parties forthwith of its decision.

Interim measures

33. (1) Where, in the course of an investigation-

a) the Commission has reasonable grounds to suspect that an enterprise is a party to one or more of the prohibited activities under this Act; and

b) considers that as a consequence it is necessary for it to take an interim measure as a matter of urgency for the purpose of-

(i) preventing serious and irreparable damage to a particular person or category of persons;
(ii) protecting public interest; or
(iii) preventing a person from taking any step that would hinder or impede the investigation of the Commission;

the Commission may give such directions to any person as it considers appropriate for that purpose.

(2) A direction given under this section shall be in writing.

(3) The Commission shall give the person to whom it intends to give a direction an opportunity to make representations to the Commission before issuing the direction.

Examination of witnesses

34. The Commission may, for the purposes of a hearing, do all or any of the following-

a) summon witnesses to appear before it ;

b) administer oath and examine the witnesses;

c) require any such witness to produce to the Commission any document or to furnish any information in his power, control or custody.

Immunity and privileges

35. A witness before the Commission shall be entitled to the same immunity and privileges applicable to a witness before a court of law.

Witness refusing to comply

36. (1) Any person who-

a) on being duly summoned to attend as a witness, fails to attend without reasonable excuse;
b) being in attendance as a witness refuses to take an oath or to furnish any information or produce any document in his control or possession or to answer any question;
c) destroys any document or other record likely to be required for an investigation that has commenced under this Act;
d) prevents or impedes the investigation;
e) without reasonable excuse fails, to comply with a notice served under section 31 (3);
f) knowingly provides the Commission with information that is false or misleading; or
g) does any other thing which would constitute contempt before a court of law;

shall commit an offence and shall be liable on conviction to a fine not exceeding [ ] and to imprisonment for a term not exceeding [ ].

(2) It shall be a reasonable excuse, for the purposes of subsection (1)(e) for a person to refuse or to fail to answer a question put to him or refuse or fail to produce a document that he was requested to produce, if the answer to the question or the production of the document might tend to incriminate him.

Procedures for hearing

37. For the purposes of a hearing, the Commission shall, subject to the provisions of this Part, establish its own procedures and act expeditiously taking into account the interests of the parties before it.

Power to prohibit disclosure of information, documents and evidence

38. (1) The Commission may prohibit the publication or communication of any information furnished or obtained, documents produced, obtained or tendered, or evidence given to the Commission in connection with the proceedings of the Commission.

(2) A person who publishes or communicates any information, document or evidence, the publication of which is prohibited

under subsection (1), shall commit an offence and shall be liable on [summary] conviction to a fine not exceeding [ ] or to imprisonment for a term not exceeding [ ].

Power of entry and search

39. (1) The Commission may, for the purpose of ascertaining whether an enterprise has engaged or is engaging in a prohibited activity, require an investigating officer appointed under section 31 (2), to enter and search any premises.

(2) An investigating officer entering any premises under this section may-

a) inspect and remove any document, equipment and article which he considers to be relevant to the investigation;

b) require any person on the premises to provide an explanation in respect of any of the items referred to under paragraph(a);

c) take copies of, or extracts from any document which is removed;

d) require any information which is stored in any electronic form and is accessible from the premises and which the investigating officer considers relevant for the purpose of the investigation to be produced in a form in which-

(i) it can be taken away;

(ii) it is visible and legible.

(3) An investigating officer shall only exercise the powers conferred by subsection (2) with a warrant issued under subsection (3).

(4) Where a [Magistrate] is satisfied by information on oath that there is reasonable ground for believing that any person has engaged or is engaging in conduct constituting or likely to constitute a prohibited activity under this Act, the [Magistrate] may issue a warrant permitting an investigating officer to exercise the powers conferred by subsection (1) in relation to any premises specified in the warrant.

(5) A warrant shall not authorise the retention of a document, equipment or article for more than [ ] days.

(6) An investigating officer shall-

a) on entering any premises pursuant to a warrant, produce evidence of his identity and the authority to enter; and

b) upon completing the search authorised by the warrant, leave a receipt containing a list of any document, equipment or article that has been removed in connection with the investigation.

(7) The occupier or person in charge of any premises entered pursuant to this section shall provide the investigating officer with all reasonable facilities and assistance for the effective exercise of his function.

(8) Any person who obstructs or impedes an investigating officer in the performance of his duties under this Act commits an offence and shall be liable on [summary] conviction to a fine not exceeding [ ] or imprisonment for a term not exceeding [ ] years [or to both such fine or imprisonment].

PART IX – ENFORCEMENT

Enforcement of decisions of Commission

40. (1) Where the Commission has made a finding that an enterprise is a party to a prohibited activity, in breach of any of the provisions falling under Parts IV, V and VII, the Commission may give such directions as it considers appropriate to the enterprise, directing it to bring an end to the prohibited activity and if necessary, requiring the enterprise to take such action as is specified in the direction to eliminate the harmful effect of the prohibited activity and to prevent the recurrence of such prohibited activity.

(2) A direction issued under subsection (1) may, in particular, provide-

a) in relation to an agreement prohibited under section 18, for the parties to modify or terminate the agreement;

b) in relation to a conduct prohibited under section 21, for the enterprise to modify or cease the conduct;

c) in relation to a merger prohibited under section 22, for the merger to be dissolved or modified in such manner as the Commission may direct;

d) in relation to an unfair practice prohibited under section 29, for the enterprise to cease the unfair practice and where appropriate restitution of any money, property or other consideration furnished by the consumer;

e) for such financial penalty as the Commission deems fit to impose in relation to a prohibited activity; and

f) for a party to furnish a performance bond, guarantee or any other form of security as the Commission may determine.

Enforcement by court

41. (1) For the purposes of enforcement of any direction made by the Commission under section 33 or 40, the Commission may apply for the direction to be registered with the [court] in accordance

with the Rules of Court and the [court] shall register the direction in accordance with the Rules of Court.

(2) The direction shall as from the date of registration, be deemed to be of the same force and effect as if it had been an order originally obtained in the [court] and on application being made, the [court] shall have power to enforce the direction.

Rights of private action

42. (1) Any person who suffers loss or damage as a result of a breach of a prohibited activity shall have a right of action for relief in civil proceedings against any enterprise which is, or which has at the material time been, a party to the prohibited activity.

(2) No action under subsection (1) may be brought-

a) until after a finding has been made by the Commission or where the finding of the Commission is the subject of an appeal, until after the final determination of the appeal; and

b) where the action has been lodged, within [ ] years from the date of the finding of the Commission, or the final determination of an appeal, where the finding of the Commission is the subject of an appeal.

PART X – APPEALS

Appeals

43. (1) Any person who is aggrieved by a decision of the Commission under sections 26, 33 or 40 may, within [ ] days after the date of that decision, appeal to a [Court][Judge in Chambers].

(2) The [Court][Judge in Chambers] shall hear and determine the appeal and may-

a) confirm, modify or reverse the decision of the Commission;

b) remit the matter to the Commission giving such directions as it considers appropriate;

c) impose or revoke, or vary the amount of financial penalty;

d) make such further or other order, whether as to costs or otherwise as the [Court] [Judge In Chambers] may deem appropriate.

Effect of appeal on direction

44. Where an appeal under section 43 is entered against any decision of the Commission, any direction of the Commission that is based on such decision shall remain in force pending the determination of the appeal, unless the [Judge][Court] otherwise orders.

PART XI – MISCELLANEOUS

Regulations

45. (1) [The Commission may, with the approval of the Minister] [The Minister may] make regulations for any purpose for which regulations are required to be made under this Act and generally for carrying out the purposes and provisions of this Act.

(2) Any regulations made under this Act may provide for-

a) the procedures to be followed in respect of applications and notices to proceedings of the Commission;

b) the form and manner in which a complaint or a request for investigation is to be made;

c) the fees to be charged in respect of anything done or any services rendered by the Commission under this Act;

d) the category of agreements that shall qualify for a block exemption and such factors as may be considered before granting a block exemption; and

e) anything which may be prescribed or is required to be prescribed under this Act.

Guidelines

46. (1) The Commission may publish in the gazette guidelines to indicate its policy approach to any matter within its jurisdiction under this Act.

(2) For the purpose of preparing any guidelines under subsection (1), the Commission may consult such persons as it thinks appropriate.

(3) Any guideline published in accordance with subsection (1) shall not be binding on the Commission.

Acts of employee or agent

47. In deciding whether an enterprise is a party to a prohibited activity, any act or omission by an employee or agent of an enterprise shall be deemed to be an act or omission of the enterprise, if the act or omission occurred in the course of-

a) the employee's employment with the enterprise; or

b) the agent exercising the powers or performing the duties on behalf of the enterprise within the scope of the agent's actual or apparent authority.

Protection from personal liability

48. (1) No action, suit or other legal proceedings shall lie personally against-

a) the Commission;

b) any member, employee or an agent of the Commission;

c) any person who is on secondment or attachment to the Commission;

d) any person authorised, appointed or directed by the Commission to exercise the powers of the Commission, to perform its functions or discharge its duties

for anything done or omitted to be done in good faith in the course of or in connection with-

(i) the exercise or purported exercise of any power under this Act or any other enactment;

(ii) the performance or purported performance of any function or the discharge or purported discharge of any duty under this Act or any other enactment; or

(iii) the compliance or purported compliance with this Act or any other enactment.

Confidentiality **49.** (1) It shall be the duty of every person referred to in subsection (3) to preserve secrecy with regard to all matters that have been classified as being confidential by the Commission and that may come to his knowledge in the performance of his functions and discharge of his duties under this Act and he shall not communicate any such matter to any person, except in so far as such communication-

a) is necessary for the performance of any such function or discharge of any such duty; or

b) is lawfully required by any court, or lawfully required under this Act or under any other enactment.

(2) Any person who fails to comply with subsection (1), commits an offence and shall on conviction be liable to a fine not exceeding [ ] and to imprisonment for a term not exceeding [ ] years.

(3) For the purposes of this section, a person who has a duty to preserve secrecy is a person who is or has been-

a) a member, an officer, employee or an agent of the Commission;
b) a member of a committee appointed by the Commission or any person employed, authorised, appointed or employed to assist the Commission;
c) an investigating officer or any person authorised, appointed or employed to assist the investigating officer.

FIRST SCHEDULE

section 4

EXCLUDED MATTERS

This Act shall not apply to the following matters:

a) an agreement, understanding or arrangement for collective bargaining on behalf of employers and employees for the purpose of fixing the remuneration, terms or conditions of employment of the employees;

b) an agreement expressly authorised by an enactment or a scheme made pursuant to an enactment, including such matters which are under the licensing or supervisory control of a regulatory regime for prudential or economic reasons;

c) activities expressly exempted by virtue of any treaty or any legally enforceable agreement in relation thereto or flowing therefrom;

d) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public; and

e) such other business or activity as may be from time to time prescribed by the Commission after consultation with the Minister.

SECOND SCHEDULE

section 8(2)

CONSTITUTION AND CONDUCT OF THE BUSINESS OF THE COMMISSION

Eligibility for Members

1. The persons to be appointed to serve as members of the Commission shall be selected for their ability and experience in industry, commerce, economics, law, public administration, consumer protection or their professional qualifications or their suitability otherwise for appointment.

2. The Executive Director shall be an ex officio member of the Commission.

3. The members (hereinafter referred to as the appointed members) shall be appointed by the Minister for such period not exceeding [ ] years as may be specified in the letter of appointment and each member shall thereafter be eligible for reappointment for a further [ ] years.

Chairperson

4. The Minister shall appoint one of the appointed members of the Commission to be chairperson of the Commission.

Acting Appointments

5. The Minister may appoint any person to be a temporary Chairperson or member during the temporary incapacity from illness or otherwise or during the temporary absence from [ ] of the Chairperson or any member, as the case may be.

Resignations

6. (1) An appointed member other than the Chairperson may at any time resign his office by letter in writing addressed to the Minister and transmitted through the Chairperson; and from the date of the receipt by the Minister of that letter, the member shall cease to be a member of the Commission.

(2) The Chairperson may at any time resign his office by instrument in writing addressed to the Minister; and such resignation shall take effect as from the date of receipt of that instrument by the Minister.

Revocation

7. The Minister may revoke the appointment of any appointed member, if such member-

a) is unable to perform his functions by reason of physical or mental infirmity;
b) is convicted and sentenced to a term of imprisonment for a term exceeding [ ] years;
c) fails, without reasonable excuse, to effectively carry out any of his functions under the Act;
d) engages in such activities as are reasonably considered prejudicial to the interest of the Commission;
e) is adjudged bankrupt;
f) actively engages in politics; or
g) for any other reason the Minister may consider.

Gazetting of appointments

8. The names of all members of the Commission as first constituted and every change of membership shall be published in the Gazette.

Leave of absence

9. The Minister may, on the application of an appointed member, grant leave of absence to that member.

Seal and Documents

10. (1) The seal of the Commission shall be kept in the custody of the Executive Director or the Secretary and shall be affixed to any instrument or document requiring the seal of the Commission pursuant to a resolution of the Commission.

(2) The seal shall be authenticated by the signatures of the Executive Director or any other member authorised by the Commission to act in that behalf, and the Secretary.

(3) All documents, other than those required by law to be under seal, made by the Commission and all decisions of the Commission may be signified under the hand of the Executive Director or any other member authorised to act in that behalf and the Secretary.

Procedure and meetings

11. (1) The Commission shall meet as often as may be necessary or expedient for the transaction of its business, (and in any case not less than [ ] times in each financial year), and such meetings shall be held at such places and times and on such days as the Commission may determine.

(2) The Chairperson shall preside at all meetings of the Commission at which he is present and in his absence the members present shall elect one of their number to preside at the meeting.

(3) [ ] members of the Commission, shall constitute a quorum.

(4) The decisions of the Commission shall be approved by a majority of votes and, in addition to an original vote, the Chairperson or other person presiding at a meeting shall have a casting vote in any case in which the voting is equal.

(5) The minutes of each meeting shall be faithfully recorded and confirmed at a subsequent meeting.

(6) Subject to the provisions of this Act, the Commission may make standing orders to regulate its own procedure generally, and in particular regarding the holding of meetings and special meetings, the notice to be given of such meetings, the proceedings thereat and the opening, keeping, closing and auditing of accounts.

Disclosure of interest

12. (1) A member who is directly or indirectly interested in any matter which is being dealt with by the Commission shall disclose the nature of his interest at a meeting of the

Commission and shall not take part in any deliberation or decision with respect to that matter.

(2) For the purposes of sub-paragraph (1) the word 'member' shall include the Chairperson.

Validity of proceedings

13. No act or proceeding of the Commission shall be invalid merely by reason of-

a) any vacancy in or any defect in the constitution of the Commission; or

b) any defect in the appointment of a person as a chairperson or as a member; or

c) any irregularity in the procedure of the Commission not affecting the merits of the matter decided.

Remuneration of members

14. There shall be paid from the funds of the Commission to the Chairperson and other members of the Commission, such remuneration, whether by way of honorarium, salary or fees, and such allowances as the Minister may determine.

THIRD SCHEDULE

Section 29(2)

UNFAIR PRACTICES

1. Hiding material facts from the consumer by using small print or misleading the consumer generally as to material facts, in connection with the supply of goods or services.

2. Representing that goods or services have approval, performance, efficacy, characteristics, accessories, ingredients, components, qualities, uses or benefit that they do not have.

3. Representing that a test, duly approved by the [Standards Bureau] has been carried out in respect of goods or services and as a result the goods or services have received formal approval as to standard, performance, efficacy, characteristics, quality, when that is not so.

4. Representing that goods or services are of a particular standard, quality, grade, style, model, origin, method of manufacture, and have been supplied by an enterprise of a particular trade, qualification and skill, when they are not.

5. Representing that a price benefit or advantage exists respecting goods or services where the price benefit or advantage does not exist.

6. Charging a price for goods or services that is substantially higher than an estimate provided to the consumer, except where the consumer has already agreed to the higher price in advance.

7. Charging a price for goods or services that is higher than that which is represented as a discounted price.

8. Representing that goods or services are available at discounted prices whilst the enterprise making the representations knows or ought to have known that it will not be able to supply the goods or services in reasonable quantities having regard to the nature of the relevant market.

9. Representing that a service, part, repair or replacement is needed or desirable if that is not the case, or that a service has been provided, a part has been installed, a repair has been made or a replacement has been provided, if that is not so.

10. Taking advantage of a consumer by inserting in a contract terms or conditions that are harsh or oppressive or exerting undue pressure or undue influence on the consumer to enter into a transaction involving goods or services.

11. Representing to the consumer that in connection with the purchase of goods or services, gifts, prizes or other free items will be offered, when the enterprise making the offer knows or ought to have known that the items will not be offered.

FOURTH SCHEDULE

Section 30

EXCLUDED TRANSACTIONS

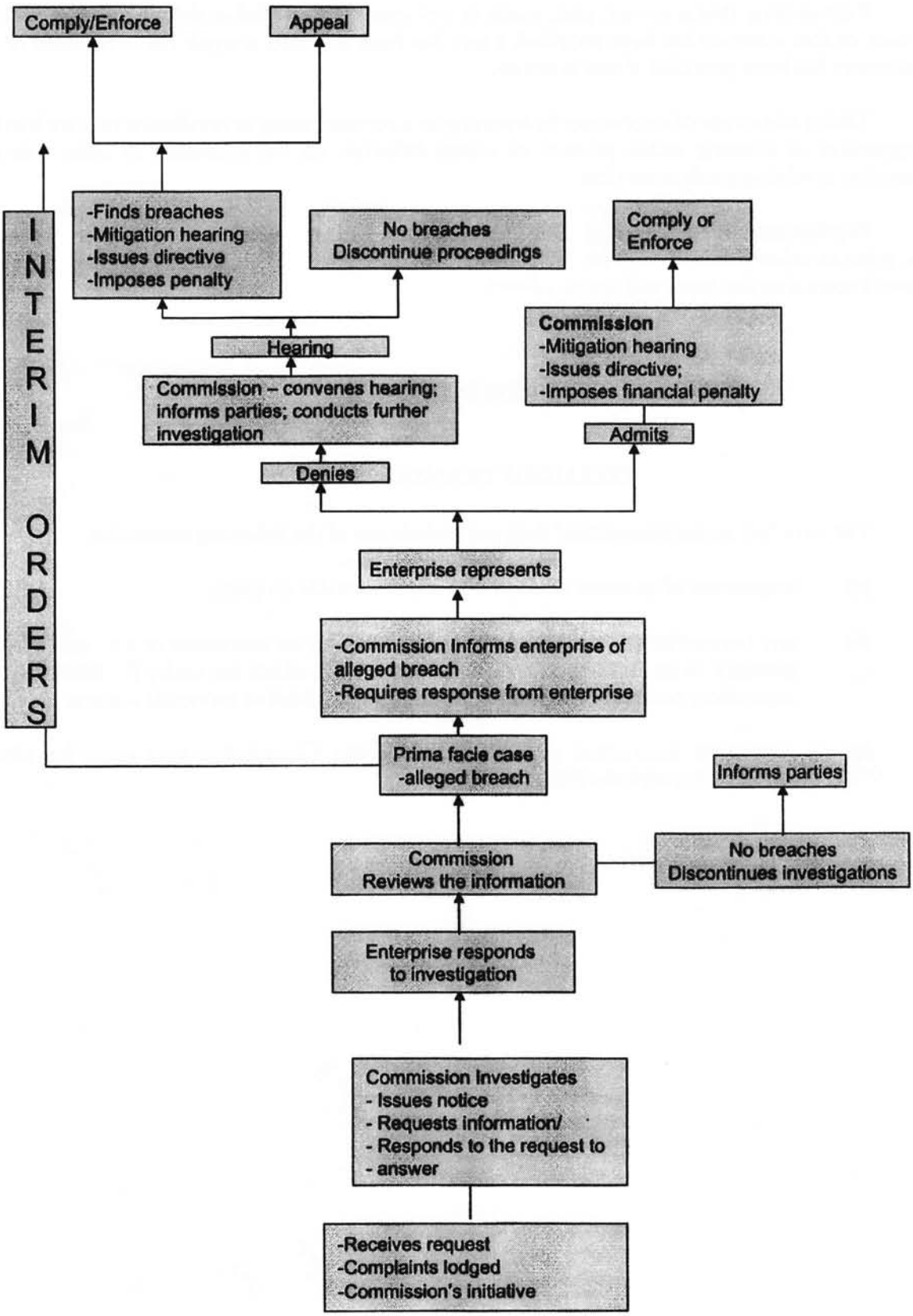
1. The term "consumer transaction" does not include any of the following transactions-

(a) acquisition of an estate or interest in any immovable property;

(b) any transaction or activity expressly authorised by an enactment or a scheme made pursuant to an enactment, including such matters which are under the licensing or supervisory control of a regulatory regime for prudential or economic reasons;

(c) any other transaction or activity which the Commission may prescribe after consultation with the Minister

INVESTIGATION AND HEARING PROCEDURES



COMMONWEALTH ACTION IN THE FIELD OF PRIVATE INTERNATIONAL LAW

Paper by the Commonwealth Secretariat

INTRODUCTION

1. The Hague Conference is the recognised international agency dealing with this specialist area of law. Commonwealth Law Ministers decided in 1977 that, rather than develop their own competence in intra-Commonwealth private international law, they would work with the Hague Conference. Several Commonwealth countries are Members of the Conference in their own right and the Commonwealth Secretariat is represented by an Observer delegation at the principal meetings in The Hague. The present paper draws the attention of Law Ministers to aspects of the work of the Conference that have important implications for intra-Commonwealth practice.

CHILD SUPPORT AND FAMILY MAINTENANCE IN INTERNATIONAL CASES

2. Commonwealth governments are well aware of the increasing mobility of people across national boundaries and of the increasing incidence in many countries of family breakdown. Especially when the child or other person in need of maintenance lives in one country and the person who should provide support is in another, the result can be that children and other family members face severe financial hardship and become a claim on the welfare provision of the state. An adequate system for the enforcement of support obligations across national boundaries is very much in the interests of governments, which will wish to provide help to those in need, so vindicating the rights of the child to which much international attention has been paid in recent years, and to place the burden on those who should properly bear it.

Commonwealth arrangements

3. This is an area in which there is a distinct Commonwealth interest, not least because of the patterns of movement from one Commonwealth country to another. Most Commonwealth countries have on their statute books legislation reflecting intra-Commonwealth arrangements dating from the 1920s and sometimes referred to as the Reciprocal Enforcement of Maintenance Orders (REMO) arrangements. Some 70 Commonwealth jurisdictions (including states and provinces within federal or composite countries) are party to these arrangements, but some, such as Canada, are moving away from the system.

4. Under the REMO system, where the maintenance claim is against someone now living in another designated country, a provisional order is made in the claimant's country of residence but needs to be confirmed after a separate hearing in that of the respondent. The complexity of the legislation, the infrequency with which any particular court will encounter it, and the likelihood that the court will be low in the judicial hierarchy, all mean that the practical operation of the REMO system can prove difficult. Two courts are involved and each hears directly from only one party. That is not an ideal arrangement but those who devised the system, in days when international communication was much more difficult than it is today, saw no alternative given the relatively small sums of money involved.

5. These intra-Commonwealth arrangements are no longer adequate. There are a number of reasons for this.

(i) The legislation was drafted with the case of deserted wives in mind; the great majority of cases are now child support cases, and the need for government assistance in handling claims by children is more pressing than in claims between adults. Despite the great scientific advances in ascertaining paternity, many of the older statutes exclude 'affiliation orders', which seems inappropriate in modern conditions. So far as spousal maintenance is concerned, almost all the legislation is limited to orders for the periodical payment of sums of money; lump sum orders, property adjustment orders and other types of financial provision are excluded; those types of orders may have become more frequent as divorcing spouses seek a 'clean break'.

(ii) The legislation requires the recognition and enforcement of an order even if the requested country would not recognise the relationship between the parties as giving rise to a support obligation; given the sharp divergence of opinion as to the status of partnerships outside marriage (and especially of same-sex partnerships) some ability to refuse enforcement on public policy grounds may be thought desirable.

(iii) Perhaps most significantly, several Commonwealth countries have taken child support cases out of the normal courts and entrusted them to an administrative agency which applies a statutory formula to determine the level of support; in some countries these agencies handle only domestic cases, but others handle cases with an international dimension. The effect is that in Australia, for example, the REMO system cannot operate as originally envisaged.

A new Hague Convention

6. The Hague Conference on Private International Law is drawing up a new Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. It is likely that the Convention will be completed and opened for signature by the end of 2006. The latest draft, dated April 2005, sets out the objects of the Convention as being:

1. to establish a comprehensive system of co-operation between the authorities of the Contracting States for the international recovery of child support and other forms of family maintenance;
2. to provide for the recognition and enforcement of maintenance decisions.

7. The core functions of the designated Central Authority under the Convention would be to transit and receive applications for the recognition and enforcement of orders, and to initiate, or facilitate the initiation of, proceedings in respect of such applications or proceedings for the making of an order. The present draft specifies in Article 6(2) other functions, some still the subject of debate:

2. In relation to such applications they shall take all appropriate measures -

a) where the circumstances require, to provide, or facilitate the provision of legal assistance;
b) to help locate the debtor;
c) to help to obtain relevant information concerning the income and other financial circumstances of the debtor or creditor, including the location of assets;
d) to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by the use of mediation, conciliation or similar processes;
e) to facilitate the ongoing enforcement of maintenance decisions;
f) to facilitate the [collection and] expeditious transfer of maintenance payments;
g) to facilitate the obtaining of documentary or other evidence;
h) to provide assistance in establishing parentage where necessary for the purpose of recovery of maintenance;

[i] to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending or anticipated maintenance application;]
[j] to facilitate service of process.][1]

8. It is recognised that in some countries the assistance that could be given would be limited, given that financial and human resources vary enormously from one country to another. The agencies in the United States, for example, handle some two million support orders (and their federal agencies will handle only cases involving child support and not 'spouse-only' cases); other countries would only be able to devote quite limited time and money to the work as one part of the budget of a Law (or other) Ministry. The strongly-held view at The Hague is that the clarity which the Convention would produce, coupled with the use of standard forms and some support through the continuing work of the Hague Conference, would ease enforcement of support obligations, and actually reduce the potential cost to states in terms of welfare benefits and associated costs.

9. Under the Convention, an applicant resident in one country seeking maintenance from a person resident in another country would be able to use the administrative co-operation procedures of the Convention to gain assistance in obtaining enforcement of an existing order or the grant of a new order from the authorities (the courts or the appropriate government agency) of the latter country. Where a new order was sought, there would be only one proceeding, not two as in the REMO system, and the use of standard forms would eliminate the complex documentation generated under the REMO system.

10. The Convention will contain rules specifying which countries' orders will be entitled to recognition and enforcement. The proposed rules have a certain complexity, mainly because of the inability of the United States to accept the residence of the creditor as a basis for recognition. The current draft of the relevant Article 15 is in the following terms:

> 1. A maintenance decision made in one Contracting State (the State of origin) shall be recognised and enforced in other Contracting States if –
>
> a) the respondent was [habitually] resident in the State of origin at the time proceedings were instituted;
> b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;
> c) the creditor was [habitually] resident in the State of origin at the time proceedings were instituted;
> [d) there has been agreement to the jurisdiction by the parties in writing or evidenced in writing;
> e) the decision was made by an authority having jurisdiction on a matter of personal status, unless that jurisdiction was based solely on the nationality of one of the parties.] ; or
>
> 2. A Contracting State may make a reservation in respect of paragraph 1 c)[, d), or e)].
> 3. A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar [factual] circumstances confer or would have conferred jurisdiction on its authorities to take such a decision;
> 4. A Contracting State shall, if recognition is not possible as a result of a reservation under paragraph 2, and if the debtor is [habitually] resident in that State, take all appropriate

[1] Please note that the inclusion of brackets replicates the original and indicates material which is still under discussion.

measures to establish a decision. This paragraph does not apply to direct applications under Article 26.

5. A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

11. Commonwealth governments have shown a considerable interest in the development of the Convention. Ms Jennifer Degeling, formerly of the Attorney-General's Department in Canberra, is one of the two co-Rapporteurs and Judge Jan Doogue of the Family Court of New Zealand is chair of the Drafting Committee. Australia, Canada, India, Malaysia, New Zealand, Pakistan, South Africa, Sri Lanka, Uganda, the United Kingdom and Zimbabwe have been represented in the negotiations as has the Commonwealth Secretariat.

12. By the time of the next Meeting of Law Ministers, the text of the Convention will be available, together with its Explanatory Report. Law Ministers may wish to have on the agenda of that Meeting a consideration of the Convention and its impact on the REMO system.

REMO Orders and the new Convention

13. One particular issue requires more urgent consideration. Some Commonwealth countries will become parties to the new Convention in due course, but will no doubt retain the REMO system for the foreseeable future for dealings with Commonwealth countries that have not become parties. It is very desirable that orders made under the REMO system should be capable of recognition under the Convention. The Convention's recognition rules (see paragraph 10 above) require an order to originate from a Contracting State. The REMO system involves an order made, in effect, by the combined efforts of two courts, that which made the provisional order (in Country A) and that which confirmed it (in Country B). Courts and commentators have sometimes described the result as 'really' an order from one of those countries; but are not in agreement as to which country that is.

14. The issue was raised at the April 2005 meeting of the Special Commission drafting the Convention by the Observer for the Commonwealth Secretariat. There seems to be a measure of support within the Commission for a solution, requiring careful drafting, under which each of Country A and Country B would be regarded as a State of origin for the purposes of the recognition rules. It would be helpful in the negotiations if Law Ministers felt able to endorse this approach.

THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The Hague Judgments Project

15. A major project of the Hague Conference over the last decade was an attempt to agree a potentially world-wide Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This was an extraordinarily ambitious project, requiring agreement on the rules governing the jurisdiction of the courts of Contracting States as well as the rules as to the recognition and enforcement of foreign judgments. Agreement could not be reached on such a broad canvas but one aspect of the work led to the successful negotiation of the Convention on Choice of Court Agreements earlier this year.

16. The Member States of the European Union now have common rules as to jurisdiction in civil and commercial matters, and are able, in reliance on those common rules, to accord virtually automatic recognition to the judgments of the courts of other Member States. The experience gained in the course of work at The Hague points to the difficulty of reaching a similar level of agreement between countries which do not have the geographical contiguity, developed internal market and strong legal and political institutions of the EU. Law Ministers may feel that it would be unwise to

devote resources to a search for agreed bases of jurisdiction to be adopted by Commonwealth countries.

Commonwealth Practice as to Foreign Judgments

17. Law Ministers have, however, long recognised the importance to their financial institutions, commercial enterprises and private citizens of effective systems for the enforcement of foreign judgments. The statute books of most Commonwealth countries contain Acts derived directly or indirectly from either or both of two United Kingdom statutes, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. The latter is a slightly revised version of the former, and is applicable to judgments given in non-Commonwealth countries. It is also possible in most Commonwealth countries to enforce a foreign judgment by an action at common law on the judgment-debt. The rules applying in such cases are similar to those under the legislation but not identical, and not wholly clear: a case (Adams v Cape Industries plc, 1989) requiring the clarification of aspects of these common law rules occupied 34 days of argument in the English High Court and a further 21 days in the Court of Appeal.

18. The principal features of the Commonwealth position were reviewed in a full report for Law Ministers in the mid-1970s. It was in fact consideration of that report which led to the decision to work closely with the Hague Conference. No full survey has been made of reforms undertaken subsequently in individual Commonwealth countries, but overall the position is thought to have changed relatively little. It was found:

(a) that the effect of the legislation in each country generally depended on the designation of 'reciprocating States', supplemented in the practice of some countries by bilateral agreements;
(b) that the legislation provided for the registration of judgments where the country of origin was regarded as having a proper claim to jurisdiction on criteria set out in the Act; these were almost always narrower than the bases upon which the country requested to enforce the judgment would itself claim jurisdiction: in particular, a judgment granted after service of process outside the country of origin would not be recognised, even though almost all Commonwealth countries would assert jurisdiction on that basis.

19. The criteria for recognition in the case of a judgment given in an action in personam, as set out in legislation on the 1933 model, are:

(i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings . . . ; or
(ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or
(iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

20. In addition, the judgment has to be final and conclusive as between the judgment debtor and the judgment creditor (or require the former to make an interim payment to the latter); and has to provide for the payment of a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.

Improving Commonwealth practice

21. Law Ministers may wish to consider whether use could be made of the enormous effort by governments and experts at The Hague in order to improve intra-Commonwealth practice. The 'Interim Text' of a possible Hague Convention drawn up in 2001 identified, albeit with many unresolved issues, a number of bases of jurisdiction the use of which would entitle the resulting judgment to recognition. In the context of the work at The Hague, which attempted to prescribe rules as to jurisdiction and to meet the needs of the civil law and common law traditions and to reconcile the contrasting approaches of the United States and the EU on many issues, the draft text had to be extremely detailed. That text could, however, be drawn upon in the context of a much more limited exercise.

22. This would make no attempt to prescribe jurisdictional rules: it is for each Commonwealth country, subject to treaty and other international obligations, to determine the rules governing the jurisdiction of its courts. It would identify possible clarifications and improvements to the rules governing the recognition of foreign judgments, and suggest ways in which those clarifications and improvements could be taken into Commonwealth practice without requiring a major re-negotiation of existing arrangements. Examples are given in the paragraphs which follow.

Clarifications

23. In the Hague text the primary basis of jurisdiction was the residence of the defendant. In Commonwealth practice, this remains the principal basis upon which courts recognise foreign judgments (see paragraph 19(iv) above, which also uses the concept of the principal place of business). The Hague text contains useful clarifications of the meaning of 'residence' in this context. It provides that a natural person is be considered to be resident (a) if that person is resident in only one State, in that State; and (b) if that person is resident in more than one State, in the State in which that person has his or her principal residence; or if that person does not have a principal residence in any one State, in each State in which that person is resident. An entity or person other than a natural person is to be considered to be resident in the State (a) where it has its statutory seat; or (b) under whose law it was incorporated or formed; or (c) where it has its central administration; or (d) where it has its principal place of business.

24. Similarly the Hague text corresponding to the basis noted at paragraph 19(v) above refers to actions in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, provided that the dispute relates directly to the activity of that branch, agency or other establishment, and includes a possible clarification that a legal entity shall not be considered a 'branch, agency or other establishment' by the mere fact that the legal entity is a subsidiary of the defendant.

Bases not found in current Commonwealth practice

25. The Hague text also suggests a number of bases for taking jurisdiction, which are found in international instruments, such as the regulation governing jurisdiction within the European Union, and in national legislation. In Commonwealth practice, these are grounds on which many courts would give leave for the service of process outside the jurisdiction; but although this would give jurisdiction to the court concerned, statutes based on the UK models (and the similar common law rules) would not enable the resulting judgment to be recognised and enforced elsewhere.

26. Cases falling into this category include the following:

(i) proceedings concerning immovable property in the country in which the property is situated;
(ii) proceedings relating to disputes among the trustee, settlor and beneficiaries of a trust concerning the validity, construction, effects, administration or variation of a trust in the courts of a country designated in the trust instrument for this purpose;
(iii) actions in contract in the courts of a country in which (a) in matters relating to the supply of goods, the goods were supplied in whole or in part; (b) in matters relating to the provision of services, the services were provided in whole or in part; (c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part;
(iv) actions brought by consumers (natural persons acting primarily for personal, family or household purposes) in the country in which the consumer is habitually resident against another party acting for the purposes of its trade or profession in respect of a consumer contract;
(v) actions brought by employees in the State in which the employee is habitually resident arising out of individual contracts of employment; and
(vi) actions in tort in the courts of the State (a) in which the act or omission that caused injury occurred, or (b) in which the injury arose.

27. Almost all Commonwealth countries will take jurisdiction in most if not all of these cases, either under specific legislation or as a result of the exercise of judicial discretion. It is not suggested that any country should change its practice in this regard. The important question is this: is there any policy reason why a judgment given in one Commonwealth country, the courts of which have taken jurisdiction under the law of that country on one of these bases, should not be entitled, subject to some public policy defences, to be recognised and enforced in another Commonwealth country?

28. If Law Ministers' views on that question favour the recognition and enforcement of such judgments, changes in Commonwealth practice will be required. They might wish to invite the Commonwealth Secretariat to examine the issues in greater depth and to report to Senior Officials on possible courses of action.

OTHER HAGUE CONVENTIONS

29. Attention is drawn to the annexed chart showing, in respect of each Hague Convention, the current signatures, ratifications and accessions in Commonwealth countries. Conventions which have attracted considerable Commonwealth interest are those dealing with the Form of Wills, with aspects of civil procedure (Legalisation, Service of Process and Taking of Evidence), and with issues affecting children (Child Abduction, Adoption co-operation, and the recent Protection of Children Convention). The Commonwealth Secretariat has issued 'accession kits', explanatory documentation designed specifically for Commonwealth governments on a number of these conventions, and plans to issue revised and additional papers in the near future.

THE HAGUE CONVENTIONS: SIGNATURES, RATIFICATIONS AND ACCESSIONS status on: 25 July 2005

HccH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

HAGUE CONFERENCE MEMBER STATES

Statute	I	ALBANIA	ARGENTINA	AUSTRALIA	AUSTRIA	BELARUS	BELGIUM	BOSNIA & HERZEGOVINA	BRAZIL	BULGARIA	CANADA	CHILE	CHINA	CROATIA	CYPRUS	CZECH REPUBLIC	DENMARK	EGYPT	ESTONIA	FINLAND	FYR OF MACEDONIA	FRANCE	GEORGIA	GERMANY	GREECE	HUNGARY	ICELAND	IRELAND	ISRAEL	ITALY	JAPAN	JORDAN
Civil procedure	II		A		R	A	R	A					2	A	A	A	R	A		R	A	R		R		A			A	R	R	
Sales of goods	III						D										R			R		R								R		
Transfer of title *	IV																								S					R		
Sales - choice of court *	V				S		S																	S	S							
National law vs law of domicile *	VI						R															S										
Recognition of companies *	VII						R															R										
Maintenance children -appl. law	VIII				R		R						2									R		R	S					R	R	
Maintenance children -enforcement	IX				R		R						2			A	R			R		R		R	S	A				R		
Protection of minors	X				R								2									R		R						R		
Form of wills	XI			A	R		R	R					1	R			R		A	R	R	R		R	R			A	A	S	R	
Legalisation (Apostille)	XII	A	A	A	R	A	R	R		A			1,2	R	A	A			A	R	R	R		R	R	A	R	R	A	R	R	
Adoption	XIII				D																											
Service abroad	XIV		A			A	R			A	A		A		A	A	R	R	A	R		R		R	R	A		R	R	R	R	
Choice of court *	XV																												S			
Enforcement of judgments	XVI														R																	
Protocol on jurisdiction	XVII														R																	
Divorce - recognition	XVIII			A									1		A	R	R	R	A	R										R		
Traffic accidents	XIX				R	A	R	R						R		R					R	R										
Taking of evidence	XX		A	A		A				A			A		A	R	R		A	R		R		R	R	A			R	R		
Administration of estates	XXI															R														S		
Products liability	XXII						S							R						R	R	R								S		
Maintenance - enforcement	XXIII			A			S									R	R		A	R		R		R	R					R		
Maintenance - applicable law	XXIV						S												A			R		R	R					R	R	
Matrimonial property	XXV				S																	R										
Marriage	XXVI			R														S		S												
Agency	XXVII		R																			R										
Child abduction	XXVIII		R	R	R	A	R	R	A	A	R	A	1,2	R	A	R	R		A	R	R	R	A	R	R	A	A	R	R	R		
Access to justice	XXIX					A		R		A				R	A	R			A	R	R	R		S	S					S		
Trusts	XXX			R							R		1		S							S								R		
Sales contracts *	XXXI		R													S																
Successions - applicable law *	XXXII		S																													
Adoption - co-operation	XXXIII	R		R	R	R	R		R	R	R	R	S		R	R	R		A	R		R	A	R		R	A	S	R	R		
Protection of children	XXXIV			R	S		S								S	R	S		A	S		S		S	S	S		S		S		
Protection of adults *	XXXV																					S		S								
Securities held with intermediaries *	XXXVI																															
Choice of court agreements *	XXXVII																															

Statute	I	REPUBLIC OF KOREA	LATVIA	LITHUANIA	LUXEMBOURG	MALAYSIA	MALTA	MEXICO	MONACO	MOROCCO	NETHERLANDS	NEW ZEALAND	NORWAY	PANAMA	PARAGUAY	PERU	POLAND	PORTUGAL	ROMANIA	RUSSIAN FEDERATION	SERBIA AND MONTENEGRO	SLOVAKIA	SLOVENIA	SOUTH AFRICA	SPAIN	SRI LANKA	SURINAME	SWEDEN	SWITZERLAND	TURKEY	UKRAINE	UNITED KINGDOM	UNITED STATES	URUGUAY	VENEZUELA
Civil procedure	II		A	A	R					A	R		R				A	R	A	A	A	A	A		R		A	R	R	A	A				
Sales of goods	III				S						S		R												S			R	R						
Transfer of title *	IV																																		
Sales - choice of court *	V																																		
National law vs law of domicile *	VI				S						R														S										
Recognition of companies *	VII				S						R														S										
Maintenance children -appl. law	VIII				R						R		S					R							R				R	R					
Maintenance children -enforcement	IX				S						R		R					R				A			R		A	R	R	R					
Protection of minors	X		A	A	R						R						A	R							R				R	A					
Form of wills	XI				R						R		R				A	S			R		R	A	R			R	R	A		R			
Legalisation (Apostille)	XII		A	A	R		A	A	A		R	A	R	A			A	R	A	A	R	A	R	A	R		A	R	R	R	A	R	A		A
Adoption	XIII																												D			D			
Service abroad	XIV	A	A	A	R			A			R		R				A	R	A	A		A	A		R	A		R	R	R	A	R	R		A
Choice of court *	XV																																		
Enforcement of judgments	XVI										R							R																	
Protocol on jurisdiction	XVII										R							R																	
Divorce - recognition	XVIII				R						R		R				A	R				R						R	R			R			
Traffic accidents	XIX		A	A	R						R						A	S			R	R	R		R				R						
Taking of evidence	XX		A	A	R			A	A		R		R				A	R	A	A		R	A	A	R	A		R	R	R	A	R	R		A
Administration of estates	XXI				S						S							R				R								S		S			
Products liability	XXII				R						R		R					S			R		R		R										
Maintenance - enforcement	XXIII			A	R						R		R				A	R				R			R			R	R	R		R			
Maintenance - applicable law	XXIV			A	R						R						A	R							R				R	R					
Matrimonial property	XXV				R						R							S																	
Marriage	XXVI				R						R							S																	
Agency	XXVII										R							R																	
Child abduction	XXVIII		A	A	R		A	A	A		R	A	R	A	A	A	A	R	A		R	R	A	A	R	A		R	R	R		R	R	A	R
Access to justice	XXIX		A	A	R					S	R						A		A		R	R	R		R			R	R	S					
Trusts	XXX				R		A				R																					R	S		
Sales contracts *	XXXI										S											S													
Successions - applicable law *	XXXII				S						R																		S						
Adoption - co-operation	XXXIII		R	A	R		A	R	A		R	A	R	R	A	R	R	R	R	S		R	R	A	R	R		R	R	R		R	S	R	R
Protection of children	XXXIV		R	A	S				R	R	S						S	S				R	R		S			S	S			S			
Protection of adults *	XXXV										S																					R			
Securities held with intermediaries *	XXXVI																																		
Choice of court agreements *	XXXVII																																		

* These Conventions have not yet entered into force

1 The Convention applies to the Hong Kong Special Administrative Region only.
2 The Convention applies to the Macau Special Administrative Region only.

A = accession (Convention in force) R = ratification (Convention in force) A = accession (Convention not in force) R = ratification (Convention not in force) S = signature (Convention not in force) D = denunciation (Convention not in force)

N.B. The date of entry into force of a Convention following a ratification or an accession may be later than the date of this chart.

For more detailed information, please consult the Hague Conference website, at http://www.hcch.net.

THE HAGUE CONVENTIONS: SIGNATURES, RATIFICATIONS AND ACCESSIONS   status on: 25 July 2005

HccH HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

NON-MEMBER STATES		ANDORRA	ANTIGUA AND BARBUDA	ARMENIA	AZERBAIJAN	BAHAMAS	BARBADOS	BELIZE	BOLIVIA	BOTSWANA	BRUNEI DARUSSALAM	BURKINA FASO	BURUNDI	COLOMBIA	COOK ISLANDS	COSTA RICA	DOMINICA	DOMINICAN REPUBLIC	ECUADOR	EL SALVADOR	FIJI	GRENADA	GUATEMALA	GUINEA	HOLY SEE	HONDURAS	INDIA	KAZAKHSTAN	KUWAIT	KYRGYZSTAN	LEBANON	LESOTHO	LIBERIA	LIECHTENSTEIN	MADAGASCAR	MALAWI	MARSHALL ISLANDS	MAURITIUS	REP. OF MOLDOVA	MONGOLIA	NAMIBIA	NICARAGUA	NIGER	NIUE	PAKISTAN	PHILIPPINES	ST KITTS AND NEVIS	ST LUCIA	ST VINCENT & THE GRENADINES	SAMOA	SAN MARINO	SEYCHELLES	SINGAPORE	SWAZILAND	THAILAND	TONGA	TRINIDAD AND TOBAGO	TURKMENISTAN	UZBEKISTAN	ZIMBABWE
Civil procedure	II			A																					A					A	A								A																				A	
Sales of goods	III																																										A																	
Transfer of title *	IV																																																											
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Protection of minors	X																																																											
Form of wills	XI		A							A	A										A	A										A						A																A		A				
Legalisation (Apostille)	XII	A	A	A	A	A	A	A		A	A			A	A		A		A	A	A	A				A	A	A				A	A	R		A	A	A			A			A			A	A	A	A	A	A		A		A	A			
Adoption	XIII																																																											
Service abroad	XIV		A			A	A			A																			A							A									A				A		A	A								
Choice of court *	XV																																																											
Enforcement of judgments	XVI																												A																															
Protocol on jurisdiction	XVII																												A																															
Divorce - recognition	XVIII																																																											
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Matrimonial property	XXV																																																											
Marriage	XXVI																																																											
Agency	XXVII																																																											
Child abduction	XXVIII					A		A				A		A		A		A	A	A	A		A			A												A	A			A					A								A		A	A	A	A
Access to justice	XXIX																																																											
Trusts	XXX																																	A																	A									
Sales contracts *	XXXI																																						A																					
Successions - applicable law *	XXXII																																																											
Adoption - co-operation	XXXIII	A			A				R			R	A	R		R			R	R			A	A			R								R			A	A	A						R					A				R					
Protection of children	XXXIV																		A																																									
Protection of adults *	XXXV																																																											
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REPORT ON LEGAL ASSISTANCE FOR HIPC COUNTRIES

Paper by the Commonwealth Secretariat

BACKGROUND

1. In their Meeting in Abuja in 2003, Commonwealth Heads of Government reaffirmed their commitment to a successful HIPC Initiative. They called on all Paris Club creditors that are not yet participating in this Initiative to do so. Heads of Government also called for topping up to be applied so that HIPCs achieve a sustainable exit from their debt burden at their completion points.

2. In the Aso Rock Declaration, Heads of Government welcomed the advisory and consensus building work of the Commonwealth HIPC Ministerial Forum (CHMF) and encouraged its efforts to achieve HIPCs' sustainable exit from debt. Following this Meeting, in September 2004, at the Commonwealth Finance Ministers Meeting in St Kitts and Nevis, Ministers noted the behaviour of commercial creditors, who have been resistant to participate in the process of debt relief and who had even brought litigation against a number of HIPCs. Ministers welcomed the efforts the Commonwealth Secretariat is making to mobilise support for the HIPCs in tackling the difficult issue of creditor litigation.

3. The meeting of Senior Officials of Commonwealth Law Ministries in London in October 2004, received with appreciation a paper prepared on strategies for dealing with sovereign debt in distress. The paper addressed both the handling of negotiations with creditors and litigation strategy and commended the suggestions as to the possible role of the Commonwealth Secretariat in providing a legal clinic for advice and access to expertise.

4. HIPC Ministers met in March 2005 in Maputo, Mozambique and Ministers recalled the proposals for 'rapid reaction legal assistance' by the Commonwealth Secretariat and expressed the hope that this would be implemented without delay.

ACTIVITY

5. In view of the growing number of commercial creditors' litigations against sovereign countries, the Commonwealth Secretariat has decided to implement the report, commended by Senior Law Officials and endorsed by CHFM, to establish a 'One-Stop Legal Referral Service' within the Legal and Constitutional Affairs Division of the Commonwealth Secretariat.

6. The Legal and Constitutional Affairs Division, working collaboratively with the Economic Affairs Division has commenced submissions to the UK's Department for International Development for the provision of funds to assist the Commonwealth Secretariat to realise the establishment of this Legal Service.

CONCLUSION

7. Law Ministers are asked to endorse the efforts of the Secretariat to move as quickly as possible to render legal service to HIPC countries.

ROUNDTABLE DISCUSSIONS

(Updates on Commonwealth Secretariat Activities)

REPORT OF ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD

Paper by the Commonwealth Secretariat

INTRODUCTION

1. This paper reviews the activities of the Secretariat in the legal field and spans the period from the last Law Ministers Meeting held in St Vincent and the Grenadines in November 2002, to the end of October 2005.

2. At the last Commonwealth Law Ministers Meeting the agenda was largely based on the principles set out by Commonwealth Heads of Government in their 2002 Coolum Declaration. These principles reaffirmed the Commonwealth's commitment to democracy, the rule of law, good governance, and freedom of expression and the protection of human rights. They also condemned in the strongest possible terms, all forms and manifestations of terrorism and re-affirmed the determination to work to promote people-centred sustainable development. The work of the Division very broadly reflects this mandate in terms of its emphasis on terrorism and training in counter–terrorism initiatives and its work on access to justice and keeping countries abreast with the development of international legal norms.

3. The 2003 Commonwealth Expert Group Report on Development and Democracy rightly identified one of the central problems of the stalled processes of democratisation as institutional weakness noting that effective institutions are essential to successful democratisation. Many new and fragile democracies lack the institutional infrastructure necessary to embed democratic practices into a viable reality, capable of promoting the rule of law. It is therefore important to have the human resource capacity, viable institutional mechanisms and appropriate constitutional and legal frameworks to check potential abuses of executive power and challenge corruption. These issues were reflected in the agendas of the 2004 Senior Law Officials and Attorney-Generals of Small Jurisdictions meetings. This year's Law Ministers Meeting sees the addition of the following legal policy issues amongst others for consideration: Developing Legal Education in the Commonwealth; Law Reform Agencies: Their Role and Effectiveness; Juvenile Justice Policy; Control of the Proliferation of Small Arms, Ammunition and Light Weapons in the Commonwealth; Guidelines for an Independent Regulatory Framework for Commonwealth Broadcasting Organisations; and Implementing International Environmental Instruments in Small States.

GENERAL ISSUES

4. In light of the renewed agreements made by member states at the 2003 Commonwealth Heads of Government Meeting (CHOGM) and the Secretariat's strategic plans, the Legal and Constitutional Affairs Division (LCAD) continues to give priority to the provision of technical assistance and policy advice on strengthening and furthering the capacity of judicial and legal processes and institutions. Particular attention has been paid to the development of model legislative provisions and programmes to support the domestic implementation of legislation, developing stronger legal frameworks and enhancing operational capacity to address issues of security, terrorism, money laundering and asset repatriation. Support was also given to enhancing conducive business and investor regulatory frameworks through regional meetings.

5. The exercise of prioritisation and strategic planning led by the Strategic Planning and Evaluation Division (SPED) of the Secretariat has ensured that LCAD plans its divisional programmes in a more robust manner to make optimum use of resources. LCAD has also been given significant support in some of its strategic programmes by external donors which has enabled the Division to carry out a record number of activities for the period under review as will become apparent from the reports of the work of its three sections below.

6. LCAD continues to provide in-house legal advice to management on a varied number of issues. With the recent implementation of the Commonwealth Secretariat's 2003 Terms and Conditions of Service a substantial amount of time and resources has been devoted to contractual and human resource issues. Additionally, the Division continues to represent the Secretariat when actions are brought before the Commonwealth Secretariat Arbitral Tribunal. The United Kingdom Government passed the International Organisations Act of 2005 on 7 April 2005 to extend immunities to the Arbitral Tribunal Members amongst other things. LCAD also ensures the best possible legal representation where the Secretariat has had suits filed against it before the UK Courts and Employment Tribunals.

ORGANISATION AND STAFFING OF THE DIVISION

7. The former Director of LCAD, Ms Dianne Stafford from Australia resigned in 2003. Mrs. Betty Mould-Iddrisu from Ghana was appointed in her place and assumed office in November 2003.

8. Ms Kimberly Prost former Head of the Criminal Law Section (CLS) also resigned early in 2005 to take up a position with the UN Office on Drugs and Crime (UNODC) where she continues invaluable global work in criminal law. Ms Arvinder Sambei of the UK assumes office as Head of the CLS in September 2005 and we look forward to the considerable expertise she brings to bear on the Secretariat's cutting edge work in this area.

9. Other staffing changes have taken place and LCAD is in the process of recruiting several other legal staff to replace those whose current contracts have expired or have resigned.

10. LCAD has also enthusiastically embarked on a programme of interns and since 2004 has had interns and legal assistants from the UK, Mozambique, British Virgin Islands, St Lucia, Mauritius and Sri Lanka amongst others; we anticipate continuing with this diversity over the next few years. This programme has enabled LCAD to be enriched with the interns bringing a wealth of diversity to our legal programmes.

PROVISION OF INFORMATION

Commonwealth Law Bulletin

11. The *Commonwealth Law Bulletin* (*Bulletin*) is central to LCAD's prime function of disseminating information on legal developments around the Commonwealth. First published in 1974, this year the *Bulletin* celebrates 30 years of publication and continues to be the flagship publication of the Secretariat in the legal field.

12. Although originally a quarterly publication, from 1996 onwards the *Bulletin* has been published bi-annually, in June and December for economic reasons, but without any reduction in page content. Again for reasons of economy, production was moved overseas in 1998, but problems of time and distance have continued to beset the timely production of this publication.

CRIMINAL LAW SECTION (CLS)

Good Governance and the Elimination of Corruption

13. The results of a survey on the status of mechanisms to fight corruption in member countries indicated a gap in the legislative frameworks of many member countries. As a result, a programme was developed by the Criminal Law and Justice Sections to encourage and assist member countries to adopt anti-corruption legislation.

14. In April of 2004 an Expert Group meeting was convened to consider model legislation and guidelines. The Report of the Group is being finalised and will provide drafting instructions for model legal provisions which will then be prepared by a legislative drafter for consideration by Law Ministers at their next meeting.

15. Following the recommendation of the Judicial Colloquium on Corruption (Cyprus, 2002), the CLS has held two regional workshops for the Caribbean (St Lucia, June 2003) and Southern African (Mauritius, 2004) on Anti-Corruption and Integrity in the Judiciary. Details of the programme are contained in SOLM(04)11.

Provision of Information

16. The major publications from the CLS are *Commonwealth Legal Assistance News (CLAN)* and *Crimewatch*.

17. The Money Laundering and Mutual Assistance in Criminal Matters manuals have been updated, the former having been expanded to include legislation relating to the Financing of Terrorism. The CLS will introduce a new manual that contains a collection of the laws of Commonwealth countries on Terrorism and Terrorist Financing.

18. The CLS also maintains a database on the laws of member jurisdictions relating to the London Scheme for Extradition within the Commonwealth and the Harare Schemes on Mutual Assistance in Criminal Matters and the Transfer of Convicted Offenders, as well as on a broad range of topics such as money laundering, proceeds of crime, corruption and recently, terrorism. From its database and information obtained from member countries, the Section distributed updated versions of a manual entitled *International Co-operation in the Administration of Criminal Justice*, which summarises existing laws in member countries that implement the three Commonwealth Schemes. This document is to be updated again this year and distributed to member countries.

Asset Repatriation Working Group

19. At their Meeting in Abuja in December 2003, Commonwealth Heads of Government requested the Secretary-General to establish a Working Group to examine the modalities of co-operation among Commonwealth countries in respect of the repatriation of illegally obtained wealth. The Group which was established, met four times and submitted a comprehensive Report in July 2005, containing various suggestions for consideration by Law Ministers, including proposals to amend the Commonwealth Scheme of Mutual Legal Assistance in Criminal Matters (Harare Scheme), Civil Forfeiture of Assets and Return of assets to the States/victims. This Report is included in the Roundtable discussion information documents for the consideration of Law Ministers.

International Criminal Court

20. The CLS has continued to provide assistance to member countries which are signatories or parties to the Rome Statute of the International Criminal Court with the preparation and introduction

of implementing legislation. Assistance with the development of drafting instructions and drafting implementing legislation has been provided to some countries upon request.

Terrorism

21. The Counter-Terrorism Project forms a major part of the work of the CLS. At the last SOLM, the CLS reported that it had prepared a model law on Counter-Terrorism following the recommendations of an Expert Working Group set up for that purpose. The model law is intended to assist member countries with implementing their obligations under United Nations Security Council Resolution 1373. The CLS also prepared, with funding received from the Government of Canada, an implementation kit for the existing 12 UN Counter-Terrorism Conventions. Both documents have been distributed to member countries. Regional workshops were then conducted for prosecutors and legislative draftspersons in the following countries: Gaborone, Botswana - November 2002; St John's, Antigua and Barbuda – February, 2003; Banjul, The Gambia - May 2003 and Colombo, Sri Lanka- June 2003. The CLS also supported a programme of legislative drafting and training on the subject carried out by the Forum Secretariat of the Pacific Region. These activities were carried out with the support of the UK Government.

22. The next phase of the project involved the delivery of assistance to individual member countries on the preparation of country reports to the UN Counter-Terrorism Committee, the adaptation and adoption of the model law, and relevant consequential amendments to other legislation. This phase is still ongoing for countries in West Africa and has been completed for Eastern and Southern Africa and the Caribbean regions.

23. Following further generous financial assistance from the UK Government, the CLS has embarked on a third project involving capacity building for prosecutors and investigators to combat Terrorism and Terrorism Financing. This phase involves conducting regional training workshops for police, intelligence officers, prosecutors and trainers at relevant training institutions. Workshops have been held for selected countries in Africa (Namibia, February 2004) and Asia (Singapore May 2004), Nairobi, Kenya (September 2004), Kuala Lumpur, Malaysia (November 2004) and St Kitts and Nevis (February 2005). With the help of a consultant, the CLS is developing a Commonwealth Training Manual on Counter-Terrorism and other training materials for training institutions through which it is intended to mainstream the subject as part of the national training curriculum. This way, it is hoped to have a sustainable programme on terrorism prevention, investigation and prosecution.

24. The CLS has also compiled the laws of Commonwealth countries on counter-terrorism and the Manual is near completion. This manual is designed to help legislative drafters in different countries as a comparative reference/research work from which legal provisions can be adapted to best suit individual member country situations.

JUSTICE SECTION (JS)

25. The work of the Justice Section focuses on judicial reform; administration of and access to justice; constitutional and public law developments including electoral and other good governance issues; policy and law reform in matters relating to freedom of information, privacy, data protection and matters relating to land.

Land and Development

26. Pursuant to the Kingstown Declaration on Land and Development, the Justice Section organised regional workshops in the Pacific, East Africa (for East and West African Commonwealth countries), Asia and the Caribbean. The workshops identified gaps in the land policies of member countries as well as the inadequacy of legislative frameworks to provide for matters such as governance,

enforcement, and gender equality. Follow up to the workshops met with little or no response at all. A number of countries were already receiving assistance from other donor agencies for the implementation of land reforms and supporting legislation.

27. A needs assessment mission was also carried out to determine areas where the Commonwealth Secretariat could assist in land and development issues in the Southern African region. Countries selected for the mission were South Africa and Namibia. It was concluded from this mission that the Secretariat's assistance would be more productive if it was demand driven and country specific.

28. In this financial year, LCAD conducted a workshop for Tuvalu to assist with the development of that country's land policy. The workshop was held in June 2005. Participants examined needed reforms to their land laws and various aspects of reforms to land administration.

Judicial and Legal Reform

29. In Abuja, Heads of Government prioritised the independence of the judiciary. The JS has developed a three-year programme that aims at building capacity and independence of the judiciary, strengthening supporting institutions such as court registries, building capacity of the legal profession, and promoting access to justice. The report contained in the Roundtable discussions outlines this work.

30. The JS also collaborated with the Commonwealth Magistrates and Judges Association (CMJA) and the Commonwealth Lawyers Association (CLA) in conducting a training programme for Pacific judges and lawyers. The output of the programme was a toolkit on Gender and Human Rights that will be used for judicial and legal training in the Commonwealth.

31. The JS has commissioned a study on Access to Justice mechanisms in the Commonwealth which would form the basis of developing practice manuals and toolkits to assist young practitioners and paralegals in dealing with common issues such as land tenure, family disputes, succession, and small claims.

Freedom of Information and Privacy

32. The JS conducted follow-up activity on the model laws on freedom of information, and privacy and participated in a programme in the Caribbean that promoted them. The JS is carrying out regional workshops where model laws on Freedom of information, Privacy and Data Protection are being disseminated and discussed with the aim of helping member countries to develop policy guidelines to draft their own laws. The Workshop for the Asia – Pacific region was held in Kuala Lumpur, Malaysia in December 2004 while the workshop for the West African region was held in The Gambia in July 2005. The Section also participated in the Workshop on Access to Information organised by the World Bank Institute and the Commonwealth Parliamentary Association (CPA) in Ghana.

Legislative Drafting

33. The JS took over the programme for legislative drafting in December 2003. LCAD has responded to the request by Law Ministers for shortened training for legislative drafters to supplement in-house training by developing a curriculum for a short-term course. The course will be established at the Ghana School of Law for the Africa region in January 2006. The establishment of a similar course alongside the Masters programme conducted by the University of the West Indies at its Cave Hill campus is under consideration. The Roundtable discussion papers include an update on the work of the Section in this area.

34. As part of enhancing good governance, requests have been received for assistance both in the constitution-making process and inculcating a culture of constitutionalism around the Commonwealth. LCAD has held a workshop on the constitution-making process for the Southern Africa region which developed guidelines for constitution making to make the process inclusive, accessible, open and transparent. Technical assistance has been given to countries for the drafting of their constitutions

Inter-Divisional Collaboration

35. The JS collaborates closely with other divisions of the Secretariat on issues relating to promoting the rule of law and the promotion of democratic values. It has made presentations at Steering Committee meetings on areas of work where LCAD can advance HIV/AIDS related issues. It has kept the Gender Section abreast of legal developments in areas where gender related issues arise, e.g. access to land. The JS has collaborated with the Political Affairs Division on a number of issues including constitutional reform in countries such as Swaziland and has participated in the election observing process.

LAW DEVELOPMENT SECTION (LDS)

36. One of two Sections established in LCAD in 2002, the LDS is charged with keeping a legal "eagle" eye on law development matters of the Commonwealth.

Provision of Information

37. In collaboration with the Communications and Public Affairs Division, the LDS has created *"Law Home"* pages on the web site of the Commonwealth Secretariat. These pages provide a useful database which includes the Commonwealth's Schemes, Reports emanating from various legal activities pursued by LCAD around the Commonwealth and laws of some member countries and give member countries easy access to current legal information.

38. In January 2004 the LDS inaugurated its quarterly newsletter publication – *LAWD* –copies of which are sent to Law Ministers and Attorneys General. *LAWD* seeks to keep member countries up to date with the issues of primary focus of the Section such as Law and Technology; Competition Legislation; International and Regional Tribunals; and Environmental Issues.

Law and Technology

39. The LDS conducted four regional workshops around the Commonwealth between 2004 and 2005 focusing on issues of law and technology. The LDS has highlighted the model bills on Electronic Evidence and Electronic Transactions in order to encourage member countries to adopt or adapt these bills and thus enhance their legislative ability to meet the growing challenges of a technological age. As well as deliberating on the provisions of the model laws, the objectives of the workshops were to establish networking, promote harmonisation and encourage the sharing of information between member countries in this area of the law. This effort by the LDS is a collaborative one with the Governance and Institutional Development Division of the Secretariat.

Competition Legislation

40. In pursuance of the mandate by Law Ministers in 2002, the LDS has redrafted the Competition Bill which is presented here to Law Ministers for their imprimatur. The LDS garnered comments from Law Ministers and other experts and redrafted the bill to reflect the interests of the vulnerable sectors of developing societies that are systematically disenfranchised, while still complying with the rules of competition.

International and Regional Tribunals

41. As mandated by Law Ministers in 2002, an Expert Group was set up by LDS to examine issues and mechanisms surrounding the removal of the appellate jurisdiction of the Judicial Committee of the Privy Council by member countries of the Commonwealth. The objective of the Group was to ensure that Commonwealth standards would be maintained when jurisdictions such as New Zealand (which has already de-linked from the Council) and the Commonwealth Caribbean countries, carry out their proposals to de-link from the Privy Council. A *"Best Practices"* guide was produced by the Experts. The LDS will continue to liaise with and facilitate information sharing among members. The LDS will take this project to its next phase in February 2006, when there will be a meeting for the sharing of experiences of Justices and Registrars of new and old Commonwealth Courts in New Zealand. It is expected that the Caribbean Court of Justice; the Courts of Justice of COMESA and ECOWAS will be represented as well the Supreme Courts of Canada and New Zealand and the High Court of Australia.

Environment

The Law of the Sea

42. The LDS has commenced the process of sensitising landlocked states to the potential benefits under Part V of the United Nations Convention on the Law of the Sea (UNCLOS). The first part of a series of Seminars was held in June in Swaziland and will continue in December in Lesotho. Landlocked member states are encouraged to accede to the Law of the Sea Convention and thereafter enter into arrangements with their coastal neighbours for access to and benefit sharing of the sea.

Biological Diversity

43. The LDS has worked to assist member countries to adopt a comprehensive approach to enable the various provisions of international environmental conventions to which they are Parties. A core meeting was held in February 2005 represented by delegates from all regions of the Commonwealth and the outcomes of that meeting have indicated the need to hold further regional seminars to better assist member countries.

HIPC Countries

44. The LDS is working collaboratively with the Economic Affairs Division (EAD) to assist Commonwealth HIPC countries which are currently facing litigation, or will do so in the near future, to develop strategies and alternative options for dealing with the implications of sovereign commercial debt in distress, including the provision of legal advice and/or assistance where indicated. The LDS and EAD are in discussions with potential partners so as to secure the necessary funding to establish a legal referral service for HIPC countries in distress.

OECD

45. Collaboratively with the EAD, the LDS as mandated by Law Ministers, continues to assist in OECD activities relating to taxation and the attainment of a level playing field, particularly those relating to small states.

Hague Conference on Private International Law

46. It will be recalled that from 1977, Law Ministers agreed that international co-operation in civil matters (such as international child abduction cases) was best handled through the work of an international agency. The experiences of the past intra-Commonwealth arrangements, such as the Reciprocal Enforcement of Maintenance Orders (REMO) indicated their inadequacy. The Hague

Conference on Private International Law has now resolved to draw up a new Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. A report on this issue is contained in SOLM(04)13.

ECONOMIC & LEGAL SECTION (ELS)

47. The Special Advisory Services Division (SASD) provides technical assistance to member countries in four programme areas. The programmes aim to: (i) enhance the capacity of member countries for sustainable debt management; (ii) build competitiveness in agriculture and enterprise, particularly at the Small and Medium Enterprise (SME) level; (iii) improve export competitiveness; and (iv) provide economic and legal advice on establishing regulatory environments conducive to direct investment, private sector development and growth in trade.

48. It is within the last programme, (iv) above, that the Division's legal expertise resides. The areas in which ELS specialises are natural resources, capital markets, trade law and maritime boundary delimitation.

Natural Resources Development

49. The SASD, through its ELS, is engaged in providing technical assistance to several Commonwealth governments in the reform of legislation and regulatory arrangements governing the exploitation of mineral and petroleum resources. In June 2005 the Parliament of The Gambia enacted the Mines and Quarries Act, the preparation of which involved substantial advisory inputs from ELS and assistance with drafting. Early this year, ELS completed consultations with the Ministry of Minerals, Energy and Water Resources of Botswana on an official statement of mining policy and was recently requested to carry out a review of Ghanaian mineral sector policies by the Minerals Commission. Preparation of draft mining legislation is in progress in Kenya and Swaziland where antiquated pre-independence mining legislation has hampered efforts to attract investment.

50. ELS also provides support to Commonwealth governments in the licensing of minerals and petroleum operations, in particular by providing assistance to government teams negotiating the terms of agreement with investors on a range of complex legal, economic and financial issues. This assistance includes the review of investor proposals, advice on negotiating strategies and assistance with the formulation of contractual provisions. ELS advisers are presently engaged in assisting the Government of The Gambia to evaluate and negotiate the terms of a pioneering foreign-sponsored mineral sands project. Assistance is also being provided in connection with proposals presented to the Tanzanian Government to develop an integrated gas-to-power project based on shallow water gas deposits.

Capital Markets and Private Sector Development

Competition policy and regimes

51. Since 1999 ELS has been assisting the Department of State for Trade, Industry and Employment of the Government of The Gambia in the development of competition policy and law with a view to creating an enabling environment for greater private sector participation and fair competition between market players. It prepared a competition policy and law to ensure the prevalence of fair competition in the Gambian economy and to complement the Government's private sector development and investment strategy. Its assistance also covered the formulation of an appropriate institutional framework to administer the competition regime in The Gambia. The new Competition Bill was enacted by Parliament at the end of 2004.

52. ELS is assisting the Southern African Development Community (SADC) Secretariat with the development of a regional competition policy model and model competition law. The project seeks to

assist SADC with the development of a regional competition policy which will not only address the key components of a national competition regime for the benefit of its members that do not as yet have any competition policy or regime, but will also address regional competition and related issues which arise in cross border activities. ELS co-sponsored (with LCAD) the Commonwealth Expert Group Meeting on the Draft Model Bill on Competition for the Africa Region.

Securities markets and Stock Exchanges

53. The SASD through ELS is assisting the Government of Sierra Leone with the establishment of a regulatory framework for the development of capital markets in Sierra Leone. The assistance has included an assessment of the feasibility of establishing a stock exchange and comprises the preparation of a new securities law to regulate securities trading and the licensing of market intermediaries and stock exchange and collective investment schemes. In this context assistance is also being provided in the review and updating of companies law and preparation of bankruptcy legislation in order to facilitate the smooth and orderly development of capital markets in Sierra Leone.

54. ELS has also been assisting the Government of Maldives with the establishment of a regulatory framework for the development of a securities market and the licensing of a stock exchange. ELS has prepared an updated companies law, a new securities bill and detailed securities and companies regulations for the Government. ELS is now advising on and preparing legislation to regulate fund management and collective investment schemes such as unit trusts and open/close ended investment companies in Maldives. ELS is also assisting in the preparation of a new codified law of trusts to reinforce and strengthen the administration and functioning of the new collective investment schemes legislation in Maldives.

55. ELS has assisted the Government of Uganda in the preparation of a new collective investment schemes legislation and has been assisting the Capital Markets Authority in its review of the securities law. ELS is assisting in the preparation of a new updated securities law and the related review of companies law which takes into account global trends and developments in the global securities markets, corporate governance and the guiding principles issued by the International Organisation of Securities Commissions (IOSCO) as well as ongoing initiatives of East African Securities Regulators in the development of the regional East African securities markets. ELS is also assisting the Government of Tanzania in a similar review of its securities legislation.

Trade Regulation

56. This is an area of growing importance to Commonwealth countries and, correspondingly, for ELS. Smaller Commonwealth jurisdictions and least developed countries (LDCs) demonstrate the need for targeted technical assistance providing government officials and stakeholders with an enhanced understanding of rights and obligations derived from the Uruguay Round Agreements, and the means to take advantage of special flexibility measures within the multilateral rules-based framework.[1] ELS's technical assistance programme is focused on the development of appropriate regulatory instruments suitable to the circumstances of countries with limited human resources and

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[1] The WTO Committee on Trade and Development, WT/COMTD/W/77 and Rev.1 and Adds. 1-4, has identified 155 separate special and differential (S&D) treatment provisions in the WTO Agreements and Ministerial Decisions, and classified them into six categories: (i) fourteen provisions that aim to increase the trade opportunities of developing country Members; (ii) fifty provisions under which WTO Members should safeguard the interests of developing country Members; (iii) thirty-three provisions that allow flexibility of commitments, of actions, and use of policy instruments by developing countries; (iv) nineteen provisions that allow transitional time periods; (v) fourteen provisions on technical assistance; and (vi) twenty-four provisions relating specifically to LDC Members. Many of these provisions involve technical assistance measures and time-limited exemptions from WTO rules that have largely expired; other provisions address important medium and longer-term policy flexibility options for LDCs and small vulnerable developing countries.

trade volumes with a view to facilitating their successful integration into the multilateral trading system.

57. ELS is providing technical assistance to small states, LDCs and other vulnerable Commonwealth developing countries in sequencing trade and trade-related policy reforms at a pace consistent with their trade, development and financial needs. With the end of a number of transitional periods for implementation of WTO rules, Commonwealth developing countries and LDCs are increasingly being called upon to implement amendments to trade-related legislation. ELS has been assisting with the review and revision of trade-related legislation, and development of appropriate trade policy instruments to facilitate the successful integration of LDCs and smaller Commonwealth countries into the multilateral trading system; a specific niche area concerns countries in the process of accession to the WTO. ELS is providing assistance to the Governments of Samoa and the Kingdom of Tonga in conducting a trade-related legislative review, with a view to their accession to the WTO.

58. The relationship between trade and investment is a significant determinant of growth and development in vulnerable small developing Commonwealth countries: significantly, about one third of world trade is being undertaken within and another third between multinational corporations. A key challenge for small vulnerable developing countries is implementing regulatory systems that promote transparent, stable and predictable conditions for trade and investment to expand, while preserving necessary levels of policy flexibility to safeguard national interests and achieve strategic development goals, consistent with WTO rules. ELS programme of technical assistance addresses several components of the trade and investment challenge, including the review and modernisation of trade-related investment legislation compatible with international standards and conducive to the attraction of investment, economic growth and development. Two projects worthy of particular note in this area concern our work with the Governments of Belize and St Lucia in the review of fiscal incentives and the investment framework.

59. Further extensive programme work is being undertaken in the area of TRIPS and public health as outlined in a separate background paper.

Maritime Boundaries

60. ELS has continued to provide technical assistance to several Commonwealth states, particularly small island developing dtates (SIDS), seeking to maximise their maritime areas and to benefit from the sovereign rights accorded to them over the resources they contain under international law. Assistance has included the preparation of hydrographic and technical reports; the review and updating of legislation in conformity with the 1982 UNCLOS; building and strengthening the capacity of senior government officials involved in the negotiation of national maritime boundaries; the preparation of negotiating briefs; and some aspects of desktop studies for the extended continental shelf. ELS assistance in this area has enabled member states like Mauritius to enact modern maritime zones legislation, and includes ongoing work with Guyana, Papua New Guinea, Fiji, and Mozambique on the review and updating of their maritime zones legislation. New projects on similar exercises are expected to start with Sierra Leone and Kiribati. ELS has also participated in the negotiations of maritime boundaries in support of some states who have commenced such negotiations with neighbouring states.

61. In line with the Secretariat's Strategic Plan Priorities (2004-2008), ELS identified as part of its strategic work plan, the extended continental shelf as a priority area for assistance to Commonwealth developing and small island states. Efforts have been focused on raising awareness, and building states' capacity to competently prepare and submit their extended continental shelf claims to the UN Commission on the Limits of the Continental Shelf (CLCS) before the 2009 deadline. ELS has undertaken this work at national and regional levels.

62. A key element of this capacity building and assistance is the development of desktop studies in preparation for submissions to the CLCS. At the national level, assistance on the development of a desktop study for Guyana is ongoing, while new projects were commenced with Papua New Guinea, Mozambique and Fiji. New projects are expected to commence shortly following recent requests from the Governments of Sierra Leone and Kiribati. On a regional level, the Secretariat has been collaborating with the United Nations Division on Law of the Sea and Legal Affairs (DOLOS) in a series of capacity-building training workshops to assist member countries in the preparation of their submissions to the CLCS. Two such regional workshops took place in February and May 2005 for the Pacific and Indian Ocean regions respectively. The last two workshops are scheduled for December 2005 and May 2006 for the West African and Caribbean regions respectively.

63. In October 2004, ELS presented a paper to Commonwealth Law Ministers of Small Jurisdictions on the cost implications of the implementation of Article 76 of UNCLOS. As a result of that paper, the Ministers in their Communiqué recommended that:

> "The Commonwealth Secretariat should prepare a summary of the rights and obligations in respect of an extended continental shelf under UNCLOS."

64. Many small member states are legitimately concerned about their financial and technical ability to undertake the necessary work required for preparing submissions. Coupled with this is the concern regarding the consequences that will flow from the failure to submit their claims by the deadline of 2009. These issues are further explored in a separate information paper on the rights and obligations of states in respect of an extended continental shelf.

GOVERNANCE AND INSTITUTIONAL DEVELOPMENT DIVISION (GIDD)

65. The Commonwealth Secretariat's Governance and Institutional Development Division (GIDD) assists member countries in developing and sustaining institutions that support open and accountable governance, sound administration and a caring, supportive culture to improve the lives of Commonwealth citizens and protect their interests.

66. GIDD has responsibility for the Secretariat's mandate on public sector development through in-house advisory services, training and provision of technical assistance. Its work covers the full spectrum of public sector administration and management, public sector governance, corporate governance and public-private partnerships, promotion of oversight institutions as well as issues relating to civil society and private sector institutions with a public responsibility. GIDD is also responsible for the Commonwealth Service Abroad Programme (CSAP), which is an innovative volunteer-based programme designed to assist in the development and implementation of people-centred, mass-impact projects that contribute to the achievement of the Millennium Development Goals. GIDD's work is primarily demand-driven. All its programmes have been created because member countries have demanded them and because there is an identified need for them. GIDD works in collaboration with LCAD and the Human Rights Unit (HRU) in delivering these activities.

67. Over the years, GIDD expertise and training have been provided for the drafting of constitutions, legal and judicial reforms and administration of justice. GIDD has assisted in mobilising resources to build legal capacity in several countries, to help strengthen the democratic machinery, and to provide assistance in designing and managing elections and electoral systems. GIDD is helping Commonwealth countries make regular use of legal experts provided by GIDD in the operation of their legal systems and in law revision and reform. Experts help reform or update statute books, or introduce new areas of intervention such as with Information Communications Technology (ICT) – and in promoting measures to combat domestic violence or child abuse.

68. Many of the lawyers preparing legislation in the Commonwealth today are graduates of the long-established courses in parliamentary drafting supported by GIDD. However, critical shortages still occur, and GIDD continues to provide long-term legislative drafters. GIDD has also assisted in setting up election infrastructures, with advice on legislation and electoral machinery, and providing experienced management in such thorny areas as constituency demarcation and voter registration.

69. Currently there is an average of 30 long-term experts in the field under GIDD's projects supporting different aspects of legal development. In Africa and the India Ocean, experts include legal drafters, State Prosecuting Counsels, prosecutors for criminal cases on fraud and corruption and some nine judges for High Courts on criminal cases. In the Caribbean and the North Atlantic legal experts include legislative drafters, parliamentary counsels, Directors of Public Prosecution, Solicitor Generals and Attorneys-at-Law. Europe and the Mediterranean also benefit from the skills of legislative drafters, Registrars of High Court, and advisers on money laundering/proceeds and asset forfeiture.

70. A breakdown of Technical Experts provided in the field and supported by GIDD as at 30 June 2004, together with details of regional and pan-Commonwealth training activities is provided at **Annex 1.**

SOCIAL TRANSFORMATION PROGRAMMES DIVISION (STPD)

Gender and the Law Issues

71. The Gender Section of the STPD presented the Commonwealth Plan of Action for Gender Equality 2005-2015 (PoA) to the meeting of Ministers Responsible for Women Affairs (7WAMM) in Fiji in June 2004.

72. The PoA focuses on four critical areas for Commonwealth action: Gender, Democracy, Peace and Conflict; Gender, Human Rights and Law; Gender, Poverty Eradication and Economic Empowerment; and Gender and HIV/AIDS. The PoA was presented on behalf of the Commonwealth to the United Nations Beijing+10 Review held in New York, March 2005.

73. At a meeting of Commonwealth Ministers Responsible for Women's Affairs held in New York on 27 February 2005, the Denarau Statement issued at the Fiji meeting was recalled in which Ministers had noted the progress made by member countries in the development of national action plans on gender. The Denarau Statement further noted the actions taken by member countries in advancing *de jure* equality through the institutionalisation of constitutional or legislative reforms for the claiming of women's rights. Fifty Commonwealth countries have ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and 15 countries have also ratified the Optional Protocol.

74. The PoA acknowledges the challenges presented by persistent gender inequalities and inequities. These include the widespread prevalence of gender-based violence and violations of women's human rights, the exacerbation of feminisation of poverty, lack of women's full participation in leadership and decision-making, and women's continued unequal access to economic and social resources and justice.

75. The PoA recognises that because customary and religious laws, practices and traditions are often significant and meaningful to people, it is therefore critical to promote active dialogue among members of the judiciary, religious, cultural and civil institutions and communities to address the realisation of women's human rights.

76. The critical areas identified by the PoA under 'Gender, human rights and law' include gender-based violations, trafficking in women and girls, the rights of marginalised peoples including

indigenous communities and women's land and property rights. The Gender Section is working with national women's machineries, key legal and judicial institutions, human rights bodies and women's and other civil society organisations to address these critical issues.

77. In partnership with LCAD, the Section is soon to publish a case law book on women's human rights. It will offer legal practitioners, academics and civil society groups' useful information and resources to address the realisation of women's human rights from the standpoint of legal provisions.

HIV/AIDS

78. At the Commonwealth Health Ministers Meeting in Geneva in May 2005, Ministers acknowledged the continuing importance and urgency of addressing HIV/AIDS. It is now recognised that HIV-related stigma and discrimination remains an enormous barrier to effectively fighting the HIV and AIDS epidemic. Fear of discrimination often prevents people from seeking treatment for AIDS or from admitting their HIV status publicly. People with, or suspected of having, HIV may be turned away from healthcare services and employment and may be refused entry to a foreign country. In some cases, they may be evicted from home by their families and rejected by their friends and colleagues. The stigma attached to HIV/AIDS can extend into the next generation, placing an emotional burden on those left behind.

79. Denial goes hand in hand with discrimination, with many people continuing to deny that HIV exists in their communities. Today, HIV/AIDS threatens the welfare and well being of people throughout the world. At the end of the year 2004, 39.4 million people were living with HIV or AIDS and during the year 3.1 million died from AIDS-related illness. Combating the stigma and discrimination against people who are affected by HIV/AIDS is as important as developing medical cures in the process of preventing and controlling the global epidemic.

80. A certain amount can be achieved through the legal process. In some countries people who are living with HIV or AIDS lack knowledge of their rights in society. They need to be educated, so that they are able to challenge the discrimination, stigma and denial that they meet in society.

81. Institutional and other monitoring mechanisms can enforce the rights of people living with HIV and AIDS and provide powerful means of mitigating the worst effects of discrimination and stigma. No policy or law can alone combat HIV/AIDS related discrimination but they may be some of the many actions to take.

82. The fear and prejudice that lies at the core of HIV/AIDS discrimination needs to be tackled at the community and national levels. A more enabling environment needs to be created to increase the visibility of people with HIV/AIDS as a 'normal' part of any society.

83. It is also important to confront the fear based messages and biased social attitudes, in order to reduce the discrimination and stigma against people who are living with HIV or AIDS.

LEGAL AND CONSTITUTIONAL AFFAIRS DIVISION
LIST OF PUBLICATIONS (2002-2005)

1. Law Development Issues of the Commonwealth (LAWD)
2. Commonwealth Law Bulletin (CLB), Volumes 27, 28 and 29 and Indexes
3. Report of the Expert Group Meeting on the Removal of Appellate Jurisdiction from the Judicial Committee of the Privy Council by Member Countries (2003)
4. Report of the Workshop on Curriculum Development for the Training of Legislative Drafters (2003)
5. Law and Technology Workshop for the Caribbean Region (2003)
6. Law and Technology Workshop for the Asia Region (July 2004)
7. Law and Technology Workshop for Pacific Region (November 2004)
8. Law and Technology Workshop for the Africa Region (March 2005)
9. Report of the Expert Group Meeting on the Commonwealth Model Bill on Competition for the Pacific Region (May 2004)
10. Report of the Expert Group Meeting on the Commonwealth Model Bill for the Pacific Region (November 2004)
11. Report of the Expert Group Meeting on the Commonwealth Model Bill for the Caribbean Region (December 2004)
12. Report of the Expert Group Meeting of the Commonwealth Model Bill for the African Region (April 2005)
13. Report on the Commonwealth Seminar on the Implementation of International Environmental Instruments and Policy Development (May 2005)
14. Report on the Commonwealth Seminar on Landlocked States for Africa (June 2005)
15. Report of the Commonwealth Pacific Regional Workshop on Land and Development, Apia, Samoa 9 – 12 March 2003
16. Report of the Commonwealth Workshop on Land and Development, Nairobi, Kenya 8 – 10 July 2003
17. Report of the Commonwealth Workshop on Land and Development, Bridgetown, Barbados, 10-12 November 2003
18. Report of the Commonwealth Workshop on Curriculum Development for the Training of Legislative Drafters, Christ Church, Barbados, 10 -12 November 2003
19. Report of the Commonwealth Workshop on Access to Information for the Asia and Pacific Region, Kuala Lumpur 8 – 10 December 2004
20. Report of the Commonwealth National Capacity Regional Workshop on Land and Development, Funafuti, Tuvalu 15 -17 June 2005
21. Report on the Workshop for Curriculum Development and Legislative Drafting Training (Africa Region), Accra, Ghana June 2005
22. Report on Workshop on Constitution Making Process, Livingstone, Zambia July 2005
23. Commonwealth West Regional Workshop on Legal Aspects of Access to Information and Data Protection, Banjul, The Gambia, Corinthia Atlantic Hotel, July 20 -23, 2005
24. Mutual Assistance in Criminal Matters: Guide to National Practice and Procedure (Parts 1 & 2)
25. Mutual Assistance in Criminal Matters Updates (July 2004)
26. Combating Money Laundering: Guide to National Laws (Parts 1, 2 & 3)
27. International Co-operation in the Administration of Criminal Justice: Laws of Commonwealth Countries and Jurisdictions on the subjects of:

    - Extradition and Rendition of Fugitive Offenders;
    - Mutual Assistance in Criminal Matters;
    - Transfer of Convicted Offenders.

28. Changing Face of International Co-operation in Criminal Matters in the 21st century Papers from the Oxford Conference, August 2002
29. Commonwealth Legal Assistance News Issues
30. Commonwealth Crime Watch Issues
31. Implementation Kits for the International Counter-Terrorism Conventions
32. Report of Expert Working Group on Legislative and Administrative Measures to Combat Terrorism
33. Model Legislative Provisions on Measures to Combat Terrorism
34. Workshop documents and Report of the Workshop on Legislative Measures to Combat Terrorism: Gaborone, Botswana, 4-8 November 2002
35. Workshop documents and Report of the Workshop on Legislative Measures to Combat Terrorism: St John's, Antigua and Barbuda, 10-14 February 2003
36. Workshop documents and Report of the Workshop on Legislative Measures to Combat Terrorism: Colombo, Sri Lanka, 31 March-1 April 2003;
37. Workshop documents and Report of the Workshop on Legislative Measures to Combat Terrorism: Banjul, The Gambia, 12-16 May 2003
38. Report of the Workshop on the Implementation of the Rome Statute of the International Criminal Court: Port of Spain, Trinidad and Tobago, 14-16 February 2001
39. Report of the Workshop on the Implementation of the Rome Statute of the International Criminal Court: Dar es Salaam, Tanzania, 4-6 February 2002
40. Report of the Workshop on the Implementation of the Rome Statute of the International Criminal Court: Apia, Samoa, 25 – 28 March 2002
41. Report of the Workshop on the Implementation of the United Nations Convention Against Transnational Organised Crime (Palermo Convention), Kuala Lumpur, Malaysia, 6-7 June 2002
42. Report of Expert Working Group on Evidence
43. Law in Cyber Space
44. International Co-operation in Criminal Matters: Balancing the Protection of Human Rights with the Needs of Law Enforcement, Oxford, August 1999
45. The 2002 Commonwealth Secretariat Oxford Conference on the Changing Face of International Co-operation in Criminal Matters in the 21st Century, Oxford
46. Curriculum Development Course Notes and Case Book
47. Report of the Workshop on Capacity Building in Combating Terrorism, Windhoek, Namibia, 2-6 February 2004.
48. Report of the Workshop on Capacity Building in Combating Terrorism, Nairobi, Kenya, 20-24 September 2004.
49. Report of the Workshop on Capacity Building in Combating Terrorism, Singapore, 10-14 May 2004.
50. Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court, Marlborough House, London 7-9 July 2004.
51. Model Law to Implement the Rome Statute of the International Criminal Court (including the Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court) March 2005.
52. The Prosecution of International Crimes: A Practical Guide to Prosecuting ICC Crimes in Commonwealth States. Edited by Ben Brandon and Mąx du Plessis
53. Meeting of Law Ministers, Saint Vincent and the Grenadines, November 2002 (1 volume: Minutes and Memoranda)
54. Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions, October 2004
55. Meeting of Senior Officials of Law Ministries, October 2004 (1 volume)
56. Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government

PUBLICATIONS BY THE HUMAN RIGHTS UNIT
(2002 – 2004 FINANCIAL YEARS)

1. Commonwealth Human Rights Law Digest
2. African Human Rights Law Reports
3. Commonwealth Guidelines for the Treatment of Victims of Crime
4. Report of the Expert Group on Strategies for Combating the Trafficking of Women and Children
5. Freedom of Expression, Association and Assembly
6. Internally Displaced Persons in the Commonwealth: Rights, Common Themes and Best Practice Guidelines (Report of an Expert Group Meeting, London, 19-21 May 2003
7. Commonwealth Workshop for Human Rights Defender (Asia Region), Colombo, Sri Lanka 21-23 October 2003
8. Compilation of International and Regional Instruments for the Protection of Human Rights Defenders, January 2004
9. Report of Mainstreaming Human Rights in the Secretariat (First Phase), April 2004
10. Tackling the Unconstitutional Overthrow of Democracies – Emerging Trends in the Commonwealth
11. An Introduction to Law and Human Rights for Young People in the Commonwealth
12. Introduction to Citizenship for Young People in the Commonwealth, 2004
13. Compilation of International and Regional Instruments for the Protection of Human Rights Defenders
14. *Paper on* "Small Island States in the Face of Climatic Change: The End of the Line in International Environmental Responsibility"
15. *Newsletter* – "The Human Rights Update – Issues 1-5"

Breakdown of Technical Experts provided in the field and supported by GIDD as at 30 August 2005:

- **Grenada** – 1 Solicitor General assisted the Attorney General's Chambers in civil litigation and provision of legal advice.
- **Antigua** – Two legal Draftspersons are due to commence assignments with the Government of Antigua from December 2005.
- **Bahamas** – a Legal Draftsperson is providing support to the Government of Bahamas.
- **Bermuda** – Two Parliamentary Counsels are providing short-term assistance to the Attorney-General's Chambers, Hamilton, Bermuda.
- **Papua New Guinea** – In-Country Roundtable on Legal Framework For E-Governance, Waigani, Papua New Guinea.
- **Sierra Leone** – GIDD is collaborating with the Department of International Development to help clear up the serious backlog of cases, especially cases related to corruption. Three judges are attached to the High Court of Sierra Leone and on the Appeals Court. Two CFTC-prosecutors are attached to the Anti-Corruption Commission as part of this support. The programme also involves training of counterparts involved in the administration of justice in Sierra Leone.
- **The Gambia** – Through a Legal Capacity Building Project, GIDD is also collaborating with the UK Department for International Development to provide the services of five judges and a prosecutor, as well as training of counterparts, as part of the effort to improve the administration of justice in that country.
- **Botswana** – A legal drafter is assisting in the Attorney General's office to help alleviate the acute shortage of drafters in that country. The expert is assisting in preparing draft legislation, statutory instruments as well as training junior counsels.
- **Solomon Islands** – 1 Constitutional lawyer helped to prepare drafting instructions for a new federal constitution as part of the UNDP-supported project on constitutional reform. The draft constitution was submitted in November 2003. A Registrar of the High Court continues to be attached to the Ministry of Justice and the services of a Puisne Judge are being provided up to November 2006.
- **Tuvalu** – 1 Adviser to the Attorney General to the Tuvalu Government, assisting in providing institutional support and advice to the Office of the Attorney General in Tuvalu.
- **Vanuatu** – (a). 1 Technical Adviser on land valuation - setting up a land valuation framework through the drafting of land valuation legislation and relevant legal instruments. The Adviser has already reviewed the legislative frameworks for land valuation and drafted a Land Valuation Act in consultation with the state law office. The Act has since been gazetted. (b) 1 senior judge for the administration of justice and the preparation and implementation of courts civil procedures rules.
- **Fiji** – Two CFTC funded experts, a Law Revision Commissioner and a Parliamentary Counsel are assisting the Attorney General's Office.
- **Asia–Pacific Group** – 1 Consultant on anti-money laundering, assisting the Asia-Pacific group to address the needs of member states on issues of anti-money laundering. The Consultant is based in Australia and is co-ordinating technical assistance and training programmes for the Asia-Pacific region.
- **Forum Secretariat** – 1 Consultant on anti-money laundering, assisting Pacific Island states to combat the laundering of the proceeds of crime in the region. The Consultant is based in Fiji and is working with anti-money laundering units in Fiji, Cook Islands, Samoa, Nauru and Vanuatu.

- **Organisation of Eastern Caribbean States (OECS) Secretariat** – (a). 1 Legal drafter to assist with family law and domestic violence legislation reform in the Eastern Caribbean. (b). A two person advisory Consultancy team is ensuring that the legislative and constitutional framework at national levels are supportive of the proposed economic union of OECS member states

Regional and Pan-Commonwealth Training Activities:

- Provision of CTFC awards have enabled personnel from the civil services of Jamaica, Belize, St Lucia and Antigua to pursue post-graduate studies in legislative drafting at the University of the West Indies (UWI), Barbados.
- Three 1-week Training Workshops for Ombudsman offices in the Caribbean, and Africa (73 participants).
- When the citizens complain: 2 weeks study programme for Ombudsman, Human Relations and Complaints Handling offices; London, UK (22 participants).
- Managing Change – Managers in Government: 2 weeks study programme for Government lawyers and Legal Advisers, London UK (10 participants from around the Commonwealth).
- 'Trust in Government' – Promoting Ethics, Integrity and Professional standards in Public Services, London UK (18 participants).
- 3 months Anti-Corruption Training, Australian National University, Canberra, Australia (12 participants).
- West Africa Regional Workshop on Ethics and Integrity (in collaboration with ECOWAS), Abuja, Nigeria (31 participants).
- Officials from the legal establishment including the police and the Solicitor General participated in a one week National Workshop in The Gambia on *'Ethics and Accountability in Public Services'*.
- Law and Technology workshops, (Pan-Commonwealth series) conducted for the Caribbean and Asia/Pacific regions in collaboration with LCAD.
- Pan-Commonwealth Corporate Governance Programme (series of training seminars and workshops) in Africa, Asia, Caribbean, and the Pacific for Company Directors and Senior Officials (over 200 officials already trained).
- In collaboration with the Economic Affairs Division, GIDD sponsored two one-week sub-regional workshops in May and August 2005 respectively. These workshops were geared to building capacities of countries in the Eastern and Southern Africa region involved in developing and finalising Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) national strategies within the first year of implementation of the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) strategic Plan.
- Individual CFTC awards have enabled senior government officials from African countries, such as The Gambia, to pursue post-graduate studies in Law.
- A CFTC award is also assisting a Judge from Cameroon to participate in judicial training in Canada.

Criminal Law Issues

REPORT OF THE COMMONWEALTH WORKING GROUP ON ASSET REPATRIATION

Table of Contents

EXECUTIVE SUMMARY

TERMS OF REFERENCE

1. In pursuance of the mandate in the Aso Rock Declaration the Commonwealth Secretary-General constituted a Working Group on the recovery and repatriation of assets of illicit origin focusing on maximising co-operation and assistance between governments. The Working Group, comprised of experts from eleven Commonwealth governments as well as other independent experts and observers, met on four occasions. They considered and discussed, *inter alia*:

- the major problems in asset tracking, recovery, and repatriation and best practice in overcoming those problems;
- the key impediments to effective international co-operation in this area and effective ways in which those impediments can be addressed;
- the laws, administrative structures and other mechanisms necessary, in both "victim" and "receiving" states to prevent the movement of assets, and to allow for effective international co-operation in tracing and confiscating the assets;
- taking into account the provisions of the United Nations Convention Against Corruption (UNCAC), in particular Article 57, the laws, administrative structures and other mechanisms necessary to provide for the return of confiscated assets;
- possible amendments to the Commonwealth Scheme for Mutual Assistance in Criminal Matters (the Harare Scheme) to provide for more effective co-operation in this area.

ISSUES ADDRESSED

2. In approaching its mandate, the Group examined the issues in a chronological manner, much as a case would develop in practice.

Misappropriation of Assets

3. Measures for co-operation and repatriation cannot be viewed in isolation from the need for all states to put in place a comprehensive regime to combat corruption, with particular emphasis on the establishment of a broad range of preventive measures. The Group recommended that countries be guided by instruments such as the *Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption* and Chapter II of the UNCAC in establishing these essential preventive measures. It is also essential to have a comprehensive regime of criminal offence provisions to govern activities that may lead to the misappropriation of funds.

Immunities

4. It is a fundamental principle that all persons are equal before the law. However in some Commonwealth countries Heads of State and Government and other officials enjoy immunities from criminal prosecution, which can preclude effective prosecution and pursuit of illicit assets in corruption cases. The Group considered that Commonwealth governments should strive for a position where there are no immunities.

Preventing the Movement of Funds

5. To prevent the movement and concealment of funds, countries need to fully implement the international standards and measures designed to prevent money laundering. This requires not only legislative action but also the adoption of relevant structures and administrative procedures. Particular emphasis is needed on enhanced scrutiny with respect to both foreign and domestic

politically exposed persons (PEPs). Effective measures should also be adopted to prevent cash smuggling and allow for cash seizures.

Serving Heads of State

6. Delicate political and practical questions were discussed concerning actions against serving Heads of State where assets believed to be obtained through corruption are located in another state. To the greatest extent possible, existing legislation and procedures for the reporting of suspicious transactions and the sharing of that information should be utilised in such situations. It may also be feasible in some situations for the country in possession of the funds to take domestic measures with reference to those assets. On a broader level the Group recommended that Heads of Government give consideration to an ad hoc Commonwealth peer review mechanism for such situations.

Mechanisms for Asset Confiscation

7. An effective system for the restraint and confiscation of proceeds of crime is fundamental to allow for the repatriation of assets. There are three different types of confiscation procedure which can be used: conviction based, non-conviction based and ordinary civil litigation. The Report recommends that Commonwealth countries that have not already done so should promptly put in place strong and comprehensive legislation for both conviction and non- conviction based asset confiscation and establish and properly fund agencies dealing with asset confiscation and management.

Tracing and Tracking of Assets

8. Legislation is of little value unless it can be effectively enforced. In this respect there is a need for training, dedicated resources and co-ordinated efforts to enhance the strength of the relevant investigative agencies. The need for adequate investigative tools and powers was discussed and some effective strategies arising from this discussion are outlined in the Report.

Mutual Legal Assistance – General

9. There are a myriad of existing obstacles to effective mutual legal assistance including: delay; a lack of understanding/communication; the need for consultation between authorities; absence of co-ordination of efforts, particularly in complex cases; and the requirement by some countries for a bilateral treaty. The Group recommends a number of steps that should be taken to overcome these impediments including allowing for the rendering of legal assistance without a requirement for a bilateral treaty and in the absence of dual criminality. The Report recommends that a Commonwealth Network should be established to assist consultation, communication and co-ordination between Commonwealth countries.

Availability of Mutual Legal Assistance

10. The need for mutual assistance to be sought and obtained in respect of investigations and proceedings for non-conviction based asset confiscation was emphasised. Amendments to the Harare Scheme were recommended in this regard and are attached hereto at **Annex 5**. While limitations on the use of mutual legal assistance in purely civil proceedings are acknowledged, the Report urges Commonwealth countries to permit the use of evidence gathered through mutual legal assistance in civil proceedings related to corruption matters. The Group also recommended further examination of the possible use of mutual legal assistance to gather evidence for civil proceedings brought by a victim country for the limited purpose of asset recovery in corruption cases.

Mutual Assistance for Freezing/Restraint/Confiscation of Assets

11. Acknowledging the balance of interests between effective and speedy recovery of assets and the property rights of individuals, the Group noted the practical advantages of direct enforcement of foreign orders for freezing/restraint and confiscation. Adoption of legislation establishing a direct enforcement system is recommended, recognising the need for an executive discretion to grant or refuse a request, for innocent third parties to challenge a restraint order in either requesting or requested states, and for the accused to have a limited right of challenge in the requested state. The Report states that such legislation should provide for the enforcement of both conviction based and non-conviction based orders.

Mutual Assistance – The Harare Scheme

12. Specific revisions were proposed to the Harare Scheme primarily to extend its application to non-conviction based asset confiscation and to add some provisions to make it a more effective tool for co-operation generally and especially with respect to restraint, confiscation and repatriation.

Restraint of Assets

13. Delay was highlighted as a major problem in effective restraint action and the Group acknowledged that the timing of restraint order applications is crucial. The Report recommends that Commonwealth countries ensure their legislative scheme for restraint and confiscation is flexible and permits early applications for a restraint order. Alongside this the Group discussed the importance of effective mechanisms for the management of restrained assets. The Report recommends that Commonwealth countries should adopt such mechanisms.

Effective Repatriation of Assets

14. Delay was again identified as a significant problem in the repatriation of assets and the final Report encourages Commonwealth countries to "fast track" corruption cases to reduce delay. The Group highlighted the need for countries to implement Chapter V of the UNCAC on Asset Recovery and in particular to put in place executive or judicial mechanisms that will allow for the repatriation of confiscated assets in corruption cases as mandated under the Convention. The Group also recommended amendments to the Harare Scheme to incorporate UNCAC provisions.

Recommendations for Implementation

15. The Group concluded that full implementation of the 58 recommendations contained in the Report is key to advance effective action in the repatriation of assets plundered through corruption. The Group identified 10 key recommendations, set out below, the implementation of which should be given priority attention. **Annex VII** references the paragraphs in the Report from which these Key Recommendations were drawn. It was also recommended that Heads of Government should commit increased resources for the Commonwealth Secretariat to assist Commonwealth countries with the implementation of these recommendations.

KEY RECOMMENDATIONS

1. Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency.

2. Commonwealth Heads of State/Government, ministers and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity. Heads of

Government should commit themselves to take active steps to ensure the removal of these immunities.

3. In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place.

4. Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died. Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation.

5. Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement.

6. Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non- conviction based orders, it should be amended to do so.

7. Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:

(a) in cases of misappropriation or other unlawful taking of public funds, or the laundering thereof;
(b) where the requesting country reasonably establishes its prior ownership of confiscated property; or
(c) when the requested country recognises damage to the requesting country.

8. Commonwealth countries should ensure that the law clearly prescribes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds.

9. Commonwealth countries should allocate sufficient resources to establish and properly fund central authorities and law enforcement and other agencies dealing with asset confiscation and management.

10. Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the report.

REPORT

I. INTRODUCTION

Terms of Reference

1. Commonwealth Heads of Government agreed the following in the Aso Rock Declaration issued at their summit in December 2003 in Abuja:

"We recognise that corruption erodes economic development and corporate governance. We welcome the successful conclusion of the United Nations Convention against Corruption and urge the early signature, ratification and implementation of the Convention by member states. We pledge maximum co-operation and assistance amongst our governments to recover assets of illicit origin and repatriate them to their countries of origin. This will make more resources available for development purposes. To this end, we request the Secretary-General to establish a Commonwealth Working Group to help advance effective action in this area."

2. Further, in their Communiqué, Heads of Government :
"welcomed the recent adoption of the United Nations Convention against Corruption and requested member states to sign and ratify it. They noted that systemic corruption, extortion and bribery undermine good governance. They called for enhanced mutual co-operation in the repatriation of illegally acquired public funds and assets to the countries of their origin in accordance with the provisions of the Convention."

3. In pursuance of the above mandate, the Commonwealth Secretary-General constituted a Working Group comprised of experts representing eleven Commonwealth governments, and other independent experts, with particular experience in the fields of asset forfeiture and international co-operation.

4. Representatives from the United Nations Office on Drugs and Crime (UNODC), the International Monetary Fund (IMF), the World Bank, Transparency International and the International Bar Association also participated as observers to the meetings of the Group.

5. The Working Group was mandated to examine the issue of the recovery of assets of illicit origin and repatriation of those assets to the countries of origin, focusing on maximising co-operation and assistance between governments. In particular the Group was to consider, *inter alia*,:

- the major problems in asset tracking, recovery, and repatriation and best practice in overcoming those problems;
- the key impediments to effective international co-operation in this area and effective ways in which those impediments can be addressed;
- the laws, administrative structures and other mechanisms necessary, in both "victim" and "receiving" states to prevent the movement of assets, and to allow for effective international co-operation in tracing and confiscating the assets;
- taking into account the provisions of the United Nations Convention against Corruption, in particular Article 57, the laws, administrative structures and other mechanisms necessary to provide for the return of confiscated assets;
- possible amendments to the Commonwealth Scheme for Mutual Assistance in Criminal Matters (the Harare Scheme) to provide for more effective co-operation in this area.

Meetings and Participants

6. The Working Group on Asset Repatriation met in Marlborough House on four occasions - 14th to 16th of June 2004, 15th to 17th November 2004, 30 March to 1st April 2005 and 29 June to 1st July 2005. A combined list of participants for each meeting is attached as ***Annex I***.

Programme of Work

7. As a first principle, the Working Group decided not to repeat or duplicate work already undertaken in other fora and to take into consideration existing international instruments, standards and recommendations of relevance including:

The Framework of Commonwealth Principles on Promoting Good Governance and Combating Corruption (Commonwealth Framework);
The United Nations Convention against Corruption (UNCAC);
The African Union Convention on Preventing and Combating Corruption;
The revised Forty Recommendations of the Financial Action Task Force on Money Laundering; (FATF Recommendations);
The FATF Special Nine Recommendations on Combating the Financing of Terrorism;
The Wolfsberg AML Principles on Private Banking (Wolfsberg Principles);
The Commonwealth Scheme for Mutual Assistance in Criminal Matters (the Harare Scheme).

8. The Group agreed to build upon these and elaborate further on them as and when necessary.

9. In approaching its mandate, the Group examined the issues in a chronological manner, much as a case would develop in practice, as set out in an outline reference paper. The topics and subtopics below generally reflect that chronological approach though some issues of special concern have been separated out *(see **Annex II**- Outline)*.

10. During the course of its work, this Group received a presentation from an official of the Commission for Africa on the work being undertaken on asset repatriation within that forum. The Group in turn made recommendations to the Commission as to possible areas for consideration. By the time of its third meeting, the Commission for Africa had published its Report and the Group noted the recommendations on corruption and the repatriation of assets.

II. GENERAL

11. The Group noted that the UNCAC represents an excellent "roadmap" for combating corruption and obtaining the repatriation of assets. It is important that Commonwealth countries sign, ratify and implement the UNCAC as a matter of urgency.

Recommendation

R.1 Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency.

III. MISAPPROPRIATION OF ASSETS

Preventive Measures

12. Measures for co-operation and repatriation cannot be viewed in isolation from the need for all states to put in place a comprehensive regime to combat corruption with particular emphasis on the establishment of a broad range of preventive measures.

13. As a guide, Commonwealth countries should have regard to the comprehensive preventive measures outlined in the Commonwealth Framework and Chapter II of the UNCAC (***Annex III*** - *Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption)*.

Asset Declarations

14. In the context of asset repatriation, special attention should be given to the use of disclosure obligations for relevant government officials and politicians. Asset declarations /disclosures can be a very effective preventive measure. While there are benefits flowing from allowing public scrutiny of such disclosures, confidentiality may be necessary for some states because of security concerns. A proper disclosure system must include:

- requirements for disclosure by the person and close family members;
- obligations to properly maintain the records;
- proper mechanisms for review and verification of the disclosure material;
- enforcement mechanisms and adequate penalties for failure to disclose.

15. A very effective tool for authorities responsible for enforcing and following up on asset declarations is having access to tax information to verify the declarations. Commonwealth countries should provide for such access, to the extent applicable and possible in a domestic context.

Criminal Offences

16. Commonwealth countries need to have a complete range of criminal offences in domestic law to govern activities that may lead to the misappropriation of funds. It is particularly important to have clear legislative provisions which regulate the expenditure of public funds by all officials, including Heads of State and Government. Further, any misappropriation in violation of those provisions should constitute a criminal offence. Under the laws of some countries the distinction between state and private funds in relation to Heads of State and Government may be unclear or inadequately defined. This is problematic as it may prevent effective co-operation between countries in the subsequent confiscation and return of such funds, if the requesting country cannot point to specific underlying criminal activity in support of the request for assistance.

17. The use of an offence of unjust enrichment, where the onus shifts to the individual to show that the assets were acquired through legitimate means, can be an extremely effective tool to combat corruption. While recognising that in some Commonwealth countries there may be constitutional problems with such an offence, the Group was of the view that such an offence should be recommended for adoption as it is a highly useful anti-corruption measure.

18. However, because not all countries will be able to adopt such an offence, there may be problems with dual criminality should mutual assistance, extradition or restraint and forfeiture be necessary in a particular corruption case. To avoid this, corruption investigations and prosecutions should be broadly framed to cover a full range of offences so that requests for assistance can be presented and executed if necessary.

Recommendations

R.2 Commonwealth countries should have regard to the Commonwealth Framework and Chapter II of the UNCAC on Preventive Measures and adopt a comprehensive prevention regime under domestic law.

R.3 Having regard to the criminal offence provisions of the UNCAC, Commonwealth countries should ensure that there are a broad range of criminal offences under domestic law for use in corruption cases, including an offence of bribery of foreign officials abroad.

R.4 Commonwealth countries should ensure that the law clearly describes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds.

R.5 Commonwealth countries should introduce an offence of unjust enrichment if it does not already exist.

Immunities

19. It is a fundamental principle of law that all persons are equal before the law. However in some Commonwealth countries Heads of State and Government and other officials enjoy immunities from criminal prosecution, which can preclude effective prosecution and pursuit of illicit assets in corruption cases, particularly if they are absolute and broadly cast.

IMMUNITY FROM PROSECUTION BY OR IN ANOTHER STATE

20. Under international law, current Heads of State/Government have immunities which are absolute while they remain in office, with respect to proceedings that may be brought against them by or in another State.

21. In the case of former Heads of State/Government there is emerging authority that they are no longer entitled to claim immunity from prosecution in another state where the act in question is governed by a treaty, such as the Torture Convention. Under that Convention and other similar instruments State Parties have an obligation to prosecute or extradite in such cases and those obligations could not be carried out if all or most of the persons covered by the treaty enjoyed immunity. There is also authority in support of an exception to "functional immunity" in cases of crimes under customary international law such as war crimes, genocide and crimes against humanity.

22. To date this exception has had limited application to convention crimes such as torture and crimes under customary international law. However, it may be that this is an area where international law can be advanced to extend this exception to corruption crimes, given the tremendous damage resulting from acts of corruption and the existence of the UNCAC. The Commonwealth, as a group of 53 states, could through its recommendations and actions perhaps encourage a movement in international law so that in future the exception to functional immunity might well be applicable to corruption offences.

23. As well, in future, it might be possible for the jurisdiction of the International Criminal Court (ICC) to be extended to cover corruption offences. While clearly the current mandate of the Court is restricted to crimes against humanity, war crimes and genocide (with aggression to be included when a definition is agreed), earlier drafts in the negotiation of the Rome Statute made reference to other crimes including terrorism and drug trafficking. Thus it is not fanciful to suggest that in future there may be scope for an extension of the use of the ICC for adjudication of

corruption cases. The Commonwealth could advance this argument before the Review Conference for the Rome Statute which is to be convened in 2009.

IMMUNITIES FROM DOMESTIC PROSECUTION

24. While the question of prosecution in other jurisdictions is relevant and of interest, the central problem in corruption matters is the existence of immunities under domestic law, some of which are constitutionally enshrined, precluding the prosecution of Heads of State/Government in domestic courts. These immunities present a major obstacle to the prosecution of corruption offences alleged to have been committed by these officials and ultimately to the recovery of assets obtained through these offences, particularly where only conviction based asset confiscation is available.

25. The state of the law on the point varies within the Commonwealth. Attached as ***Annex IV*** is a summary of the country laws on this issue within the Commonwealth as best could be determined. The survey indicates that while some countries afford immunity from civil and criminal action to Heads of State/Government the majority do not.

26. Of those that do provide immunities, some countries only allow any form of legal action to be taken after the Head of State/Government leaves office. Although this position can be pragmatic in that the Head is able to go about the business of governing without fear of prosecution, it becomes a problem where the Head of State may wish to continue in office in order to enjoy immunity. It is also a problem where he/she stays on for a long period of time as Head of State/Government while his/her corrupt activities continue unabated. In such circumstances, by the time action is taken, the assets might have long been dissipated, be untraceable, or the individual might have been too old for any effective action to be taken against him/her.

27. Even more problematic are those countries that allow for the immunities to continue after the person has left office.

28. The Group considered that Commonwealth governments should strive for a position where there are no immunities. Currently the position of these countries with such immunities is influenced by the need to guard against political or abusive suits or prosecutions against former government officials by a new regime. Also, sometimes, in cases of transition to democratic rule, promises of immunity from prosecution in limited cases may be necessary to ensure a smooth transition.

29. Optimally no Head of State/Government should have immunity from prosecution for criminal matters. The potential for abuse and the difficulties such immunities pose in cases of grand corruption are extremely significant. Thus, those countries that have some immunity should take active steps to amend their laws in order to remove any immunity for Heads of State/Government or any other officials in case of criminal prosecution.

30. The Group recognised that in some exceptional circumstances, particularly in cases of countries in transition to democracy there may be a requirement that immunities be retained for a period of time. To the extent that is the case, such immunity provisions must be very strictly crafted and limited in purpose. In particular they should:

- include an exception to the immunity in the case of serious criminal offences as defined by penalty or, as a minimum, corruption offences;
- be limited in application to the time during which the Head of State/Government is in office;
- be retrospective in application and not apply to any future acts;
- be restricted to Heads of State/Government only and not extended to other officials.

Recommendations

R.6 Commonwealth Heads of State/Government and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity.

R.7 Heads of Government should commit themselves to take active steps to ensure the removal of these immunities.

R.8 The Commonwealth Secretariat should prepare periodic reports for consideration by Heads of Government on progressive action towards reaching the optimum goal of no immunities at all from criminal prosecutions throughout the Commonwealth.

R.9 The Commonwealth as an organisation of sovereign states should advance a position for the inclusion of corruption offences within the Rome Statute of the International Criminal Court at the Review Conference for the Statute in 2009.

Cabinet Secrecy/Public Interest Immunity

31. The protections afforded under principles of cabinet secrecy or public interest immunity, while of critical importance to safeguard the operations of government, can be used to shield evidence of corrupt activities from detection. This can serve as a major impediment to both foreign and domestic corruption investigations and asset repatriation action. An examination of the current state of the law in a sampling of Commonwealth jurisdictions revealed increasing recognition of the need for more open government. This had led to increased scrutiny by the courts of claims of public interest immunity. Of particular interest with regard to asset repatriation was recognition by the courts in at least one jurisdiction that public interest immunity could not prevent the disclosure of information relevant to allegations of serious misconduct by a cabinet Minister and thus by analogy to criminal activity. As well, Law Ministers have recognised the importance of freedom of information in recommending a model law on that subject.

32. While public interest immunity must be available in appropriate cases, there should be an avenue for the review of such claims and exceptions where the evidence sought is relevant to the investigation of criminal activity.

Recommendation

R.10 The law in Commonwealth countries should provide for:

(a) a judicial review mechanism for claims of public interest immunity;

(a) exceptions to the privilege where it can be established that the information or evidence sought is relevant to the investigation of (serious) criminal activity, with appropriate safeguards on any disclosure as may be necessary.

IV. PREVENTING THE MOVEMENT OF FUNDS

33. Commonwealth countries must have in place effective schemes to combat and prevent the movement and laundering of funds. If proceeds of corruption are difficult or impossible to move between jurisdictions, it will be far easier to trace, freeze, confiscate and return those funds. It is therefore critically important that the international standards and measures aimed at preventing money laundering that have been developed are fully and effectively implemented in domestic law. As a starting point, all states need to have in place comprehensive legislation on money laundering, proceeds of crime, corruption etc. and that legislation needs to be effectively implemented and

enforced. A robust anti-money laundering regime, incorporating effective risk management systems, is essential to prevent and combat laundering generally and in particular with respect to corruption offences. Customer due diligence and record keeping requirements such as "know your customer", beneficial owner identification, know your customer's business and ongoing due diligence exercises, in addition to the essential criteria of having in place appropriate risk management systems, are central to the fight against money laundering especially in relation to corruption and the tracking and tracing of assets.[1]

Politically Exposed Persons (PEPs)

34. One component of an anti-money laundering regime of particular relevance in cases of grand corruption is use of additional safeguards with reference to PEPs. PEPs are individuals who are or have been entrusted with prominent public functions. Examples include Heads of State and Government, senior politicians, senior government, judicial or military officers, senior executives of state owned corporations, and important political party officials. The term can also extend to their family members and close associates.

35. Both the Financial Action Task Force (FATF) Recommendations (Recommendation 6) and the UNCAC (Article 52) address the issue of PEPs and require financial institutions to apply enhanced measures of scrutiny, in addition to normal due diligence, to PEPs. While the FATF recommendation limits this requirement to foreign PEPs, (albeit the interpretative note on Recommendation 6 encourages countries to also apply such standards to PEPs within their own country), the UNCAC makes no such distinction. The approach taken in the UNCAC is preferable as it ensures more comprehensive protections against the movement of funds in corruption cases. Therefore, countries should ensure that enhanced scrutiny requirements for PEPs are applied and enforced to both foreign and domestic PEPs.

36. Each state will need to determine how broad or narrow a definition of PEPs will be used. A broad application to a range of public officials is consistent with the aim of combating all forms of corruption. However, depending on the domestic context, unless the definition is kept reasonably narrow, it may be difficult for the relevant authorities in financial institutions to enforce it and it may render the concept of enhanced scrutiny meaningless. At minimum, countries should ensure that enhanced scrutiny is applied to foreign and domestic officials falling within the FATF definition of PEPs –

individuals who are or have been entrusted with prominent public functions, for example Heads of State or government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials. Business relationships with family members or close associates of PEPs involve reputational risks similar to those with PEPs themselves. The definition is not intended to cover middle ranking or more junior individuals in the foregoing categories.

37. While enhanced scrutiny with reference to PEPs is clearly a useful tool there are many complex and difficult issues which can mitigate against the effectiveness of this measure in practical application.

38. It is often very difficult to establish a link between the PEP and the impugned assets. The use of corporate bodies, networks of individuals and trusts can make it extremely difficult to detect the connection between an asset and a PEP. Further PEPs may utilise alternative remittance regimes thereby circumventing some of the protections applicable to financial institutions. Other complications include the fact that PEPs may use their relatives in order to disguise their connection to assets.

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[1] FATF Methodology on Recommendations 5 & 6

39. A further issue relates to the identification of PEPs by financial and related institutes. In small and developing states it may be quite difficult for the relevant institutions to identify particularly foreign PEPs given their limited resources and access to information.

40. There was discussion of a possible Commonwealth list of PEPs. However, after discussion of the pros and cons, it was agreed that this would not be practicable. As well such a list might detract from the responsibilities of financial and related institutions to carry out customer due diligence.

41. However, there are ways in which the Commonwealth could assist countries in building capacity in the identification of PEPs, particularly in small and developing countries.

42. For example, some countries have made very effective use of an early warning system whereby banks and financial institutions are alerted to situations within foreign states which may make them particularly high risk for corruption activities. The Commonwealth Secretariat could assist countries with development and training in the implementation of such a system.

Cash Smuggling

43. Cash smuggling is increasingly the mechanism of choice for moving funds especially within countries that have primarily cash based economies, as is the case for a number of Commonwealth jurisdictions. There has also been an increase in cash smuggling as a method of laundering generally, in both developed and developing countries, due to enhanced regulation of financial and related institutions.[2]

44. Possible avenues to combat the use of cash smuggling include cross border cash declarations and powers for administrative cash seizures at borders. While cash declarations can be an effective tool, they are of little value unless there is an effective system in place to analyse and follow up on the reports. This may not be possible particularly in small and developing states.

Cash Seizures

45. Some countries have had considerable success in using cash seizure powers generally, in addition to seizures at the border. Legislative powers have been introduced to allow police officers to make a cash seizure anywhere within the country where there is a reasonable suspicion that the funds are the proceeds or instrumentalities of crime and the amount exceeds a specified threshold. The police may hold the funds for an initial short term period after which they must apply to a magistrate for an extension. Ultimately a magistrate will determine if the funds are to be confiscated. Experience has shown that very often in such cases the individuals involved make no attempt to challenge the seizure and the funds are confiscated. This is a tool which Commonwealth countries may wish to consider implementing. In adopting such a system, careful consideration needs to be given to ensure that there is a clear recourse to a judicial authority to prevent possible abuses. Countries will also need to keep in mind what the threshold should be particularly in countries which have cash based economies.

Recommendations

R.11 Commonwealth countries which have not already done so should implement the broad range of international initiatives directed at preventing the movement of illicit assets and combating money laundering. This should include adopting and enforcing anti-money laundering and proceeds of crime laws with relevant structures and administrative

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[2] See also the FATF Special Recommendation IX on the cross-border movement of cash

procedures. The Commonwealth Secretariat should continue to support member countries with these efforts.

R.12 The Commonwealth Secretariat should develop programmes to assist countries with the development and implementation of early warning systems to raise awareness about political situations particularly vulnerable to corruption.

R.13 Commonwealth countries should enact laws to allow for expedited cash seizures at the border and generally throughout the country in respect of cash which exceeds a specified threshold.

R.14 Enhanced scrutiny regimes should be applied to PEPs as defined by the FATF but extending to both domestic and foreign PEPs.

R.15 The Commonwealth Secretariat should continue to support countries in the implementation of international initiatives to combat money laundering and to gather and disseminate information regarding anti-money laundering and corruption legislation within the Commonwealth.

V. SERVING HEADS OF STATE

46. One of the most difficult and politically sensitive questions is what action can be taken when assets of a current Head of State are located in another state and there is reason to believe that the assets have been obtained through corruption. One preventive measure that can be used with respect to current Heads of State/Government is to require them to make asset declarations and to make such declarations publicly available (see earlier discussion under Misappropriation of Funds). This position already applies in a number of Commonwealth countries and the rest should be encouraged to adopt the same approach.

47. In principle, where there is evidence that a Head of State or Government is involved in corrupt activities the normal systems under the domestic law and the constitution of his or her state should allow for action to be taken. Each state must have in place independent and effective mechanisms and structures that allow for investigation and prosecution in such circumstances. This can be followed by steps to pursue any assets which have been obtained through this corrupt activity. However it must be recognised that there are situations where because of weaknesses within legal systems, the political realities or the application of immunities, no effective action can be taken in the home state. In such a scenario it will be difficult for another state to take any steps regarding the illicit assets, let alone return those assets, given that it would mean sending the funds back to the person believed to have been involved in the corrupt activity.

48. The state in which such funds are located will face a number of practical problems. There will be no request for freezing or confiscation action emanating from the victim state, unless an independent law enforcement authority chooses to make one. It may be impossible to gather relevant evidence for any kind of confiscation action without the co-operation of the victim state. Further, even if evidence is obtained and assets are frozen, there is still the question as to what should be done with those assets.

49. While no doubt there are a myriad of practical problems, the fact that the individual involved is a current Head of State should not prevent the application of existing laws and procedures relating to money laundering and asset forfeiture.

50. Suspicious transactions involving a current Head of State/Government should in the normal course be reported to the FIU or other appropriate bodies or authorities in the receiving country and,

in turn, that FIU or body or authority should share the information with the country of the Head of State/Government to generate action in that state. It may also be possible to spontaneously transmit the information through judicial or law enforcement channels between countries. If such communication with the other state is not feasible or effective, the receiving state should consider methods by which the assets can be restrained and confiscated without the co-operation or involvement of the victim state. Taking into account problems relating to immunities, this would include possible money laundering prosecutions against the bank or other holder of the funds, actions against associates or others involved in the offence with associated confiscation, or the use of non-conviction based asset confiscation if sufficient evidence can be gathered to demonstrate on the civil standard that the asset was obtained through illicit activity. Alternatively, once the bank or institution is aware that the asset may be the proceeds of crime, it may effectively "freeze" the account by refusing to carry out any transactions with respect to it for fear of exposure to money laundering charges.

51. Given the seriousness of the issue and the potential devastating consequences of grand corruption, the Commonwealth may wish to consider a proactive role in addressing this problem. Governments are increasingly subjecting themselves to voluntary peer review mechanisms in various fora. Taking into account the sensitivities surrounding serious allegations of corruption by a serving Head of State/Government, it may be an appropriate area for an ad hoc Commonwealth peer review mechanism to be introduced.

Recommendations

R.16 Commonwealth countries should have in place independent and effective mechanisms by which allegations of corruption with respect to a current Head of State/Government can be investigated and prosecuted and the relevant assets can be frozen and confiscated.

R.17 The procedures relating to suspicious transaction reporting should apply where suspect funds belonging to a current Head of State/Government of another country are identified. Where possible and appropriate, the FIU or other appropriate body or authority in the receiving state should communicate the information about the suspect funds to the FIU or other appropriate body or authority in the home state for action to be taken.

R.18 Where there is sufficient evidence, the receiving state should use the methods available under domestic law to obtain the restraint and confiscation of the relevant assets.

R.19 In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place.

VI. MECHANISMS FOR ASSET CONFISCATION[3]

52. An effective system for the restraint and confiscation of proceeds of crime is fundamental to respond to the various corruption cases that may arise and allow for the repatriation of assets. It is a requirement of all of the recent relevant conventions[4] and international/regional anti-money laundering standards.

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[3] Depending on the law and practice, legislation in this area uses the term forfeiture or confiscation. For consistency the term confiscation is used throughout this document but is intended to incorporate schemes which use the term forfeiture.

[4] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations Convention against Transnational Organized Crime, and United Nations Convention against Corruption

53. The seizure and confiscation of assets associated with criminal conduct can be carried out in a variety of ways. Of key importance are the mechanisms for conviction based and non- conviction based asset confiscation.

Types of Confiscation Systems

(a) Conviction based Confiscation

54. As the name suggests in a conviction based system, a criminal conviction is generally a pre-requisite to confiscation. After a person has been convicted there is a process in place to allow a court to order the confiscation of assets as proceeds or instrumentalities of crime, either on the basis of an application or of its own initiative. Within this general concept, there are a range of approaches to criminal conviction confiscation in different jurisdictions.

55. For example, several jurisdictions employ a "value" based confiscation system. Under this regime, if a person is convicted of an offence, the court can calculate the "benefit" to the defendant from that offence. Having determined the accrued benefit, the court would then assess the defendant's ability to pay or, in other words, the value of the amount that might be realisable from the defendant's assets. On the basis of these calculations, the court would make a "confiscation" order, in the amount of the benefit or the realisable assets, whichever is less.

56. Some of these systems also employ assumptions in the calculation of the benefit. For example, the law may provide that where the defendant has been convicted of two or more offences, any property transferred to him or her at any time six years prior to the commencement of proceedings is assumed to be a benefit obtained through the offences. It will be for the person to demonstrate otherwise.

57. If the defendant fails to prove the legitimate source of his assets (or assets passing through his hands over a prescribed period) the court could make a confiscation order in relation to those assets, even though they had not been demonstrated to be part of the benefit of the conviction offence.

58. Another conviction based model is that which focuses on tainted property. In such systems, upon conviction, the sentencing judge may order confiscation if satisfied, on a civil standard, that the property is proceeds and the offence for which the conviction was obtained was committed in relation to those proceeds. Even if not satisfied that the property relates to the specific offence, the court may also order confiscation of property if satisfied beyond reasonable doubt that the property is proceeds of crime. There is also the possibility of a fine in lieu of confiscation where the property in question cannot be located, has been transferred to a third party, is outside the country, has been substantially diminished in value or has been commingled with other property.

59. Some countries employ a combined system which allows for orders relating to the "benefits" and the confiscation of tainted property.

60. While these systems all require a conviction as a prerequisite, the proceedings after conviction are generally of a civil nature, employing the civil standard of proof.

61. In some systems confiscation may be possible without a conviction if a charge has been laid and the person has died or absconded.

(b) Non-Conviction based In Rem Confiscation Proceedings (Civil Forfeiture)

62. A non-conviction based confiscation system allows the state to bring court proceedings against property on the basis that the property constitutes the proceeds or instrumentalities of crime.

This process is different from conviction based confiscation in that the action is against the property not the person i.e. an *in rem* proceeding and there is no requirement for an underlying criminal conviction of any person.

63. The standard of proof to be met in an application for civil confiscation would be that applicable in civil proceedings, which in most common law jurisdictions is the balance of probabilities.

64. While again there are variations in the laws that have been adopted, generally the procedure is as follows: Proceedings will be commenced either by an application for "freezing" or "preservation" or an application for confiscation. In some systems it is mandatory to apply for preservation first; in others an application for confiscation may be brought in the first instance.

65. While applications for "freezing" or "preservation" may be made *ex parte*, prior to any application for confiscation, notice will need to be given to all persons who may have an interest in the property.

66. Evidence will be presented following civil rules of procedure and the court will be empowered to make a confiscation order in relation to the property if satisfied on a balance of probabilities that the property is the proceeds or instrumentalities of an offence or unlawful activity.

67. All of the legislation provides safeguards which allow innocent third parties to protect their interest in any such property.

(c) Ordinary Civil Litigation

68. Quite apart from the measures outlined above, which are legislated mechanisms by which a state can pursue the seizure and confiscation of assets, private civil litigation can be used by individuals and states to seek the recovery of assets. In such cases, general civil proceedings will be launched by a lawful owner to seek the recovery of assets alleged to have been misappropriated through criminal activity. In the context of corruption cases, some victim states have resorted to using a civil lawsuit to try and recover the relevant assets within another state. This, unlike the measures above, is purely private litigation.

Mechanisms to be Employed for Effective Confiscation

69. At a minimum, it is essential that each state has in place a strong and comprehensive system for criminal asset confiscation i.e. a system premised on an underlying conviction of a person for a criminal offence. However, because of the variation in corruption offences and the range of underlying circumstances, it can be difficult and perhaps impossible to use conviction based confiscation systems to recover and return the assets of these crimes in all cases.

70. Creative approaches are needed to overcome these obstacles, particularly in circumstances where the main perpetrator is not subject to prosecution because of death, immunities or inability to bring him or her within the jurisdiction of the court. One possible approach is to prosecute offences of money laundering against individuals involved in the offences, the banks or even the recipients of the funds and to use this as a vehicle to obtain asset confiscation. In some countries it may be possible to pursue confiscation on the basis of an *in absentia* proceeding although this may be difficult because of the evidentiary burden that needs to be met. In several countries the very restricted availability of *in absentia* proceedings would limit the usefulness of this approach to recover and repatriate assets.

71. It is clear that even with a creative approach to the use of conviction based systems, there are inherent limitations to this mechanism flowing from the requirement for an underlying criminal conviction. A conviction based asset confiscation system alone will not be sufficient to comprehensively pursue and repatriate the proceeds of corruption crimes in a meaningful way in all cases.

72. A complementary non-conviction based asset confiscation regime can be used successfully to pursue the proceeds of corruption where conviction based systems may not be effective. Under this system, a confiscation action can be brought against assets alleging, on a standard of balance of probabilities, that the assets are the proceeds or instruments of crime. As there is no need for an underlying criminal conviction, it eliminates the necessity to overcome issues that may arise in prosecution including applicable immunities, death of suspects and inability to extradite, as well as evidentiary problems.

73. Successful use has been made of this procedure in several countries such as Australia, the Republic of Ireland, South Africa, the United States and recently the United Kingdom.

74. Some particular advantages of this procedure are:

- it allows for liability to be established to the civil standard and without the need for a criminal conviction to be recorded against the person in possession or ownership of the property;

- use of the process to recover assets in a victim or receiving state in cases where the accused has died or absconded and the assets cannot be confiscated and returned otherwise;

- assets can still be pursued where an individual is acquitted for whatever reason but there is sufficient evidence on a civil standard that the assets were obtained through illegal activity.

- in cases where there are problems surrounding possible prosecution or extradition because of allegations of political motivation, actions can still be taken in respect of the property on the proper evidence.

75. In some countries there may be constitutional concerns surrounding the establishment of a regime for civil confiscation. Careful consideration would need to be given to any applicable legal or constitutional constraints within each country. Countries might also wish to take into account the various cases where constitutional challenges have been brought within the jurisdictions that have existing laws for non-conviction based asset confiscation. To date, those regimes have withstood constitutional attack.

76. Countries should have in place legislative and administrative regimes which incorporate options for asset confiscation, including conviction based and non-conviction based systems that will provide the maximum flexibility to respond to the range of factual scenarios that may arise in corruption cases.

77. Any legislative scheme adopted needs to be comprehensive. In particular any non-conviction based asset confiscation regime should include appropriate investigative powers to be fully effective.

78. At the same time the legislative and administrative structures for asset confiscation should be as simple and straightforward as possible, to allow for manageable use and implementation, particularly in small and developing states with very limited resources. They would also need to

properly balance flexibility and simplicity with clarity to ensure that the rights of individuals are protected.

Recommendations

R.20 Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died.

R.21 Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation.

R.22 Commonwealth countries should allocate sufficient resources to establish and properly fund law enforcement and other agencies dealing with asset confiscation and management.

VII. TRACING AND TRACKING OF ASSETS

Training/ Experience

79. While it is important that jurisdictions adopt comprehensive money laundering and asset confiscation legislation, those laws are nothing but paper in the absence of effective enforcement. There are several current examples of states where such laws have been in place for some time but there has been little, if any, enforcement action by way of prosecutions or asset confiscation. A major impediment to effective enforcement is lack of knowledge and capacity on the part of investigating and prosecuting authorities, as well the judiciary. Because it is a relatively new field with many complexities, there is a priority need for training of police, prosecutors and judicial authorities. Technical assistance programmes within the Commonwealth should be continued and enhanced. Existing Commonwealth programmes where law enforcement mentors are placed in jurisdictions to assist with ongoing investigations and at the same time contribute to capacity development within a country or a region should be continued and enhanced.

80. On the question of capacity building and training, one possible method to resource this on a domestic level is to use confiscated assets to fund such programmes.

Dedicated Resources

81. It is of critical importance that there are dedicated units responsible for the investigation of asset confiscation cases. Experience demonstrates that little, if any, action will be taken if enforcement is left to general police units with no specialised mandate. Such units need to be multidisciplinary in structure or have available to them support from specialists and experts such as forensic accountants and tax authorities. Sufficient funds need to be allocated for the provision of such support.

Co-ordinated Efforts

82. It is also extremely useful to have joint investigative teams both on a domestic and international level to deal with these cases. This can allow for the combined strength of the individual powers of the relevant agencies to be used in the investigative process.

Investigative Tools/Powers

83. Investigators need to have access to a range of modern investigative powers in order to effectively trace and track assets. This would include production and monitoring orders and powers for authorised interception of communications.

84. There can be problems surrounding the timeliness in which bank/financial institutions respond to requests for relevant banking information. A legislative solution to this problem is a production order power through which time limits can be set within which the required information should be produced.

85. Another important tool for asset tracking is the use of compelled examinations of persons. While there may be concerns about self-incrimination, these can be addressed through limiting the use to which such information can be put. For example, a recent corruption law adopted in one jurisdiction provides for compelled statements to be taken in cases where an individual is identified to be living beyond his or her means. The evidence obtained cannot be used in any criminal proceedings but can be introduced in civil proceedings relating to the confiscation of assets.

86. It is also important to keep in mind some general enforcement initiatives that can be used to track and identify illicit assets including the extension of administrative cash seizure powers from border points to a country generally, the targeting of particular industries for investigation, and the use of storefront undercover money laundering operations.

87. Tax information can be invaluable to an investigation of this nature. The applicable law should allow law enforcement authorities access to such information by way of warrant or otherwise both with respect to domestic and foreign investigations relating to proceeds of crime.

88. The investigative powers outlined above should be applicable to both criminal conviction based and non-conviction based asset confiscation regimes.

Recommendations

R.23 For asset confiscation legislation to be effectively implemented law enforcement authorities need to have the requisite knowledge and skills. Commonwealth countries, with support from the Commonwealth Secretariat, should develop and implement programmes for training/capacity building for police, prosecutors and judicial officers in relation to asset confiscation laws and practice.

R.24 The Commonwealth Secretariat should continue with and enhance its programme for placement of prosecution and law enforcement mentors within Commonwealth countries and regions to assist with ongoing asset confiscation and money laundering cases and contribute to capacity building.

R.25 Commonwealth countries should adopt best practices for asset confiscation investigations and proceedings including:

- **establishing dedicated, law enforcement teams to investigate proceeds of crime matters which are multidisciplinary in composition or have support from experts in various relevant disciplines;**
- **establishing where possible joint investigative teams on a domestic and/or international level;**

- **providing sufficient funds for the investigation and prosecution of confiscation cases including funding specialist support;**

- **Adoption or review and amendment of laws to provide for a range of investigative powers of particular relevance to these investigations including for compelled interviews, production orders, account monitoring and interception of communications.**

R.26 Adoption or review and amendment of laws which allow for investigators to access tax information for their investigations.

VIII. MUTUAL LEGAL ASSISTANCE - GENERAL

Delay

89. There is a general problem of delay in the mutual assistance process. In asset confiscation this can be particularly damaging, given the speed at which assets can be moved around the world. In all countries there is a significant problem of the resources – financial and human - that are dedicated to mutual assistance matters. Unless this is given priority attention, there can be little progress in overcoming the problem of delay. The problem is acute for small states where there are other priorities and where one case can overwhelm the limited resources of the state. To address this problem better resourced requesting states may wish to consider in particular cases providing assistance to the requesting state bearing in mind the provisions on expenses of compliance in the Harare Scheme (Article 12).

Lack of Understanding/Communication

90. Lack of understanding of legal systems and the requirements for successful requests is also a significant impediment to effective mutual assistance. While this problem is severe as between different legal traditions, it is also problematic within the same systems, such as the common law, because of varying domestic practices.

91. To overcome this particular problem it would be useful to have a forum where mutual assistance practitioners could exchange information and discuss cases. Experience has repeatedly demonstrated the importance of personal contacts and networks for effective co-operation and how this can have a major impact on a practical level. Such contacts can be used to obtain information and identify a proper authority in a country with which there has been no previous experience. In some instances, it may be useful to enter into a memorandum of understanding between relevant authorities or offices to enhance the working relationship. Numerous examples can be given of how such contacts have enhanced mutual assistance. Some existing networks that could be looked at for possible Commonwealth adaptation would be the European Judicial Network and Eurojust.

92. Senior Officials of Law Ministries of the Commonwealth recently recommended that the Commonwealth Secretariat explore the possibility of establishing a Commonwealth Network analogous to the European Judicial Network and present recommendations to Law Ministers at their next meeting. This Working Group fully endorses that initiative. In its consideration of the matter the Secretariat might wish to explore a structure with both regional or localised networks and an overarching body. Because of the broad geographic scope of the Commonwealth, this would be one way to ensure that at least on a regional basis there could be more frequent meetings and interactions, as it is unlikely that the overarching group could meet more than once a year or every two years. As one of the central aims of the network is the development and enhancement of personal contacts, this approach would allow for better interaction towards this aim.

93. National websites which give guidance on the requirements for mutual assistance requests are very useful and all states should consider the development of such sites. To further enhance the effective exchange of operational information, a Commonwealth webpage for mutual assistance should be established. It could provide information on mutual assistance regimes in member countries with some practical advice on the making of requests and contact particulars including where possible exemplars from large experienced central authorities. It could also contain links to country websites and those of other international organisations.

Issues in Practice

Consultation

94. The importance of consultation between central and other relevant authorities prior to the submission of a formal request cannot be overstated. This is the best way in which a requesting state can ensure that the proposed request will meet the legal requirements in the requested state. If this is done, the formal request when presented is more likely to be executed as soon as possible, without the need for more formal exchanges.

Follow up

95. There is a need for central authorities to take a very proactive approach in pursuing requests for assistance that have been submitted to another state. Officials in the central authority need to contact the requested state authorities on an ongoing basis to ensure that the relevant request receives attention. Similarly a requested state should have in place at least a basic system by which receipt of requests is acknowledged. In addition to submitting requests to and following up with central authorities, in asset confiscation cases, it would be useful to copy any relevant asset confiscation authorities to ensure that the request is known and receives attention. In cases where assets are to be simultaneously frozen or seized in several jurisdictions, authorities must co-ordinate to ensure that the process is properly managed.

Urgency

96. There is much overuse by authorities of the term "urgent" in relation to requests. A request should only be classified as urgent where there are good reasons to do so and preferably not just because authorities in the requesting state have been dilatory in pursuing the matter. If an effective job is to be done in prioritising cases, urgent requests need to be restricted to instances of real urgency.

Co-ordination

97. In dealing with complex cases, such as those of grand corruption, where more than two jurisdictions are involved it can be helpful to hold case conferences involving all the relevant states. Often in such instances there will be litigation action in various states and these conferences will ensure that everyone is informed of the status of the matter in other relevant jurisdictions. It also affords an opportunity to strategise.

Confidentiality/Limitation of Use

98. Requesting and requested authorities must respect requirements for confidentiality and limitation of use of information, as both a requesting and requested state, and to understand the disclosure requirements in each others' jurisdictions. There are many examples of serious incidents arising from the onward sharing of information given to one agency or the public disclosure of information through the execution process.

Treaty Requirements

99. The policy of some states to require a bilateral treaty for the rendering of mutual assistance can be an impediment to international co-operation. Small and developing states simply do not have the necessary resources to negotiate even very simple bilateral mutual assistance agreements. Further, within the Commonwealth the Harare Scheme is available to serve as a multilateral basis for mutual assistance. Those states that currently require a treaty for mutual assistance should reconsider their position on this point.

International Organisations

100. International organisations can be very useful in facilitating international co-operation. The UNODC has developed a software programme which generates a mutual assistance request by prompting the insertion of information in key fields. While each request will still need to be tailored and developed for the particular case and jurisdiction, this tool will assist with the preparation of organised requests, which include key information. It will be of particular assistance to states that have limited experience with mutual assistance. The UN also maintains lists of central authorities as they relate to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Drug Convention) and will in future have such lists for the United Nations Convention against Transnational Organized Crime (TOC) and the UNCAC.

101. The Criminal Law Section of the Commonwealth Secretariat can refer authorities to appropriate contacts within another country for mutual assistance matters and generally provide advice and assistance as may be required.

Other Forms of Co-operation

102. In considering mutual assistance/international co-operation in a broader sense other forms of co-operation such as FIU to FIU, regulatory body to regulatory body and law enforcement to law enforcement, as well as co-operation between those bodies, must be utilised as far as possible.

Recommendations

R.27 Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement. Optimally domestic law should allow for assistance to be rendered to all countries on the basis of national law without the requirement for a treaty.

R.28 Commonwealth countries which have yet to do so should promptly establish a central authority as required under the Harare Scheme.

R.29 Consultation between central and other relevant authorities (e.g. law enforcement) regarding mutual legal assistance requests should be strongly encouraged.

R.30 Central authorities and the mutual legal assistance execution process should be properly resourced and funded and Commonwealth countries should allocate sufficient resources for this purpose.

R.31 The Commonwealth Secretariat should establish a webpage which would include practical information on mutual legal assistance laws (including restraint and confiscation

requirements) and systems within member countries and provide some guidance on how to make requests to different countries.

R.32 Creation of a Commonwealth Network similar to the European Judicial Network/Eurojust adapted to the particular circumstances of the Commonwealth. This could include setting up both regional bodies as well as a Commonwealth entity.

R.33 The Commonwealth Secretariat should continue and enhance its assistance programmes to Commonwealth countries relating to capacity building and training. The Secretariat should also continue to facilitate co-operation by maintaining lists of central authorities and providing contact particulars for central authorities and other relevant officials to member countries in response to requests.

R.34 Commonwealth countries should have the legal capacity to render mutual legal assistance in the absence of dual criminality.

R.35 Commonwealth countries should adopt best practices for effective mutual legal assistance including:

(a) encouraging the development of personal contacts between central authorities and other relevant officials;

(b) where appropriate develop MOU's to enhance working relationships;

(c) to the extent possible consulting with authorities in the requested state about applicable laws and the content of a request prior to submitting any formal documentation;

(d) ensuring that requests for assistance are kept confidential and that the requesting state is consulted when circumstances arise where disclosure of the request is sought;

(e) implementing the Best Practice Recommendations of the UNODC Expert Working Group (2001).

IX. AVAILABILITY OF MUTUAL LEGAL ASSISTANCE

Investigative Assistance in Non-Conviction based (Civil) Asset Confiscation

103. Generally, mutual assistance schemes apply only to criminal matters so that assistance in terms of evidence gathering and enforcement of restraint and confiscation orders is restricted to investigations and prosecutions of offences and conviction based confiscation. This can create obstacles to effective co-operation particularly in cases of grand corruption given that there will be instances where it is not possible to pursue the confiscation and return of assets through criminal conviction based confiscation. In those cases, effective confiscation remedies may be hampered unless mutual assistance can be sought and obtained in respect of investigations and proceedings for non-conviction based asset confiscation.

104. Some countries may have difficulty, including constitutional restrictions, with extending mutual assistance in evidence gathering to non-conviction based asset confiscation investigations and proceedings. However, non-conviction based systems cannot function effectively without mutual assistance being available for such investigations and proceedings. Therefore it is imperative that mutual assistance in evidence gathering is available for non-conviction based asset confiscation.

Recommendation

R.36 Commonwealth countries should have the legal capacity to provide mutual legal assistance with respect to investigations and proceedings relating to non- conviction based asset confiscation. Similarly, the Harare Scheme should be amended to cover such types of assistance.

ORDINARY CIVIL LITIGATION TO RECOVER ASSETS

105. There is a separate and distinct issue as to whether systems such as mutual assistance can be used in respect of pure civil proceedings, where a state has brought a lawsuit to recover stolen assets. This is a much more difficult application of mutual assistance as it would extend it to pure civil proceedings where the state is an ordinary litigant.

106. Under current domestic and international law, measures such as mutual assistance, which are aimed at criminal matters, cannot be used to assist or enforce civil proceedings. Pure civil judgements can only be enforced as between states through processes such as reciprocal enforcement of judgements agreements and related domestic laws. The criminal process cannot be used for this.

107. There are practical examples where mutual assistance proceedings have been challenged as having been instituted not to support a criminal investigation or prosecution but to obtain the return of funds in a pure civil proceeding. The case law supports the practice of pursuing both criminal investigation and the return of funds in parallel and to use mutual assistance to support the criminal matter. However, it would not be permissible to use the mutual assistance process under the guise of a criminal investigation to support a purely civil process.

108. At the same time, it is a well-recognised practice in mutual legal assistance that evidence gathered for a criminal proceeding may be used in a civil proceeding, if the requested country consents to such use either generally in a treaty or on a case by case basis. Given that civil proceedings may provide the only recourse for a victim state in corruption cases, Commonwealth countries should exercise their discretion favourably and permit the use of evidence gathered through mutual assistance in such proceedings.

109. On the broader question of using mutual assistance regimes to gather evidence for civil proceedings the Group, while recognising that the existing principles would be very difficult to vary, considered that further reflection should be given to the possible application of these tools in civil proceedings in the very limited circumstances of asset repatriation.

Recommendations

R.37 The mutual legal assistance regimes in Commonwealth countries should permit evidence gathered for a criminal proceeding to be subsequently used in civil proceedings and requests for such use should be granted in corruption cases.

R.38 Commonwealth Law Ministers should examine further the issue of the possible use of mutual legal assistance to gather evidence for use in civil proceedings brought by a victim country for the recovery of assets in corruption cases.

X. MUTUAL ASSISTANCE FOR FREEZING/ RESTRAINT/ CONFISCATION OF ASSETS

Balance of Interests

110. Currently there is a significant operational problem arising from delay in the execution of requests for cross border restraint, with the result that assets are lost before effective freezing measures can be put into place. Any proposed solutions to this problem must strike an appropriate balance between effective and speedy action to prevent the dissipation of assets and the protection of the property rights of the individual.

111. For example, while stringent requirements for supporting information and evidence for restraint orders can be onerous to meet on an urgent basis, those requirements exist to protect both the individual and the requested state. If a state obtains and executes a restraint order on the basis of a foreign request and it subsequently is established to be insupportable or no confiscation order is ultimately obtained, the state may be subject to claims for any resulting damages. It was noted that Article 54(2) of the UNCAC was developed through discussions of these competing interests and it reflects a compromise position that is relevant to keep in mind. Notably, the subparagraphs provide for the freezing or seizing of property on the basis of the foreign order or through domestic action on the basis of a request, where the order/request provides "a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such action and that the property would eventually be subject to an order for confiscation."

112. On a practical level, where a state has standards to be met for the order to be executed, it is particularly important that the relevant information is provided by the requesting state in support of the request for restraint. If requests are made for supplementary information these should be responded to as quickly as possible.

Direct/Indirect Enforcement

113. Various international conventions have created obligations on State Parties to act upon requests for assistance and to enforce foreign restraint and confiscation orders. However, those conventions have recognised alternative methods that may be used to enforce such orders specifically:

- "Direct enforcement" where the foreign request is, subject to relevant pre-requisites being met, registered in the requested state and executed like a domestic order;[5]
- "Indirect enforcement" where information and evidence submitted by the requesting state is used to support an application for a domestic order for restraint or confiscation.

114. In some countries the indirect enforcement system has been used effectively to respond to foreign requests for restraint or confiscation. If sufficient evidence is provided an *ex parte* application is made to obtain the relevant order. This approach also gives the requested state the ability to consider the evidence used to obtain the foreign order.

115. However in many countries there have been difficulties with the indirect enforcement approach that have prevented its effective use, especially to obtain the speedy restraint of assets in response to foreign requests. This is particularly the case where the requesting state employs a different model for asset confiscation than the requested state. For example, if the requesting state uses a value based system and the requested state has a tainted property scheme the type of evidence

[5] In some instances it might be necessary to obtain ancillary orders for the management of the property restrained under domestic law. It may also be necessary to obtain additional orders for effective realisation of the order in the requested state.

needed to obtain the relevant order in each state will be quite different. The problem may be even more acute when the request involves two countries with different legal systems for example common law and civil law. In cases of restraint the delays arising from these problems may result in the funds disappearing before any action can be taken.

116. These difficulties do not arise with the use of a direct enforcement system as there is no need to produce evidence to meet the standards in the requested state. With this approach there is no need to litigate the issues around the merits of the restraint order in two jurisdictions. It is also a much simpler and quicker method for enforcement given that only one order need be obtained.

117. The major issue with direct enforcement is that it is not realistic to envisage a system where all restraint and forfeiture orders from every country and in every case would be directly executed upon request. With some countries, there may be problems with the underlying process through which the orders were obtained in the requesting state such that direct execution in the requested state would not be acceptable. There may be concerns as well about potential abuse of the direct enforcement system in particular cases. As a result, a system of "automatic" direct enforcement in all cases is not workable.

118. For that reason, a country using a direct enforcement system may wish to retain the right to refuse a request where it would be inappropriate to execute it either because of legal deficiencies in the process in the requesting state or inappropriate or improper motivations behind the original order.

119. Countries have used different methods to address this concern. Some countries have employed a system where certain countries have been designated with the result that requests emanating from those countries will be directly enforced. However in the experience of some countries a designation system can be difficult to work with on a practical level because of the problems and delays in the procedures for designation. It also may be difficult to decide on the countries to be designated and there is less flexibility to address problems that may arise in particular cases. Another approach to this issue is to have a general power to enforce directly orders from all countries, with an executive discretion to determine in which cases the orders would be enforced. Though this approach will naturally involve a judicial review of the executive decision taken, experience indicates it is a more workable approach which provides for sufficient flexibility and protections.

120. Because of the significant problems with indirect enforcement experienced by many countries, the preferred option, especially for small and developing countries with limited resources is a system of direct enforcement where foreign orders for restraint/seizure and confiscation could be registered and enforced as if issued in the requested state. Such a system is simpler to operate, less problematic and much less resource intensive.

Asset Management

121. Experience indicates the importance of careful management of assets that are subject to restraint. Countries need to put in place a good system for the management of such assets to ensure that their value is maintained and in some instances increased.

Effective Remedies

122. In accordance with various human rights instruments and standards, an individual affected by a restraint or confiscation order has a right to an effective remedy in response to state action. In the case of direct enforcement, arguably, the affected person has no effective remedy regarding the action in the requested state. He/she may have no opportunity for challenges and variation orders

that would otherwise be available under domestic law. At the same time, this approach does eliminate the possibility of double litigation of issues in both the requesting and requested state.

123. In the case of a confiscation order, the only recourse available should be in the requesting state where the order is made. Once all appeals and reviews have been exhausted in that state, the order should be fully enforceable in the requested state. This is no different than the enforcement of other types of final orders under analogous regimes such as the enforcement of civil judgements.

124. The more contentious issue relates to an order for restraint or seizure which one state seeks to enforce in another state given the interim nature of the order. While a direct enforcement mechanism is advisable for such orders, there is an issue as to what challenges, if any, could be brought in the requested state. In principle, challenges as to the merits, in particular relating to the underlying criminal conduct, should be brought in the requesting state where the matter originated and the relevant evidence would be located.

125. In the requested state, innocent third parties should be able to challenge the orders with a view to demonstrating why the property should not be subject to restraint.

126. There is a tension between the entitlement of an accused to pursue his or her remedy in the state in which he or she is located and requiring him or her to pursue such remedies in the requesting state.

127. It was agreed that an accused should not be allowed to forum shop and choose a location to attach the underlying criminal offences and orders where it will be most difficult for the state to respond. Their effective remedy should be pursued in the state where the matter arose and actions within the requested state should be limited to procedural questions, issues as to whether the particular property should be subject to restraint or arguments over fundamental human rights.

Use of Disclosure Statements

128. On a related point there are also concerns about the use of disclosure statements that are available under proceeds of crime legislation in many states. When these are used domestically there are protections in place to ensure there is no self-incrimination and information from them is not transmitted to prosecution authorities dealing with any substantive criminal case. If such information is being taken in one state and transmitted to another, steps will need to be taken to ensure that the same protections will be afforded by the authorities in the receiving state.

Cross Border Access to Funds

129. The Group also considered some related issues surrounding cross border restraint. In some jurisdictions, the accused is permitted to access restrained assets – assets restrained either by virtue of a domestic proceeding or in response to a foreign request – for various purposes including legal costs and necessities. This can result, in some cases, in the dissipation of the restrained assets. Other jurisdictions have by statute restricted or eliminated the access of accused persons to such assets.

Dual Criminality

130. The requirement for dual criminality for the cross border enforcement of restraint or confiscation orders can result in serious impediments to effective co-operation, particularly where the underlying offences may involve unique concepts such as continuing criminal enterprise or racketeering offences. Countries should examine their systems and determine whether it is strictly necessary to require dual criminality for the cross border enforcement of foreign restraint and confiscation orders.

Recommendations

R.39 Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. The direct enforcement system should:

(i) allow for all foreign orders to be enforced but subject to an executive discretion to grant or refuse requests in particular cases;
(ii) provide for the enforcement of conviction based and non-conviction based orders;
(iii) allow for innocent third parties to challenge a restraint order or the enforcement of a confiscation order in both the requesting and requested state;
(iv) permit the accused to challenge a restraint order in the requested state on a limited basis related to procedural questions or fundamental human rights but not to challenge the underlying criminal offences or orders issued in the requesting state.

R.40 Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non-conviction based orders, it should be amended to do so.

R.41 Commonwealth countries should ensure proper co-ordination of cross border restraint and confiscation efforts and the management of assets.

R.42 Commonwealth countries should have the legal capacity to render legal assistance in relation to requests for restraint and confiscation from another country in the absence of dual criminality.

XI. MUTUAL ASSISTANCE - THE HARARE SCHEME

131. The Harare Scheme is not a treaty. It is an instrument, like the London Scheme for Extradition, reflecting the commitment of Commonwealth Law Ministers to provide mutual assistance in criminal matters amongst the member countries of the Commonwealth. Such assistance is to be rendered on the basis of the Scheme, as implemented in domestic law, without the requirement for a treaty.

132. While the Scheme represents an important tool for the rendering of assistance amongst member countries, there are problems with its implementation. Some countries have not adopted legislation to implement the Scheme at all and still others require the existence of a treaty for the rendering of assistance. These implementation issues pose an impediment to effective assistance. While the Scheme is comprehensive in scope, some improvements are needed to make it a more effective tool consistent with modern practice, particularly in terms of restraint, confiscation and return of assets. As well, it is not clear under the current provisions that the Scheme is applicable to non-conviction based asset confiscation cases.

133. To this end the Group agreed on proposed changes to the Scheme to:

- extend the application of the Scheme to non-conviction based asset confiscation;

- ensure the Scheme applies to the various models for asset confiscation within the Commonwealth and incorporates comprehensive definitions;

- make the Scheme more effective in asset confiscation cases by providing for the production of documents, the presence of representatives of the requesting state in the execution process and providing that requests shall not be refused on the ground of bank secrecy;

- provide for an obligation to return assets in specified corruption cases;

- enhance the provisions of the Scheme relating to asset sharing.

134. Attached as ***Annex V*** is a proposed revision of the Harare Scheme for Mutual Assistance to make it a more effective tool for co-operation generally and with respect to restraint, confiscation and repatriation.

Recommendations

R.43 Commonwealth countries that have yet to do so should promptly enact mutual legal assistance legislation.

R.44 National legislation for mutual legal assistance in Commonwealth countries should implement the provisions of the Harare Scheme.

R.45 The Harare Scheme should be amended in accordance with Annex V.

XII. RESTRAINT OF ASSETS

Delay

135. Delay is a major problem in effective restraint action both domestically and in response to international requests. Such delays can result in the movement of funds making it impossible to trace them subsequently.

136. FATF Recommendation No. 38 in part emphasises the need for expeditious action in response to requests by foreign countries for the identification, freezing, seizure and confiscation of assets. Expeditious action is of particular importance in terms of the restraint of assets be it on a domestic basis or in response to a foreign request.

137. One possible measure that can be used to ensure timely restraint is an administrative "blocking" order that would prevent the movement of funds for a short period of time where the circumstances are suspicious. Some existing models give such a power to the FIU. This power gives some flexibility to authorities to hold the funds while further investigations – foreign or domestic – are carried out. In some models, the original limited order can be extended to allow for further investigations but the individual has a right to apply to the court to have the order lifted. Constitutional provisions in some countries may prevent the use of such orders or may limit the time span for which the order may be given.

138. Given the usefulness of these orders, in the absence of such restrictions, countries should provide for such a power to its FIU or other appropriate authority.

139. Money laundering requirements also can be employed effectively to carry out speedy restraint in an indirect fashion. This can be particularly useful in cases of grand corruption. For example, if authorities in a financial institution receive information from an FIU or government authority, a press release, the internet or other public sources about the potential involvement of individuals in cases of grand corruption, they have knowledge that may subject them to possible

money laundering allegations if they subsequently are involved in transactions involving those persons.

140. Another way to deal with cases where there is insufficient time to freeze assets through a court application is to seek the assistance of the financial institution or individual or organisation in delaying any transactions with the funds. This too however has its own problems including a necessary "tipping off" of the suspect.

141. On preventing the movement of funds, one should not lose sight of the importance of the application of first principles. The rigorous enforcement of Know Your Customer/ Know the Business principles and requirements for Suspicious Transactions Reports should play an important role in preventing the movement of funds and resulting in their "de facto" restraint.

Timing of Restraint Order

142. Historically, some legislation mandated that applications for restraint could be made only where charges had been laid or were imminent. This led to a host of practical problems and has resulted in recent changes in the laws in some jurisdictions to allow for such applications to be made once an investigation has commenced. This approach has problems as well for example in defining when an investigation has commenced. It is preferable therefore not to tie the making of an application or the issuance of an order to either the laying of charges or commencement of an investigation. Some preferable triggers include where there is a basis to believe that a confiscation order might ultimately issue or that assets might be dissipated.

Damages

143. Restraint orders in foreign or domestic cases invariably carry a risk of damages being assessed against the state. In cross border cases there is also a question as to how the costs of such damage awards should be shared as between states. In some jurisdictions this risk is lessened by legislative provisions that restrict the award of damages for the actions of public officials to cases involving bad faith.

Management of Assets

144. One of the most challenging problems in restraint and forfeiture is the management of assets that have been restrained. This can be an easy task in some instances and an extremely complex one in others. This is particularly the case where the asset seized is an ongoing business or enterprise requiring day-to-day management. In adopting and implementing an asset confiscation scheme a key consideration will be the mechanism for asset management. Various management models can be employed depending on the domestic context from the use of private receivers to the creation of a public service office for this purpose. Which ever model is adopted, states need to ensure that there is an effective mechanism in place for this purpose.

Access to Assets

145. A further matter highlighted concerned the issues surrounding legislation that permits access to restrained funds for legal, living and other expenses that can result in the serious dissipation of the seized assets.

Recommendations

R.46 Commonwealth countries should ensure that the legislative scheme for restraint and confiscation is flexible and permits early application for a restraint order.

R.47 Commonwealth countries should ensure that the legislative scheme contains appropriate mechanisms for asset management.

R.48 FIU's or other appropriate authorities within each country should have the power to issue short term administrative freezing orders.

XIII. EFFECTIVE REPATRIATION OF ASSETS

General

146. Separate consideration needs to be given to the mechanisms in place for the return or repatriation of confiscated assets. A distinction needs to be drawn between the sharing of assets in criminal cases such as drug matters and return of funds to victims, including state victims in cases of corruption.

147. While some cases of grand corruption may be straight forward others can be extremely complicated. For example, there may be cases where it is difficult to ascertain who the actual victim is. Where government officials receive a bribe from a private company to obtain a contract is the victim the state or the shareholders of the company? Similarly what if a government official extorts bribes from all of the bidding companies? It is again questionable whether the state is the victim. What if funds from an international organisation intended for an aid project in a country are misappropriated? Should they be returned to the state or to the organisation? There are also the complications discussed previously that will arise where the assets are believed to have been misappropriated by a current Head of State. What action can be taken in respect of such funds in the absence of a request? If action is taken should those funds be returned while the Head of State remains? These questions illustrate that there are not always clear answers to the complex issues surrounding the identification of victims for the purposes of asset repatriation.

148. Because of the complex issues involved, it is clear that discussions as to the ultimate disposition of funds should begin at the earlier stages of restraint and confiscation and not be left until the end of the process.

United Nations Convention against Corruption

149. To effectively implement Chapter V of the UNCAC on repatriation, in particular Article 57, countries should develop and implement specific mechanisms that will allow for assets confiscated in one country to be repatriated in accordance with the Convention obligations.

150. In cases involving the embezzlement of public funds or the laundering of such embezzled funds, Article 57 of UNCAC imposes an obligation on a state to return those confiscated funds to a requesting State Party. The Group was of the view that it was of critical importance to highlight and implement this aspect of UNCAC. However, it was thought that in a Commonwealth context the term embezzlement has a specific legal meaning which might be interpreted restrictively therefore the Group believed that the use of the phrase misappropriation or other unlawful taking of public funds is preferable.

151. Unless agreed otherwise, the requested State Party may deduct reasonable expenses incurred in the proceedings leading to the return of the assets. This is an important caveat as confiscation proceedings can involve considerable costs, which may be particularly onerous for small jurisdictions with limited resources. At the same time, recognition of alternative agreements highlights that it is open for some requested states to waive the deduction of costs and allow for the return of 100 per cent of the funds. But at a minimum, it is incumbent on states wishing to implement the Convention to ensure that the law allows for the return of 100 per cent of the assets confiscated

minus reasonable costs in the particular cases specified in Article 57 of UNCAC. A determination of reasonable costs should be made on the basis of actual expenditure not with regard to an artificial percentage established under domestic law.

152. This principle for the return of funds should be recognised as a distinct concept in domestic law, separate and apart from any laws or guidelines relating to asset sharing. The same principle will be applicable in other corruption cases where the requesting State Party reasonably establishes its prior ownership of such confiscated property or when the requested State Party recognises damage to the requesting State Party as a basis for returning the confiscated property, as set out in Article 57 of the Convention. In addition to the UNCAC obligations, this approach properly reflects the general equities involved in such cases.

153. There are two possible approaches to implementing this obligation under domestic law. A state can provide for the funds to be ordered returned through a judicial process either at the time of confiscation or following. Alternatively, return could be carried out using a general executive power to distribute the assets post confiscation, which power could make specific reference to the Convention obligations. Each state will need to determine which mechanisms would be most effective and appropriate taking into account domestic laws and context.

154. In other corruption cases, the UNCAC requires priority consideration to returning the assets to the requesting State Party, to prior legitimate owners or compensating the victims of crime. States may wish to consider how best to deal with such cases, including possibly employing existing sharing regimes.

Delay

155. Delay again is a significant problem in the repatriation of assets. While due process has to be maintained, which by its nature may cause delays, as far as possible states should implement fast track, priority systems for corruption cases to reduce the amount of delay to a minimum.

Requirements for Treaty/Memorandum

156. Under the legislation of some states agreements are required for the sharing or repatriation of assets, either as a stand alone agreement or as part of a mutual assistance treaty. In other jurisdictions, sharing and repatriation may take place on the basis of domestic law without the requirement for any specific agreement.

157. There are clearly many benefits to bilateral treaty arrangements, including the personal contacts and better understanding of systems forged through the process. Further the negotiation of asset sharing instruments can be relatively simple. However, for small and developing states with very limited human resources and access to technology, the requirement for a treaty or arrangement as a prerequisite to repatriation or sharing can be very onerous. Given the common interests of states in this area, bilateral agreements for repatriation of assets are unnecessary. If some framework instrument were necessary within the Commonwealth it would be useful to look at either amendments to the Harare Scheme (see earlier discussion on amendments to the Harare Scheme) or the creation of a separate scheme to provide for sharing and repatriation between Commonwealth countries without the need for bilateral treaties or arrangements.

Arrangements Regarding the Return of Assets

158. It is a reality that returning states in some instances may have legitimate concerns about a repetition of misappropriation with regard to the returned funds or more general concerns about the use that may be made of the funds by the government in power.

159. There are equally serious questions though as to why a state which happens to have received the funds, perhaps in violation of anti-money laundering standards, should be in a position to impose its views on how the returned funds should be used.

160. The compromise achieved on this issue in the UNCAC is captured as follows in Article 57, paragraph 5:

> "Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case–by–case basis, for the final disposal of confiscated property."

161. In this regard the Commonwealth might be an appropriate forum to assist countries in coming to an agreement on asset return where necessary and appropriate.

162. Small and developing states with limited resources and often not much experience face significant challenges when confronted with cases where international co-operation is needed to obtain the repatriation of funds in cases of corruption. The G8 has recently been working on an initiative to establish asset recovery teams which can be used to assist other states in their efforts to identify and recover assets misappropriated through corruption. To maximise resources and avoid duplication there is advantage in the Commonwealth aligning its work with that of the G8 in this regard.

163. In some countries, particularly those employing a UK "benefit" model of confiscation where the orders issued are *in personam.*, a form of "repatriation" is employed at the restraint phase of a proceeding. In these states the defendant may be required by court order to repatriate assets held in foreign states so that they form part of a single compilation of assets that can be managed in one state. Similarly if a receiver has been appointed in a particular case he or she may pursue the repatriation of assets through the use of a power of attorney. Some states object to the movement of assets in such manner being of the view that the assets should be frozen and confiscated in that state and dealt with in accordance with domestic sharing regimes. On the other hand, the benefits of being able to gather the assets in one jurisdiction and the resulting psychological impact that may have on the individuals involved can be an important tool for effective asset forfeiture.

Recommendations

R.49 Where the relevant countries agree the Commonwealth should assist in reaching an agreement on the final disposal of confiscated assets.

R.50 Commonwealth countries that require a bilateral treaty or memorandum of understanding for asset sharing or the return of assets should eliminate this requirement.

R.51 Clause 28 of the Harare Scheme should be amended as set out in Annex V to ensure that the Scheme can be used as a basis for the sharing of assets and to provide for the repatriation of assets.

R.52 Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:

- **(a) in cases of misappropriation or other unlawful taking of public funds or the laundering thereof;**
- **(b) where the requesting country reasonably establishes its prior ownership of confiscated property; or**
- **(c) when the requested country recognises damage to the requesting country.**

R.53 The law for the return of funds in these cases should be distinct from any existing laws or provisions relating to asset sharing. Where possible, Commonwealth countries returning the funds should give consideration to waiving the deduction of reasonable costs.

R.54 Commonwealth countries are encouraged to implement "fast track" priority systems for corruption cases to reduce the amount of delay in repatriation to a minimum.

R.55 The Commonwealth Secretariat should liaise with the G8 presidency in relation to the identification of suitable cases for the establishment of case co-ordination teams and asset recovery task forces to assist member countries as appropriate.

XIV. RECOMMENDATIONS FOR IMPLEMENTATION

164. The Working Group has recommended steps that should be taken to advance effective action in the repatriation of assets plundered through corruption. But the recommended measures can only translate to real improvement on a practical level if they are fully implemented by member countries. Therefore it is equally important that measures are also put in place to ensure that real progress can be made in realising the commitment of Heads of Government to maximum co-operation and assistance amongst Commonwealth governments to recover and repatriate assets plundered through corruption.

Recommendations

R.56 Commonwealth countries should give priority attention to the implementation of the recommendations in this Report, particularly the key recommendations.[6]

R.57 Commonwealth Heads of Government should commit increased resources for the Commonwealth Secretariat to assist Commonwealth countries with the implementation of these recommendations.

R.58 Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the Report.

[6] Some key recommendations comprise an amalgamation of the recommendations contained within this Report.

ANNEX I

COMMONWEALTH WORKING GROUP ON ASSET REPATRIATION

Combined List of Delegates from four meetings:
14-16 June 2004,
15-17 November 2004,
30 March – 1 April 2005,
29 June – 1 July 2005.

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ANNEX II

WORKING GROUP ON ASSET REPATRIATION
OVERVIEW OF ISSUES

Paper prepared by the Commonwealth Secretariat

1. The Working Group is to examine the issue of the recovery of assets[1] of illicit origin and repatriation of those assets to the countries of origin, focusing on maximising co-operation and assistance between governments. In particular the Group should consider, *inter alia*:

- the major problems in asset tracking, recovery, and repatriation and best practice in overcoming those problems;
- the key impediments to effective international co-operation in this area and effective ways in which those impediments can be addressed;
- the laws, administrative structures and other mechanisms necessary, in both "victim"[2] and "receiving"[3] states to prevent the movement of assets, and to allow for effective international co-operation in tracing and confiscating[4] the assets;
- taking into account the provisions of the United Nations Convention against Corruption (UNCAC), in particular Article 57, the laws, administrative structures and other mechanisms necessary to provide for the return of confiscated assets;
- possible amendments to the Commonwealth Scheme for Mutual Assistance in Criminal Matters (Harare Scheme) to provide for more effective co-operation in this area.

2. The Group is expected to prepare a report with specific recommendations for the advancement of effective action in this area.

3. In order to avoid duplication, the Group is requested to build on existing international instruments and recommendations and not to repeat them. In particular the Group is asked to take into account and, where appropriate, elaborate on the existing measures in:

The Framework of Commonwealth Principles on Promoting Good Governance and Combating Corruption (Framework);
The United Nations Convention against Corruption (UNCAC);
The African Union Convention on Preventing and Combating Corruption;
The revised Forty Recommendations of the Financial Action Task Force on Money Laundering (FATF Recommendations);
The Wolfsberg AML Principles on Private Banking (Wolfsberg Principles);
The Commonwealth Scheme for Mutual Assistance in Criminal Matters (the Harare Scheme).

4. In terms of the organisation of the work, it is suggested that the issues be examined in a chronological manner, much as a case would develop in practice. This would involve consideration of the following stages:

---

[1] The term "asset" is used throughout the paper. It is intended to be broadly interpreted to cover all forms of "property" as that term is defined in the UN Convention against Corruption.

[2] The term "victim state" is used in the paper as a reference to a state from which government funds have been misappropriated.

[3] The term "receiving state" is used throughout the paper to refer to a state in which misappropriated assets from another state are located.

[4] The term "confiscation" is used throughout the paper. It should be read to include both confiscation and forfeiture for those systems which use "forfeiture" as opposed to "confiscation".

- misappropriation of assets by Heads of State or Government/ public officials/ elected officials;
- movement of assets (out of the "victim state", internationally and into and within receiving state);
- tracing, tracking of assets;
- gathering evidence through mutual assistance;
- pursuing restraint and confiscation through mutual assistance;
- restraining assets;
- confiscating assets;
- return/repatriation of assets.

5. Consideration should be given to problems and issues relating to domestic laws and measures and, where relevant, the impediments to effective international co-operation, arising at each stage. For the first meeting, it may be useful to consider these stages with a view to identifying the problems, gaps, and issues as well as the impediments to co-operation. At the subsequent meetings the Group can identify appropriate laws and measures, as well as best practices to address the problems and impediments identified. This approach will allow for time between meetings for any follow up research that may be required.

6. The Group is encouraged to engage in broad ranging and open discussions of the issues the experts consider relevant. To facilitate the discussions, the following are some possible questions that the Group could consider. However these are not intended to be exhaustive of the matters to be discussed and should not in any way limit the extent or focus of the discussions. The Group may also decide to focus on a completely different set of questions and points than those outlined below.

MISAPPROPRIATION OF ASSETS

7. Issues relating to laws/practices to prevent misappropriation of state assets.

- Is there an absence of controls in place to regulate the expenditure of state funds by heads of government, heads of state, public officials, elected officials?
- What gaps or problems can be identified in terms of reporting and accounting requirements particularly with respect to high level government officials not subject to general public service controls?
- Are the existing general criminal offence provisions in most states relating to theft, fraud and misappropriation of funds sufficient for these cases or are specific offences required?
- Are there gaps in terms of criminal offences and/or asset restraint and confiscation provisions which create problems in terms of international co-operation in the tracking, restraint, confiscation and return of assets?

MOVEMENT OF ASSETS

8. Issues relating to the movement of misappropriated assets within the victim state, to another state and within the receiving state.

- Are there particular weaknesses in anti-money laundering regimes which are exploited in these cases?
- Can common typologies for movement of assets in such cases be identified?
- Are there particular problems with the existing standards and practices relating to politically exposed persons?
- Are there issues surrounding the enforcement of anti-money laundering regulations in relation to financial institutions or in respect of other organisations/bodies?

TRACING, TRACKING ASSETS

9. Issues relating to tracing and tracking assets domestically and internationally.

- In terms of domestic investigations are there problems in terms of investigative resources and/or training and capacity for asset tracing?
- Is there an absence of effective investigative tools for the tracking of assets?
- What informal and formal avenues are available for tracking, tracing assets internationally?
- What are the key practical problems in tracking assets cross border using the avenues described above?
- What, if any, bank secrecy impediments exist?

USE OF MUTUAL ASSISTANCE TO GATHER EVIDENCE

10. Issues surrounding the use of mutual assistance to gather evidence for criminal prosecutions in corruption cases and for asset restraint and confiscation proceedings.

- What kinds of practical problems do requesting states face with requests for assistance aimed at gathering evidence for corruption prosecutions?
- What kinds of practical problems do requested states face with requests for assistance aimed at gathering evidence for corruption prosecutions?
- What kinds of problems do requesting states face with requests for assistance aimed at gathering evidence for asset restraint/confiscation proceedings?
- What kinds of problems do requested states face with requests for assistance aimed at gathering evidence for asset restraint/confiscation proceedings?
- Are there problems with the use of the Harare Scheme in these cases?
- Should any of the provisions of the Harare Scheme be amended to enhance co-operation in evidence gathering?
- Are there problems in using the Harare Scheme to obtain and provide for evidentiary assistance in investigations and proceedings relating to civil asset confiscation?

USE OF MUTUAL ASSISTANCE TO OBTAIN CROSS BORDER RESTRAINT AND CONFISCATION OF ASSETS

11. General issues with the use of mutual assistance to obtain the restraint/confiscation of assets.

- What kinds of practical problems do requesting states face with requests for assistance aimed at restraint/confiscation?
- What kinds of practical problems do requested states face with requests for assistance aimed at restraint/confiscation?
- Are there problems with the provisions of the Harare Scheme relating to requests for restraint/confiscation?
- Are there provisions lacking in the Harare Scheme to allow for effective co-operation in restraint/confiscation?
- What, if any, delays are encountered with requests for restraint and confiscation made through mutual assistance channels and what are the apparent causes of any such delay?

RESTRAINT OF ASSETS

12. Issues relating to the restraint of assets where the predicate corruption offence occurs in one state and proceeds of the offence are located in another state.

- Are there problems arising from a lack of dual criminality relating to the predicate offences?

- What, if any, problems arise from the sufficiency of information/evidence provided in support of a request for restraint?
- Does a lack of asset restraint and confiscation laws in the "victim" state prevent effective restraint action in the receiving state?
- Are there problems arising from the incompatibility of the asset restraint and confiscation regimes between states?

13. A state can execute a request for restraint of assets either directly (registering and enforcing a foreign order of restraint as if it were a domestic order) or indirectly (by taking information and evidence provided by the requesting state and using it to obtain a restraint order under domestic proceeds of crime laws).

- What problems are encountered in use of the "direct" system of enforcement?
- What problems are encountered in the use of the "indirect" system of enforcement?

CONFISCATION OF ASSETS

14. Issues relating to the confiscation of assets where the predicate corruption offence occurs in one state and proceeds of the offence are located in another state.

15. Under the international conventions, a state can execute a request for confiscation of assets either directly (registering and enforcing a foreign order of confiscation as if it were a domestic order) or indirectly (by taking information and evidence provided by the requesting state and using it to obtain a domestic confiscation order under domestic proceeds of crime laws).

- What problems are encountered in use of the "direct" system of enforcement?
- What problems are encountered in the use of the "indirect" system of enforcement?

16. Many states operate under a conviction based system of asset confiscation requiring the conviction of an individual before assets may be confiscated.

- What problems arise from this requirement for a criminal conviction before assets may be confiscated?
- Generally will a conviction in the victim state support confiscation in the receiving state or is a conviction in the receiving state required?
- Are there problems with proof of the conviction or the sufficiency of information and evidence provided in support of a request for confiscation?
- Are there problems relating to dual criminality with respect to the predicate offence?

17. There has been a recent trend toward the adoption of non conviction based or "civil" asset confiscation regimes within states.

- What, if any, potential impediments are there to the use of civil asset forfeiture for the confiscation of assets in these cases?
- Are there difficulties that arise if the victim state does not have a similar civil asset confiscation regime in place?

REPATRIATION OF ASSETS

18. Issues surrounding the return of assets to a "victim" state.

- Are there problems arising from an absence of legal mechanisms for return?

19. States may employ different forms of legal measures to return confiscated assets to another state. One approach would be to empower the courts to order the funds "returned" at the time of or after confiscation. Another approach would be to give an executive authority power to release confiscated funds to the requesting state.

- What problems are anticipated with the "judicial" or the "executive" model?

- Taking into account the provisions of the UNCAC what problems are anticipated in meeting the conditions for the return of funds?

ANNEX III

MISAPPROPRIATION OF ASSETS
Preventive Measures

Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption

1. The Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption sets out a number of preventive measures which include national actions, international actions and actions by the Commonwealth as an Association. The measures contained in the Framework constitute actions which would lead into a policy of zero tolerance in the fight against corruption. These actions would encompass the prevention of corruption, the enforcement of laws against it and the mobilisation of public support for anti-corruption strategies.

National Actions

2. The Framework urges all Commonwealth countries which have not done so to develop national strategies to promote good governance and eliminate corruption. The strategies would need to be comprehensive in engendering transparency and accountability in all sectors and in covering all the active and passive actors in corruption. Emphasising on the need for ethics and integrity in the public and private sectors, the Framework stresses that corruption at the highest level causes the greatest threat to the stability and well-being of societies and its elimination must be given the highest priority in the implementation of effective anti-corruption strategies.

3. In dealing with economic and fiscal policies, the Framework identifies opportunities for seeking economic rents as a major cause of corruption. It urges the initiation of policy reform in economic management that can help to maximise transparency and certainty and minimise administrative discretion which would reduce rent-seeking as well as eliminate incentives which generate corrupt practices.

4. The Framework calls for the need to improve the management, efficiency and delivery of public services as an essential element for any national strategy to enhance governance and reduce corruption. This is particularly critical, in view of the increasing trend towards contracting out and/or privatising services previously provided by the state. The measures to improve management and efficiency should encompass all those who have responsibilities for providing goods and services in the public interest.

5. On public service and providers of public services, the Framework urges the development of a merit-based, professional and non-partisan civil service which is appropriately sized, well-motivated and well-paid as a preventive measure to corruption. Rule of law should apply equally to all those involved in the administration and provision of services in the public interest, as it does to the whole of civil society.

6. Codes of conduct, with appropriate sanctions for breaches that are enforced consistently and vigorously, should bind those holding offices of trust. There should also be promotion of ethical standards, which instil pride in the virtues of integrity, professionalism, efficiency, transparency and impartiality in the public service through education and training.

7. In financial management, the Framework urges the development of sound management systems as essential tools for good governance, which enable governments to set macro-economic targets to allocate resources, and to implement programmes and projects efficiently. It recommends the establishment of rigorous accounting, financial reporting and auditing systems covering all public

programmes and investments. Auditors-General or other auditing authorities should be sufficiently independent to allow open criticism of government finances. Countries should be encouraged to adopt codes of fiscal transparency. Countries also need to have effective regulations for their financial sectors (including private financial institutions and parastatals), that reduce opportunities for corrupt practices.

8. To eliminate corruption in public procurement, governments should be encouraged to review their procurement practices and develop comprehensive guidelines with transparent processes to cover contracts for goods, civil works and services, and criteria for using all types of procedures ranging from prudent shopping to national and international competitive bidding.

9. The Framework also spells out preventive measures that need to be taken in the judiciary and the legal systems of Commonwealth countries. It urges the entrenchment of independent judiciary as a key preventive measure to corruption. This requires objective criteria for the selection and removal of judges, adequate remuneration, security of tenure, and independence from the executive and legislative branches of government. It also expects judges to act properly in accordance with their office and to be subject to the ordinary criminal laws of the land.

10. The legal system would also need to be strengthened through vigorous applications and enforcement of existing laws. The Framework urges governments to make effective use of existing criminal and civil laws to obtain the appropriate remedy in each case. It encourages governments to enhance investigative policing and prosecutorial services to ensure compliance with the law. It calls for strengthening of laws against corruption to provide a meaningful deterrent (active and passive corruption should be made criminal offences), comprehensively covering all holders of all offices of trust; criminal law should provide for the seizure and forfeiture of the proceeds of corruption; there should be provisions for protection of witnesses and whistle-blowers in cases involving corruption. There should be statutes which permit investigators and prosecutors to base criminal proceedings on the discovery of significant increases in assets of the holder of an office of trust, which cannot be reasonably attributed to lawful source of income; the laundering of proceeds of crime must be criminalised and laws which provide for the granting of assistance to other countries investigating and prosecuting money laundering offences, must be available to ensure effective international co-operation to combat money laundering.

11. The Framework also prescribes the need for civil administrative and regulatory laws that enhance preventive measures.

- The use of damages awards and the facility to void contracts may be appropriate in many cases.

- Administrative action such as the use of disciplinary procedures, can contribute to the battle against corruption and ease over-burdened court systems by dispensing appropriate sanctions.

- Regulations requiring declaration of assets and financial interests by holders of offices of trust.
- Non-criminal laws such as those providing for the disqualification of directors guilty of improper conduct in the management of corporations, and the regulation of financial institutions to prevent money laundering.

12. At the national level, the Framework promotes the involvement of civil society as an independent and creative partner in the development of coalitions to improve governance and combat corruption.

International Actions

13. The Framework recognises the critical importance that international preventive actions have in the success of any national strategy. It urges all countries (developed and developing) to join the battle against cross-border corruption. This would involve the mobilisation of international support for a global compact against corruption, negotiated under the auspices of the United Nations with universal participation which builds on the positive elements of existing conventions and other regional and international initiatives (*the UN Convention Against Corruption is an example of this expected outcome*).

14. With regard to preventive measures in programmes of international financial institutions and aid agencies, the Framework recommends the need for added scrutiny, greater transparency and accountability, and appropriate conditionality in procurement using multilateral and bilateral aid resources. It also recommends that the levels of corruption in recipient countries should be taken into account in determining the quantum and direction of external assistance. Issues related to governance and corruption should also be taken up by international financial institutions, in policy dialogue with recipient countries and in the development of country assistance strategies.

15. To prevent corruption in procurement using resources from international financial institutions, the Framework urges these institutions to strengthen their procurement guidelines along the lines of the anti-fraud/corruption provisions of the 1996 World Bank guidelines on procurement. It also encourages bilateral donors to reduce tied aid since the tying of aid to procurement from a donor country reduces the scope for competitive bidding and increases the incentives for corrupt practices.

16. The Framework suggests actions in the areas of monitoring corruption, the arms trade, and money laundering which would enhance preventive measures. On monitoring corruption, it calls for the need to improve the methodological basis for the quantitative assessments applied by monitoring agencies such as Transparency International. In the arms trade, it recommends more transparency in the trade, which could include wider and more detailed reporting in arms trade transactions in the UN arms register; the creation of a new international code of conduct for the arms trade, requiring the disclosure of greater information by all parties involved; and the inclusion of specific clauses in arms sales contracts that reduce the role of middle-men and ban illegal commissions. On money laundering, it urges countries to implement the FATF's 40 recommendations and encourages the development of regional anti-money laundering groups to strengthen anti-money laundering measures across the Commonwealth, which would provide a basis for stronger mechanisms to enable the expeditious repatriation of proceeds of corruption.

Commonwealth Actions

17. The Commonwealth-wide preventive measures proposed in the Framework include both political actions by Commonwealth countries collectively, and practical actions taken by Commonwealth governments and the Commonwealth Secretariat. The Framework emphasises that the Commonwealth's commitment to promote good governance and fight corruption should be credible, tangible and visible. It urges Commonwealth Heads of Government to adopt a declaration that commits the Commonwealth to specific principles, standards and goals and establish a mechanism/process to facilitate its implementation as well as periodic review of progress. The Framework also calls for the Commonwealth to support a truly global compact against corruption that would fill gaps in existing instruments and be universal in its scope, thus creating a level playing field for all countries. It suggested that the Commonwealth could work through the UN system in developing such a compact (*the UN Convention Against Corruption is an example of this expected outcome*).

18. The Framework encouraged Commonwealth countries to maximise the use of existing co-operation schemes and keep them under review in order to meet the needs of all countries seeking to combat corrupt practices. It also suggested that the Commonwealth should work with other international agencies to develop effective standards to ensure that all off-shore financial centres are not used to launder proceeds of corrupt practices.

19. Commonwealth governments were also encouraged to give the Secretariat additional resources to enable it to assist member countries with policy advice and technical support to design their own anti-corruption strategies and to compile and disseminate information on emerging good practices in combating corruption and improving governance.

ANNEX IV

Summary of the Position Regarding Immunities from Domestic Prosecution of Head of State/Government in the Commonwealth"

	Country	Presidential & Vice-Presidential Immunity (serving)	Presidential Immunity (past)	High-Ranking Govt. Officials (serving)	High-Ranking Govt. Officials (past)
1	CYPRUS	Immune from criminal proceedings ***Can be prosecuted for any offence including corruption following special leave from President of Supreme Court**		Immune from criminal proceedings ***Can be prosecuted for any offence including corruption following special leave from Supreme Court**	
2	FIJI	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
3	GHANA	Immune from civil and criminal proceedings for acts or omissions done while in office	Civil or criminal proceedings may be instituted within **three** years of leaving office ***In respect of anything done or omitted to be done before or during the term of office**	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
4	JAMAICA	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
5	LESOTHO	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
6	MALAYSIA	The King (constitutional monarch) can only be prosecuted or sued by a Special Court established under Article 182 of the Federal Constitution, in respect of his personal criminal/civil liability. A prosecution/ civil suit against the King shall not be instituted except	-ditto- -ditto-	None	None

	Country	Presidential & Vice-Presidential Immunity (serving)	Presidential Immunity (past)	High-Ranking Govt. Officials (serving)	High-Ranking Govt. Officials (past)
		with the consent of the Attorney General (Article 183 Federal Constitution). NOTE: The King (Ruler) is the Head of State. The Head of Government - the Prime Minister has no immunity			
7	MAURITIUS	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
8	NEW ZEALAND	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
9	ST LUCIA	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
10	SINGAPORE	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
11	SRI LANKA	Immune from civil and criminal proceedings for acts or omissions done while in office	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
12	TONGA	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings	No immunity from civil or criminal proceedings
13	BANGLADESH	Yes	None	Yes	None
14	THE BAHAMAS	None	None	None	None
15	CANADA	None	None	None	None
16	THE GAMBIA				
17	INDIA	Yes	None	None	None
18	KENYA	President has immunity from criminal and civil proceedings during the entire term of office Serving Vice-Presidents do not enjoy immunity	None	None	None

	Country	Presidential & Vice-Presidential Immunity (serving)	Presidential Immunity (past)	High-Ranking Govt. Officials (serving)	High-Ranking Govt. Officials (past)
19	NIGERIA	Full immunity, both civil and criminal, while in office bills	None	Immunity for Governors and Deputy Governors, both civil and criminal, while in office	None
20	PAKISTAN	Yes	None	None	None
21	SOUTH AFRICA	None	None	None	None
22	TANZANIA	President, while in office	None	None	None
23	TRINIDAD & TOBAGO	None	None	None	None
24	UNITED KINGDOM	HM The Queen, as Head of State	N/A	None	None
25	CAMEROON	Yes	Yes	None	None
26	BOTSWANA	Yes	None	None	None
27	MALAWI	Yes	None	None	None
28	ST VINCENT/ GRENADINES	None	None	None	None
29	ANTIGUA & BARBUDA	None	None	None	None
30	BARBADOS	None	None	None	None
31	BELIZE	None	None	None	None
32	DOMINICA	None	None	None	None
33	GRENADA	None	None	None	None
34	GUYANA				
35	ST KITTS & NEVIS	None	None	None	None
36	MALTA	None	None	None	None

ANNEX V

PROPOSED AMENDMENTS TO THE SCHEME RELATING TO MUTUAL ASSISTANCE IN CRIMINAL MATTERS WITHIN THE COMMONWEALTH (THE HARARE SCHEME)

including amendments made by Law Ministers in April 1990 and November 2002

PURPOSE AND SCOPE

1. (1) The purpose of this Scheme is to increase the level and scope of assistance rendered between Commonwealth Governments in investigations and proceedings relating to offences and confiscation proceedings. It augments, and in no way derogates from existing forms of co-operation, both formal and informal; nor does it preclude the development of enhanced arrangements in other fora.

(2) This Scheme provides for the giving of assistance by the competent authorities of one country (the requested country) in respect of criminal matters arising in another country (the requesting country).

(3) Assistance in criminal matters under this Scheme includes assistance in:

(a) identifying and locating persons;
(b) serving documents;
(c) examining witnesses;
(d) search and seizure;
(e) obtaining evidence including the production of documents;
(f) facilitating the personal appearance of witnesses;
(g) effecting a temporary transfer of persons in custody to appear as a witness;
(h) obtaining production of judicial or official records; and
(i) tracing, restraining, seizing and confiscating the proceeds or instrumentalities of crime.

MEANING OF COUNTRY

2. For the purposes of this Scheme, each of the following is a separate country, that is to say:

(a) each sovereign and independent country within the Commonwealth together with any dependent territories which that country designates; and

(b) each country within the Commonwealth which, though not sovereign and independent, is not designated for the purposes of the preceding sub-paragraph.

CRIMINAL MATTER

3. (1) For the purposes of this Scheme, a criminal matter means an investigation or proceeding relating to an offence or to confiscation proceedings.

(2) "Offence", in the case of a federal country or a country having more than one legal system, includes an offence under the law of the country or any part thereof.

(3) "Confiscation proceedings" means proceedings, whether conviction based or non-conviction based, for:

(a) an order restraining dealings with or seizing[1] any proceeds or instrumentalities;

(b) a confiscation order related to proceeds or instrumentalities;

(c) an order imposing a pecuniary penalty calculated by reference to the value of any proceeds or instrumentalities.

(4) "instrumentalities" means any property:

(a) used in or in connection with or destined for use in or in connection with an offence; or

(b) that facilitates or is otherwise concerned in an offence.

(5) proceeds means property that:

(i) has been derived or obtained whether directly or indirectly, from an offence; or

(ii) is or represents the benefit derived from an offence.[2]

CENTRAL AUTHORITIES

4. Each country shall designate a Central Authority to transmit and to receive requests for assistance under this Scheme.

ACTION IN THE REQUESTING COUNTRY

5. (1) A request for assistance under this Scheme may be initiated by any law enforcement agency or public prosecution or judicial authority competent under the law of the requesting country.

(2) The Central Authority of the requesting country shall, if it is satisfied that the request can properly be made under this Scheme, transmit the request to the central Authority of the requested country and shall ensure that the request contains all the information required by the provisions of this Scheme.

(3) The Central Authority of the requesting country shall provide as far as practicable additional information sought by the Central Authority of the requested country.

ACTION IN THE REQUESTED COUNTRY

6. (1) Subject to the provisions of this Scheme, the requested country shall grant the assistance requested as expeditiously as practicable.

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1 This is intended to cover systems where seizure is used to restrain some types of property.

2 This is intended to address the current problem that "value" or "benefit" confiscation systems such as in the UK or South Africa are not covered by the Scheme.

(2) The Central Authority of the requested country shall, subject to the following provisions of this paragraph, take the necessary steps to ensure that the competent authorities of that country comply with the request.

(3) If the Central Authority of the requested country considers:

(a) that the request does not comply with the provisions of this Scheme, or

(b) that in accordance with the provisions of this Scheme the request for assistance is to be refused in whole or in part, or

(c) that the request cannot be complied with, in whole or in part, or

(d) that there are circumstances which are likely to cause a significant delay in complying with the request,

it shall promptly inform the Central Authority of the requesting country, giving reasons.

(4) The requested country may make the granting of assistance subject to the requesting country giving an undertaking that:

(a) the evidence provided will not be used directly or indirectly in relation to the investigation or prosecution of a specified person; or

(b) a court in the requesting country will determine whether or not the material is subject to privilege.

(5) If the requesting country refuses to give the undertaking under sub paragraph (4), the requested country may refuse to grant the assistance sought in whole or in part.

REFUSAL OF ASSISTANCE

7. (1) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme if the criminal matter appears to the Central Authority of that country to concern:

(a) conduct which would not constitute an offence under the law of that country; or

(b) an offence or proceedings of a political character; or

(c) conduct which in the requesting country is an offence only under military law or a law relating to military obligations; or

(d) conduct in relation to which the person accused or suspected of having committed an offence has been acquitted or convicted by a court in the requested country.

(2) The requested country may refuse to comply in whole or in part with a request for assistance under this Scheme:

(a) to the extent that it appears to the Central Authority of that country that compliance would be contrary to the Constitution of that country, or would prejudice the security, international relations or other essential public interests of that country; or

(b) where there are substantial grounds leading the Central Authority of that country to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request.

(3) The requested country may refuse to comply in whole or in part with a request for assistance to the extent that the steps required to be taken in order to comply with the request cannot under the law of that country be taken in respect of criminal matters arising in that country.

(4) An offence shall not be an offence of a political character for the purposes of this paragraph if it is an offence within the scope of any international convention to which both the requesting and requested countries are parties and which imposes on the parties thereto an obligation either to extradite or prosecute a person accused of the commission of the offence.

(5) A request for assistance under this Scheme shall not be denied on the grounds of bank secrecy.[3]

MEASURES OF COMPULSION

8. (1) The competent authorities of the requested country shall in complying with a request under this Scheme use only such measures of compulsion as are available under the law of that country in respect of criminal matters arising in that country.

(2) Where under the law of the requested country measures of compulsion cannot be applied to any person to take the steps necessary to secure compliance with a request under this Scheme but the person concerned is willing to act voluntarily in compliance or partial compliance with the terms of the request, the competent authorities of the requested country shall make available the necessary facilities.

SCHEME NOT TO COVER ARREST OR EXTRADITION

9. Nothing in this Scheme is to be construed as authorising the extradition, or the arrest or detention with a view to extradition, of any person.

CONFIDENTIALITY

10. The Central Authorities and the competent authorities of the requesting and requested countries shall use their best efforts to keep confidential a request and its contents and the information and materials supplied in compliance with a request except for disclosure in criminal proceedings and where otherwise authorised by the Central Authority of the other country.

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[3] This is now a provision in all modern treaties and is of particular importance for proceeds investigations.

LIMITATION OF USE OF INFORMATION OR EVIDENCE

11. The requesting country shall not use any information or evidence obtained in response to a request for assistance under this Scheme in connection with any matter other than the criminal matter specified in the request without the prior consent of the Central Authority of the requested country.

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.

CONTENTS OF REQUEST FOR ASSISTANCE

13. (1) A request under the Scheme shall:

(a) specify the nature of the assistance requested;

(b) contain the information appropriate to the assistance sought as specified in the following provisions of this Scheme;

(c) indicate any time-limit within which compliance with the request is desired, stating reasons;

(d) contain the following information:

(i) the identity of the agency or authority initiating the request;

(ii) the nature of the criminal matter; and

(iii) whether or not proceedings have been instituted.

(e) where proceedings relating to an offence have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) the identity of the accused person;

(iii) the offences of which he stands accused, and a summary of the facts;

(iv) the stage reached in the proceedings; and

(v) any date fixed for further stages in the proceedings.

(f) where proceedings relating to non-conviction based confiscation have been instituted, contain the following information:

(i) the court exercising jurisdiction in the proceedings;

(ii) a description of the property alleged to be subject to confiscation;

(iii) the stage reached in the proceedings; and

(iv) any date fixed for further stages in the proceedings.

(g) where proceedings have not been instituted, state the offence which is under investigation or, in the case of non conviction based confiscation describe the nature of the investigation to date, with a summary of known facts.

(2) A request shall normally be in writing, and if made orally in the case of urgency, shall be confirmed in writing forthwith.

IDENTIFYING AND LOCATING PERSONS

14. (1) A request under this Scheme may seek assistance in identifying or locating persons believed to be within the requested country.

(2) The request shall indicate the purpose for which the information is requested and shall contain such information as is available to the Central Authority of the requesting country as to the whereabouts of the person concerned and such other information as it possesses as may facilitate the identification of that person.

SERVICE OF DOCUMENTS

15. (1) A request under this Scheme may seek assistance in the service of documents relevant to a criminal matter arising in the requesting country.

(2) The request shall be accompanied by the documents to be served and, where those documents relate to attendance in the requesting country, such notice as the Central Authority of that country is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(3) The Central Authority of the requested country shall endeavour to have the documents served:

(a) by any particular method stated in the request, unless such method is incompatible with the law of that country; or

(b) by any method prescribed by the law of that country for the service of documents in criminal proceedings.

(4) The requested country shall transmit to the Central Authority of the requesting country a certificate as to the service of the documents or, if they have not been served, as to the reasons which have prevented service.

(5) A person served in compliance with a request with a summons to appear as a witness in the requesting country and who fails to comply with the summons shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or the requested country notwithstanding any contrary statement in the summons.

EXAMINATION OF WITNESSES

16. (1) A request under this Scheme may seek assistance in the examination of witnesses in the requested country.

(2) The request shall specify, as appropriate and so far as the circumstances of the case permit:

(a) the names and addresses or the official designations of the witnesses to be examined;

(b) the questions to be put to the witnesses or the subject matter about which they are to be examined;

(c) whether it is desired that the witnesses be examined orally or in writing;

(d) whether it is desired that the oath be administered to the witnesses (or, as the law of the requested country allows, that they be required to make their solemn affirmation);

(e) any provisions of the law of the requesting country as to privilege or exemption from giving evidence which appear especially relevant to the request; and

(f) any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country.

(3) The request may ask that, so far as the law of the requested country permits, the accused person or his legal representative and a representative of the requesting state[4] may attend the examination of the witness and ask questions of the witness.

SEARCH AND SEIZURE

17. (1) A request under this Scheme may seek assistance in the search for, and seizure of property in the requested country.

(2) The request shall specify the property to be searched for and seized and shall contain, so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required to be adduced in an application under the law of the requested country for any necessary warrant or authorization to effect the search and seizure.

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[4] It is unclear why this was not in the original scheme but it would seem appropriate to allow for both sides of proceedings to be represented and participate.

(3) The requested country shall provide such certification as may be required by the requesting country concerning the result of any search, the place and circumstances of seizure, and the subsequent custody of the property seized.

OTHER ASSISTANCE IN OBTAINING EVIDENCE

18. (1) A request under this Scheme may seek other assistance in obtaining evidence including the production of documents.[5]

(2) The request shall specify, as appropriate and so far as the circumstances of the case permit:

(a) the documents, records or property to be produced, inspected, preserved, photographed, copied or transmitted;

(b) the samples of any property to be taken, examined or transmitted; and

(c) the site to be viewed or photographed.

PRIVILEGE

19. (1) The laws of the requested country may provide[6] that no person shall be compelled in response to a request under this Scheme to give any evidence in the requested country which he or she could not be compelled to give:

(a) in criminal proceedings in that country; or

(b) in criminal proceedings in the requesting country.

(2) For the purposes of this paragraph any reference to giving evidence includes references to answering any question and to producing any document.

PRODUCTION OF JUDICIAL OR OFFICIAL RECORDS

20. (1) A request under this Scheme may seek the production of judicial or official records relevant to a criminal matter arising in the requesting country.

(2) For the purposes of this paragraph "judicial records" means judgements, orders and decisions of courts and other documents held by judicial authorities and "official records" means documents held by government departments or agencies or prosecution authorities.

(3) The requested country shall provide copies of judicial or official records which are publicly available.

(4) The requested country may provide copies of judicial or official records not publicly available, to the same extent and under the same conditions as apply to the provision of such records to its own law enforcement agencies or prosecution or judicial authorities.

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[5] The production of financial documents is of critical importance in proceeds investigations. While probably covered by the general reference to other assistance with evidence gathering, it is perhaps worth specifying by reference to production of documents.

[6] The current mandatory nature of this provision is inconsistent with some of the newer laws where not all objections in both states are permitted. This could be of particular importance in terms of compelled interviews in financial/proceeds investigations. This amendment would make the application of this principle discretionary as opposed to mandatory.

TRANSMISSION AND RETURN OF MATERIAL

21. (1) Where compliance with a request under this Scheme would involve the transmission to the requesting country of any document, record or property, the requested country:

(a) may postpone the transmission of the material if it is required in connection with proceedings in that country, and in such a case shall provide certified copies of a document or record pending transmission of the original;

(b) may require the requesting country to agree to terms and conditions to protect third party interests in the material to be transmitted and may refuse to effect such transmission pending such agreement.

(2) Where any document, record or property is transmitted to the requesting country in compliance with a request under this Scheme, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless that country has indicated that its return is not desired.

(3) The requested country shall authenticate material that is to be transmitted by that country.

AUTHENTICATION

22. A document or other material transmitted for the purposes of or in response to a request under this Scheme shall be deemed to be duly authenticated if it:

(a) purports to be signed or certified by a judge or Magistrate, or to bear the stamp or seal of a Minister, government department or Central Authority; or

(b) is verified by the oath of a witness or of a public officer of the Commonwealth country from which the document or material emanates.

PERSONAL APPEARANCE OF WITNESSES IN THE REQUESTING COUNTRY

23. (1) A request under this Scheme may seek assistance in facilitating the personal appearance of the witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify:

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required; and

(c) details of the travelling, subsistence and other expenses payable by the requesting country in respect of the personal appearance of the witnesses.

(3) The competent authorities of the requested country shall invite persons whose appearance as witnesses in the requesting country is desired; and

(a) ask whether they agree to appear;

(b) inform the Central Authority of the requesting country of their answer; and

(c) if they are willing to appear, make appropriate arrangements to facilitate the personal appearance of the witnesses.

(4) A person whose appearance as a witness is the subject of a request and who does not agree to appear shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

PERSONAL APPEARANCE OF PERSONS IN CUSTODY

24. (1) A request under this Scheme may seek the temporary transfer of persons in custody in the requested country to appear as witnesses before a court exercising jurisdiction in the requesting country.

(2) The request shall specify:

(a) the subject matter upon which it is desired to examine the witnesses;

(b) the reasons for which the personal appearance of the witnesses is required.

(3) The requested country shall refuse to comply with a request for the transfer of persons in custody if the persons concerned do not consent to the transfer.

(4) The requested country may refuse to comply with a request for the transfer of persons in custody and shall be under no obligation to inform the requesting country of the reasons for such refusal.

(5) A person in custody whose transfer is the subject of a request and who does not consent to the transfer shall not by reason thereof be liable to any penalty or measure of compulsion in either the requesting or requested country.

(6) Where persons in custody are transferred, the requested country shall notify the requesting country of:

(a) the dates upon which the persons are due under the law of the requested country to be released from custody; and

(b) the dates by which the requested country requires the return of the persons

and shall notify any variations in such dates.

(7) The requesting country shall keep the persons transferred in custody, and shall return the persons to the requested country when their presence as witnesses in the requesting country is no longer required, and in any case by the earlier of the dates notified under sub paragraph (6).

(8) The obligation to return the persons transferred shall subsist notwithstanding the fact that they are nationals of the requesting country.

(9) The period during which the persons transferred are in custody in the requesting country shall be deemed to be service in the requested country of an equivalent period of custody in that country for all purposes.

(10) Nothing in this paragraph shall preclude the release in the requesting country without return to the requested country of any person transferred where the two countries and the person concerned agree.

IMMUNITY OF PERSONS APPEARING

25. (1) Subject to the provisions of paragraph 24, witnesses appearing in the requesting country in response to a request under paragraph 23 or persons transferred to that country in response to a request under paragraph 24 shall be immune in that country from prosecution, detention or any other restriction of personal liberty in respect of criminal acts, omissions or convictions before the time of their departure from the requested country.

(2) The immunity provided for in that paragraph shall cease:

(a) in the case of witnesses appearing in response to a request under paragraph 23, when the witnesses having had, for a period of 15 consecutive days from the dates when they were notified by the competent authority of the requesting country that their presence was no longer required by the court exercising jurisdiction in the criminal matter, an opportunity of leaving have nevertheless remained in the requesting country, or having left that country have returned to it;

(b) in the case of persons transferred in response to a request under paragraph 24 and remaining in custody when they have been returned to the requested country.

TRACING THE PROCEEDS OR INSTRUMENTALITIES OF CRIME

26. (1) A request under this Scheme may seek assistance in identifying, locating and assessing the value of proceeds or instrumentalities of crime believed to be within the requested country.

(2) The request shall contain such information as is available to the Central Authority of the requesting country as to the nature and location of the property and as to any person in whose possession or control the property is believed to be.

SEIZING AND CONFISCATING THE PROCEEDS OF INSTRUMENTALITIES OF CRIME

27. (1) A request under this Scheme may seek assistance in securing:

(a) the making in the requested country of an order relating to the proceeds or instrumentalities of crime; or

(b) the recognition or enforcement in that country of such an order made in the requesting country.

(2) For the purpose of this paragraph, "an order relating to the proceeds or instrumentalities of crime" means:

(a) an order restraining dealings with or seizing any proceeds or instrumentalities;

(b) an order confiscating any proceeds or instrumentalities; and

(c) an order imposing a pecuniary penalty calculated by reference to the value of any proceeds or instrumentalities.

(3) Where the requested country cannot enforce an order made in the requesting country, the requesting country may request the making of any similar order available under the law of the requested country.

(4) The request shall be accompanied by a copy of any order made in the requesting country and shall contain so far as reasonably practicable, all information available to the Central Authority of the requesting country which may be required in connection with the procedures to be followed in the requested country.

(5) The law of the requested country shall apply to determine the circumstances and manner in which an order may be made, recognised or enforced in response to the request.

(6) The law of the requested country may provide for the protection of the interests of bona fide third parties in property restrained or confiscated as a result of a request made pursuant to this Scheme, by providing:

(a) for the giving of notice of the making of orders restraining or confiscating property; and

(b) that any third party claiming an interest in property so restrained or confiscated may make an application to a court of competent jurisdiction for an order

(i) declaring that the interest of the applicant in the property or part thereof was acquired bona fide; and

(ii) restoring such property or the value of the interest therein to the applicant.

DISPOSAL OR RELEASE OF PROPERTY

28. (1) The law of the requested country shall apply to determine the disposal of any property

(a) confiscated; or

(b) obtained as a result of the enforcement of a pecuniary penalty order

as a result of a request under this Scheme.

(2) The law of the requested country shall apply to determine the circumstances in which property made the subject of interim seizure as a result of a request under this Scheme may be released from the effects of such seizure.

(3) The law of the requested country shall provide that property confiscated or obtained pursuant to an order of the type referred to in sub-paragraphs 27(2)(b) and (c) or the value thereof be returned to a requesting country where:

(i) the property was confiscated in relation to an offence involving the misappropriation or other unlawful taking of public funds or the laundering of such funds, where the requesting country was the victim of the offence; or

(ii) the requesting country reasonably establishes its prior ownership of the confiscated property to the requested country or the requested county recognises damage to the requesting country as a basis for returning the confiscated property.

(4) Subject to subsection (3) the law of the requested country shall provide that the property confiscated or obtained under an order of the type referred to in sub-paragraphs 27(2)(b) and (c), or the value thereof, may be:

(i) returned to the requesting country; or

(ii) shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.

CONSULTATION

29. The Central Authorities of the requested and requesting countries shall consult promptly, at the request of either, concerning matters arising under this Scheme.

OTHER ASSISTANCE

30. After consultation between the requesting and the requested countries assistance not within the scope of this Scheme may be given in respect of a criminal matter on such terms and conditions as may be agreed by those countries.

NOTIFICATION OF DESIGNATIONS

31. Designations of dependent territories under paragraph 2 and of Central Authorities under paragraph 4 shall be notified to the Commonwealth Secretary-General.

SUMMARY OF RECOMMENDATIONS

R.1 Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency.

R.2 Commonwealth countries should have regard to the Commonwealth Framework and Chapter II of the UNCAC on Preventive Measures and adopt a comprehensive prevention regime under domestic law.

R.3 Having regard to the criminal offence provisions of the UNCAC, Commonwealth countries should ensure that there are a broad range of criminal offences under domestic law for use in corruption cases, including an offence of bribery of foreign officials abroad.

R.4 Commonwealth countries should ensure that the law clearly describes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds.

R.5 Commonwealth countries should introduce an offence of unjust enrichment if it does not already exist.

R.6 Commonwealth Heads of State/Government and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity.

R.7 Heads of Government should commit themselves to take active steps to ensure the removal of these immunities.

R.8 The Commonwealth Secretariat should prepare periodic reports for consideration by Heads of Government on progressive action towards reaching the optimum goal of no immunities at all from criminal prosecutions throughout the Commonwealth.

R.9 The Commonwealth as an organisation of sovereign states should advance a position for the inclusion of corruption offences within the Rome Statute of the International Criminal Court at the Review Conference for the Statute in 2009.

R.10 The law in Commonwealth countries should provide for:

- **(a) a judicial review mechanism for claims of public interest immunity;**
- **(b) exceptions to the privilege where it can be established that the information or evidence sought is relevant to the investigation of (serious) criminal activity, with appropriate safeguards on any disclosure as may be necessary.**

R.11 Commonwealth countries which have not already done so should implement the broad range of international initiatives directed at preventing the movement of illicit assets and combating money laundering. This should include adopting and enforcing anti-money laundering and proceeds of crime laws with relevant structures and administrative procedures. The Commonwealth Secretariat should continue to support member countries with these efforts.

R.12 The Commonwealth Secretariat should develop programmes to assist countries with the development and implementation of early warning systems to raise awareness about political situations particularly vulnerable to corruption.

R.13 Commonwealth countries should enact laws to allow for expedited cash seizures at the border and generally throughout the country in respect of cash which exceeds a specified threshold.

R.14 Enhanced scrutiny regimes should be applied to PEPs as defined by the FATF but extending to both domestic and foreign PEPs.

R.15 The Commonwealth Secretariat should continue to support countries in the implementation of international initiatives to combat money laundering and to gather and disseminate information regarding anti-money laundering and corruption legislation within the Commonwealth.

R.16 Commonwealth countries should have in place independent and effective mechanisms by which allegations of corruption with respect to a current Head of State/Government can be investigated and prosecuted and the relevant assets can be frozen and confiscated.

R.17 The procedures relating to suspicious transaction reporting should apply where suspect funds belonging to a current Head of State/Government of another country are identified. Where possible and appropriate, the FIU or other appropriate body or authority in the receiving state should communicate the information about the suspect funds to the FIU or other appropriate body or authority in the home state for action to be taken.

R.18 Where there is sufficient evidence, the receiving state should use the methods available under domestic law to obtain the restraint and confiscation of the relevant assets.

R.19 In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place.

R.20 Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died.

R.21 Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation.

R.22 Commonwealth countries should allocate sufficient resources to establish and properly fund law enforcement and other agencies dealing with asset confiscation and management.

R.23 For asset confiscation legislation to be effectively implemented law enforcement authorities need to have the requisite knowledge and skills. Commonwealth countries, with support from the Commonwealth Secretariat, should develop and implement programmes for training/capacity building for police, prosecutors and judicial officers in relation to asset confiscation laws and practice.

R.24 The Commonwealth Secretariat should continue with and enhance its programme for placement of prosecution and law enforcement mentors within Commonwealth countries and regions to assist with ongoing asset confiscation and money laundering cases and contribute to capacity building.

R.25 Commonwealth countries should adopt best practices for asset confiscation investigations and proceedings including:

- establishing dedicated, law enforcement teams to investigate proceeds of crime matters which are multidisciplinary in composition or have support from experts in various relevant disciplines;
- establishing where possible joint investigative teams on a domestic and/or international level;
- providing sufficient funds to the investigation and prosecution of confiscation cases including funding specialist support;
- adoption or review and amendment of laws to provide for a range of investigative powers of particular relevance to these investigations including for compelled interviews, production orders, account monitoring and interception of communications.

R.26 Adoption or review and amendment of laws which allow for investigators to access tax information for their investigations.

R.27 Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement. Optimally domestic law should allow for assistance to be rendered to all countries on the basis of national law without the requirement for a treaty.

R.28 Commonwealth countries which have yet to do so should promptly establish a central authority as required under the Harare Scheme.

R.29 Consultation between central and other relevant authorities (e.g. law enforcement) regarding mutual legal assistance requests should be strongly encouraged.

R.30 Central authorities and the mutual legal assistance execution process should be properly resourced and funded and Commonwealth countries should allocate sufficient resources for this purpose.

R.31 The Commonwealth Secretariat should establish a webpage which would include practical information on mutual legal assistance laws (including restraint and confiscation requirements) and systems within member countries and provide some guidance on how to make requests to different countries.

R.32 Creation of a Commonwealth Network similar to the European Judicial Network/Eurojust adapted to the particular circumstances of the Commonwealth. This could include setting up both regional bodies as well as a Commonwealth entity.

R.33 The Commonwealth Secretariat should continue and enhance its assistance programmes to Commonwealth countries relating to capacity building and training. The Secretariat should also continue to facilitate co-operation by maintaining lists of central authorities and providing contact particulars for central authorities and other relevant officials to member countries in response to requests.

R.34 Commonwealth countries should have the legal capacity to render mutual legal assistance in the absence of dual criminality.

R.35 Commonwealth countries should adopt best practices for effective mutual legal assistance including:

(a) encouraging the development of personal contacts between central authorities and other relevant officials;

(b) where appropriate develop MOU's to enhance working relationships;

(c) to the extent possible consulting with authorities in the requested state about applicable laws and the content of a request prior to submitting any formal documentation;

(d) ensuring that requests for assistance are kept confidential and that the requesting state is consulted when circumstances arise where disclosure of the request is sought;

(e) implementing the Best Practice Recommendations of the UNODC Expert Working Group (2001).

R.36 Commonwealth countries should have the legal capacity to provide mutual legal assistance with respect to investigations and proceedings relating to non conviction based asset confiscation. Similarly, the Harare Scheme should be amended to cover such types of assistance.

R.37 The mutual legal assistance regimes in Commonwealth countries should permit evidence gathered for a criminal proceeding to be subsequently used in civil proceedings and requests for such use should be granted in corruption cases.

R.38 Commonwealth Law Ministers should examine further the issue of the possible use of mutual legal assistance to gather evidence for use in civil proceedings brought by a victim country for the recovery of assets in corruption cases.

R.39 Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. The direct enforcement system should:

(i) allow for all foreign orders to be enforced but subject to an executive discretion to grant or refuse requests in particular cases;
(ii) provide for the enforcement of conviction based and non-conviction based orders;
(iii) allow for innocent third parties to challenge a restraint order or the enforcement of a confiscation order in both the requesting and requested state;
(iv) permit the accused to challenge a restraint order in the requested state on a limited basis related to procedural questions or fundamental human rights but not to challenge the underlying criminal offences or orders issued in the requesting state.

R.40 Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non-conviction based orders, it should be amended to do so.

R.41 Commonwealth countries should ensure proper co-ordination of cross border restraint and confiscation efforts and the management of assets.

R.42 Commonwealth countries should have the legal capacity to render legal assistance in relation to requests for restraint and confiscation from another country in the absence of dual criminality.

R.43 Commonwealth countries that have yet to do so should promptly enact mutual legal assistance legislation.

R.44 National legislation for mutual legal assistance in Commonwealth countries should implement the provisions of the Harare Scheme.

R.45 The Harare Scheme should be amended in accordance with Annex V.

R.46 Commonwealth countries should ensure that the legislative scheme for restraint and confiscation is flexible and permits early application for a restraint order.

R.47 Commonwealth countries should ensure that the legislative scheme contains appropriate mechanisms for asset management.

R.48 FIU's or other appropriate authorities within each country should have the power to issue short term administrative freezing orders.

R.49 Where the relevant countries agree the Commonwealth should assist in reaching an agreement on the final disposal of confiscated assets.

R.50 Commonwealth countries that require a bilateral treaty or memorandum of understanding for asset sharing or the return of assets should eliminate this requirement.

R.51 Clause 28 of the Harare Scheme should be amended as set out in Annex V to ensure that the Scheme can be used as a basis for the sharing of assets and to provide for the repatriation of assets

R.52 Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:

(a) in cases of misappropriation or other unlawful taking of public funds or the laundering thereof;

(b) where the requesting country reasonably establishes its prior ownership of confiscated property; or

(c) when the requested country recognises damage to the requesting country.

R.53 The law for the return of funds in these cases should be distinct from any existing laws or provisions relating to asset sharing. Where possible, Commonwealth countries returning the funds should give consideration to waiving the deduction of reasonable costs.

R.54 Commonwealth countries are encouraged to implement "fast track" priority systems for corruption cases to reduce the amount of delay in repatriation to a minimum.

R.55 The Commonwealth Secretariat should liaise with the G8 presidency in relation to the identification of suitable cases for the establishment of case co-ordination teams and asset recovery tasks forces to assist member countries as appropriate.

R.56 Commonwealth countries should give priority attention to the implementation of the recommendations in this report, particularly the key recommendations.[1]

R.57 Commonwealth Heads of Government should commit increased resources for the Commonwealth Secretariat to assist Commonwealth countries with the implementation of these recommendations.

R.58 Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the report.

[1] Some key recommendations comprise an amalgamation of the recommendations contained within this Report.

ANNEX VII

KEY RECOMMENDATIONS WITH REPORT REFERENCES

1. Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency. (Taken from recommendation 1, page 2).

2. Commonwealth Heads of State/Government, Ministers and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity. Heads of Government should commit themselves to take active steps to ensure the removal of these immunities. (Taken from recommendations 6 and 7, page 6).

3. In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place. (Taken from recommendation 19, page 11).

4. Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died. Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation. (Taken from recommendation 20, page 14 and 21, page 15).

5. Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement. (Taken from recommendation 27, page 19)

6. Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non-conviction based orders, it should be amended to do so. (Taken from recommendations 39 and 40, page 25).

7. Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:

(a) in cases of misappropriation or other unlawful taking of public funds, or the laundering thereof;

(b) where the requesting country reasonably establishes its prior ownership of confiscated property; or

(c) when the requested country recognises damage to the requesting country. (Taken from recommendation 52 page 31).

8. Commonwealth countries should ensure that the law clearly prescribes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds. (Taken from recommendation 4, page 4).

9. Commonwealth countries should allocate sufficient resources to establish and properly fund central authorities and law enforcement and other agencies dealing with asset confiscation and management. (Taken from recommendation 22, page 15 and recommendation 30, page 20).

10. Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the report. (Taken from recommendation 58, page 32).

COMMON LAW MODEL ON ANTI-MONEY LAUNDERING (AML) AND COMBATING THE FINANCING OF TERRORISM (CFT) LAWS

Paper by the Commonwealth Secretariat

1. In view of the changing global security scenario and novel strategies adopted by terrorists from time to time, the Commonwealth Secretariat, jointly with the UNODC, IMF and the World Bank, is currently drafting model legislative provisions on Money Laundering and the Financing of Terrorism. In October 2004 work began on drafting a model law for common law jurisdictions that reflects the revised Recommendations (40+9) of the Financial Action Task Force (FATF). In January 2005 a drafting group was formed consisting of legal, law enforcement, and financial sector experts from the participating institutions with assistance from legal practitioners in the United Kingdom.

2. A second group not involving the Commonwealth Secretariat has been drafting parallel civil law model legislative provisions. This drafting group consists of experts from the IMF, World Bank, UNODC, the Inter-American Drug Abuse Control Commission (CICAD) of the Organisation of American States and two European financial intelligence units.

3. Participants in the common law drafting group agreed to prepare a single joint model acceptable to the entire group, and that the draft be written in a comprehensive manner in plain English that could be adapted for use in a variety of common law jurisdictions. In addition, they agreed that the common and civil law models should be consistent with each other to the extent possible, given the differences in the two systems.

4. The first meeting of the drafting group was hosted by the Commonwealth Secretariat at Marlborough House in London in January 2005. The second and third meetings were hosted by the IMF at the Joint Vienna Institute in Vienna, Austria, in April and July 2005.

5. The draft AML/CFT model legislative provisions cover the following areas:

- Customer Due Diligence (CDD)
- Record-Keeping
- Submission of Suspicious Transaction Reports (STRs)
- Formation and powers of a Financial Intelligence Unit (FIU)
- Inclusion of 'Designated Non-Financial Businesses and Professions (DNFBPs)' in the AML/CFT framework

6. In addition, the model legislative provisions would encompass provisions on two other related laws: the first is criminalising money laundering and the financing of terrorism. This includes:

- investigative powers
- forfeiture and confiscation of instrumentalities and proceeds of crime
- freezing and restraint orders
- receivership orders
- civil forfeiture.

7. The second is mutual legal assistance, which includes foreign requests for restraining orders and confiscation orders and transmittal of confiscated assets.

8. It is expected that the common law AML/CFT drafting project will be completed by the end of calendar year 2005.

9. The model legislative provisions based on the common law tradition would be ideal for adaptation by Commonwealth countries and particularly helpful for smaller jurisdictions with limited resources. As Commonwealth countries are at various stages of development and have different socio-economic needs, the model legislative provisions would provide multiple variants so that the countries can adapt the provisions best suited to their requirement.

Justice and Good Governance Issues

COMMONWEALTH PRINCIPLES ON THE ACCOUNTABILITY OF AND THE RELATIONSHIP BETWEEN THE THREE BRANCHES OF GOVERNMENT

Paper by the Commonwealth Secretariat

Introduction

1. At their meeting in St Vincent and the Grenadines 2002, Commonwealth Law Ministers gave detailed discussion to the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence which was first discussed by them in Port of Spain in 1999. The Guidelines were on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights.

2. Law Ministers considered that the text required further work before an agreed statement of principles is submitted to the next Commonwealth Heads of Government Meeting (CHOGM). They then invited the Commonwealth Secretary-General to convene a small group of Law Ministers to work with the Commonwealth Secretariat to review and develop principles based on the Latimer House Guidelines and taking into account the discussions at the Law Ministers' Meeting.

3. The resulting text from the Ministerial Group was circulated to all Law Ministers before it was submitted to the CHOGM held in Abuja in December, 2003.

4. Heads of Government welcomed the contribution made by the Commonwealth Parliamentary Association (CPA), the Commonwealth Magistrates and Judges Association (CMJA), the Commonwealth Lawyers' Association (CLA) and the Commonwealth Legal Education Association (CLEA) to further the Commonwealth Harare Principles and adopted the Commonwealth Principles of the Accountability of and the Relationship Between the Three Branches of Government. **(Annex)**.

5. The Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government were launched at a ceremony held at Marlborough House, London, in May 2004.

Dissemination of the Principles

6. The Commonwealth Secretariat commenced its programme on disseminating the Principles by holding a Pan-African Forum in Nairobi, Kenya in April 2005. Participants comprised of representatives from the Executive, Legislative, Judiciary, the Opposition and civil society from Commonwealth African countries.

7. The Forum considered a wide range of issues including the relationship between the Judiciary and the Executive and their appropriate interaction; the independence of Parliamentarians; the proper exercise of Executive power; the role of national institutions and civil society; code of conduct for parliamentarians, and mechanisms for ethical conduct for the administration of justice; fighting corruption in the judiciary and parliament and the role of the media and freedom of information.

8. It was resolved by the Forum that their deliberations should provide guidelines and a framework for the development of action plans to implement the Principles in Africa.

9. The Principles will be disseminated in similar forums in the Asia, Caribbean and Pacific regions.

COMMONWEALTH PRINCIPLES ON THE ACCOUNTABILITY OF AND THE RELATIONSHIP BETWEEN THE THREE BRANCHES OF GOVERNMENT

Commonwealth Heads of Government warmly welcome the contribution made by the Commonwealth Parliamentary Association and the legal profession of the Commonwealth represented by the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association to further the Commonwealth Harare Principles.

They acknowledge the value of the work of these Associations to develop the Latimer House Guidelines and resolve, in the spirit of those Guidelines, to adopt the **Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government.**

Objective

The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.

I. The Three Branches of Government

Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

II. Parliament and the Judiciary

(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

(b) Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

III. Independence of Parliamentarians

(a) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.

(b) Criminal and defamation laws should not be used to restrict legitimate criticism of parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

IV. *Independence of the Judiciary*

An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret

and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

(a) judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

- equality of opportunity for all who are eligible for judicial office;
- appointment on merit; and
- that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;

(b) arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;
(c) adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;
(d) interaction, if any, between the executive and the judiciary should not compromise judicial independence.

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.

V. Public Office Holders

(a) Merit and proven integrity, should be the criteria of eligibility for appointment to public office;
(b) Subject to (a), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.

VI. Ethical Governance

Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

VII. Accountability Mechanisms

(a) Executive Accountability to Parliament

Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business.

Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.

(b) Judicial Accountability

Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

(c) Judicial review

Best democratic principles require that the actions of governments are open to scrutiny by the courts, to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

VIII. The law making process

In order to enhance the effectiveness of law making as an essential element of the good governance agenda:

- there should be adequate parliamentary examination of proposed legislation;
- where appropriate, opportunity should be given for public input into the legislative process;
- parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.

IX. Oversight of Government

The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process.

Steps that may be taken to encourage public sector accountability include:

(a) the establishment of scrutiny bodies and mechanisms to oversee government, enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances;

(b) government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

X. Civil Society

Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.

CURRICULUM DEVELOPMENT AND TRAINING IN LEGISLATIVE DRAFTING

Paper by the Commonwealth Secretariat

Introduction

1. At the meeting of Commonwealth Law Ministers in St Vincent and the Grenadines in November 2002, Law Ministers recognised the continuing problems in many Commonwealth countries in attracting, training, and retaining legal drafting staff. This has impacted adversely on the quality of legislation dealing with complex issues, and law reform programmes in countries. Law Ministers mandated the Commonwealth Secretariat to arrange shorter training courses to supplement in-house training.

The Short-Term Curriculum

2. A short-term curriculum to be taught over a 12-week period, was developed under the auspices of the Commonwealth Secretariat in November 2003: **Annex.** A workshop was then held for the Caribbean region in November 2003 where the curriculum was modified to suit the requirements of the region. A further outcome of that workshop was a decision that a short-term programme be established at the Cave Hill Campus of the University of the West Indies (UWI) in Barbados.

3. The Faculty of Law at UWI revived its LLM Legislative Drafting course towards the end of 2004. How the short-term curriculum can be integrated into the Legislative Drafting component of the LLM programme is currently under consideration.

4. For the Africa region, the short-term course will be established at the Ghana School of Law in January 2006. Heads of drafting offices from African Commonwealth countries met in Accra, Ghana, in June 2005 to examine the curriculum and lay down the road map for preparations for the launch of the course. The course will be funded for the first three years by the Commonwealth Secretariat through its CFTC fund with a view that by the end of that period the course will be self-sustaining.

5. The short-term course will be introduced to the Asia and Pacific regions with a view to establishing it in appropriate institutes or integrating it to existing programmes in law schools.

Consideration by Senior Officials

6. At their meeting in October 2004, Senior Officials discussed at length the shortage of drafters in developing Commonwealth countries and appealed to the Commonwealth Secretariat to develop training programmes for legislative drafters and support assignment of personnel to Attorneys-General offices and offices of Parliamentary Counsel taking advantage of the Commonwealth network.

7. In considering the problem of retention, Senior Officials noted that developing countries had considered imposing measures to retain the services of legislative drafters who benefited from assistance programmes. One such measure was a requirement to enter into a bond with the relevant Government obliging legislative drafters to serve a minimum time before they could leave the service or to repay the cost of the training they received.

Action for Law Ministers

8. Law Ministers may wish to endorse:

(a) the observations and requests made by Senior Officials to the Commonwealth Secretariat to develop training programmes for legislative drafters;

(b) the recommendation by Senior Officials for countries to consider imposing measures to retain the services of legislative drafters who benefit from assistance programmes.

ANNEX

A CURRICULUM FOR TRAINING LEGISLATIVE DRAFTING

Professor Keith Patchett

A. Introduction

1. At the Meeting of Commonwealth Law Ministers in St Vincent in November 2002 concern was once again expressed about the high turnover of staff in legislative drafting and about the expense of some existing arrangements for training. Suggestions were made that more short-term training should be made available.

2. The following curriculum is designed to provide foundation training for relatively new entrants to drafting offices that can be delivered in the equivalent of 3 months' full time study. It derives from the author's experience in organising and delivering full and part time courses of lengths varying from 6 months to 2 weeks and authoring and assessing for the Commonwealth Distance Training Course in Legislative Drafting, a joint initiative of the Commonwealth Secretariat and the Commonwealth of Learning.

B. Underlying considerations

3. Training of new entrants to anything like full competence cannot be provided in a single short course. Such competence is achieved only with experience from performing the job that is acquired over a period of years. The aim of a foundation course, as the term implies, should be to lay a solid grounding in those matters that permit useful drafting tasks to be confidently and reliably assigned to tyro drafters sooner. Accordingly, the objective should be to develop competence in the basic essentials of drafting, rather than to expose the trainees to an academic study of the subject.

4. The course must be concerned, therefore, with developing those skills, techniques and know-how that are the fundamentals of legislative drafting and basic to the actual practice of drafting. The learning focus throughout should be on acquiring the *practical* skills and sound methodologies for performing the most common and important drafting tasks, rather than covering the drafting of all types of legislation.

5. The curriculum should enable trainees to learn *what* to do, *when* to do it, importantly *how* to do it, but also *why* it is best done in that way. So, it should comprise an integrated programme to provide knowledge about drafting approaches and techniques and to develop the skills necessary to put those into effect.

6. A drafting course should reflect best practice in the drafting offices from which the trainees are drawn. Accordingly, the course content should be the result of close co-operation between the trainers and senior members of those offices. Every training course should be thoroughly evaluated after its completion, not least by the drafting office from which a trainee has been drawn, with a view to improving and refining future courses.

7. Preferably, a foundation course should be structured as a series of building blocks that:

- introduce the trainees systematically to analytical methods, composition skills and drafting approaches and techniques; and

- then extend and reinforce these through constant practical drafting exercises replicating the most common and important drafting functions in ways that approximate as closely to actual drafting practice as is possible in a training setting.

8. The emphasis should be on learning by doing, i.e. through undertaking frequent drafting assignments and activities. Wherever possible, these should be individually moderated and subjected to detailed feedback given, where possible, in individual tuition sessions. This replicates to an extent the way in which pupil drafters learn on the job from their seniors.

9. Such an approach calls for the number of participants on a course to be small enough to permit this regular individual tuition and feedback on personal progress. It also requires this tuition to be provided by persons with drafting experience who are able to allocate the necessary time to undertake regular training sessions. The whole training programme should be co-ordinated by a training director who is responsible for overseeing the progress of the individual participants.

10. Drafting assignments should be specifically devised to enable trainees to put into effect approaches and techniques to which they have been introduced and to provide opportunities to practise particular drafting skills, as well as to inculcate sound drafting values.

11. Trainees should be introduced to drafting methodology and techniques by working through a structured set of materials presented to them by using the fullest range of teaching and information technology available (e.g. hard copy, electronic data, "show and tell" instruction, workshop-style discussion). They should be given every opportunity to become competent in using computers for producing documents and for research and conversant with the importance and impact of computer-assisted drafting, especially where that is employed in their offices.

12. Where possible, the materials should include supporting course notes and illustrative examples or precedents that demonstrate sound practice, as well as any manuals or drafting directives in use in their offices. Ideally, these should be made available in a format that will continue to be of value, as a reference source, after the completion of the training.

C. A Suggested Course Syllabus

13. The following syllabus outlines the topics that ideally should be incorporated into a foundation training course. It identifies specific aspects that justify particular attention. By no means equal weight can be given in a training course to each of the topics. Greater emphasis should be given to those that are more central to the drafting process, and time constraints will necessarily mean that less attention is possible for others. In practice, acquisition of the basic skills of analysis and composition (Parts IV to VIII below) merit more sustained attention than their application to specific types of legislation (Parts IX and X). Further, the order in which the topics should be dealt with should not follow that set out below. If trainees are to concentrate on drafting assignments, they must engage with the parts of the syllabus concerned with compositional skills (Parts V to VII) from the outset of the training.

14. The syllabus does not set out to indicate which training techniques might be best suited to the included topics. However, in most instances, a topic is best introduced either by requiring the trainees first to undertake prescribed reading that can be followed by group discussion or by group exposition by the trainer, subsequently confirmed by appropriate reading. The materials developed for the Commonwealth Distance Training Course in Legislative Drafting are designed to be used in either of these ways, and deal with most of the listed topics (but not topics 40 and 42-44). The short drafting Exercises and the much fuller Drafting Projects in that Course have been designed to give drafting practice and experience in respect of those topics that require the application of drafting skills.

A Suggested Foundation Course Syllabus

I. Introduction

1. What is legislation? What is the function of legislation?
2. Legislative drafting in Commonwealth systems
   - characteristics of Commonwealth drafting
   - centralised drafting offices
3. The role and responsibilities of Legislative Counsel
   - an amanuensis or proactive role?
4. Types, hierarchy and structure of legislative instruments
   - statutory terminology
5. Using information technology in drafting
   - computer-assisted drafting and research

II. The drafting process

6. Objectives in the preparation of written law
   - e.g. communication, clarity, conciseness, consistency, certainty, comprehensiveness, comprehensibility
7. The organisation and operation of drafting services
   - effects of time constraints
8. The relationship between the client Department and Legislative Counsel
9. The preparatory stages: policy formation, impact analysis
   - assessing policy options
10. Drafting instructions: their preparation and what to do about defective instructions
    - the role of Legislative Counsel in clarifying and refining instructions
11. Steps in the drafting process
    - analysis, research, consultation, legislative design, composition and scrutiny
    - managing the drafting process

III. Drafting constraints

12. The rules of interpretation of legislation and their influence upon legislative drafting
    - how interpretation rules are to be taken into account
13. Constitutional constraints
    - supremacy of the Constitution; parliamentary sovereignty; distribution of - the legislative power; separation of powers; judicial review; discretionary powers;
    - compliance with Bills of Rights and other human rights requirements;
    - access to official information, etc
14. Working under Interpretation legislation
    - complying with general statutory rules on construction and application of written law
15. Constraints from international treaties
    - complying with treaty provisions capable of having domestic application

IV. The legislative process

16. Stages in the legislative process
    - submissions for Cabinet approval
    - settling the legislative programme and timetable
    - consultations
    - parliamentary stages

17. The role of Legislative Counsel during the parliamentary stages

V. *Legislative syntax*

18. Principles of legislative expression – why we draft we draft as we do
19. Plain language drafting
    - techniques for achieving accessible and directly expressed text
20. Basic legislative syntax - subjects, predicates, verbs, modifiers, sentence structuring
    - techniques for writing grammatical and readable sentences
21. Punctuation

VI. *Legislative style*

22. Essentials of a good style
23. Word choice
    - broad, indeterminate and vague terms
    - avoidance of ambiguous and archaic expressions
24. Practices to avoid or that require special care
    - nominalisation; front-loading; phrase-splitting; dangling and squinting modifiers
    - provisos
    - "and" and "or"; singulars and plurals
    - gender neutral language
    - time, distance and numbers; etc
25. Referential legislation
    - incorporation by reference
    - cross-referencing

VII. *Legislative structure and arrangement*

26. Arrangement of provisions
    - factors affecting legislative structuring
27. Structuring legislation
    - when and how to divide into sections, subsections, paragraphs, Parts, Schedules, etc.
28. Linking legislative provisions
    - linking techniques
29. Legislative apparatus
    - section notes, headings, tables, table of sections, etc.
30. Devising a legislative plan
    - methodology for structuring legislation

VIII. *Drafting preliminary and final provisions*

31. Long and short titles, preambles, enacting formulae
32. Purpose clauses
33. Commencement clauses and duration provisions
34. Definitions and interpretation provisions
35. Application provisions
    - when required
    - extra-territorial legislation, retrospective provisions

36. Delegating legislative powers
    - matters to be assigned to subsidiary legislation
    - deciding on the breadth of the powers
37. Repeal and amendment provisions
    - substantive and consequential amendments
    - structuring amendment bills
    - explaining the effect of repeals and amendments
38. Saving and transitional provisions
    - when required
    - retrospective effects
39. Schedules
    - when useful

IX. *Substantive provisions*

40. Financial provisions
    - appropriation and tax legislation
    - Government borrowing, guarantees and lending
    - drafting taxing provisions
41. Compliance provisions
    - drafting offences, evidence, criminal procedure provisions
    - alternatives to penal regulation
42. Statutory authorities and corporations
    - legal personality
    - drafting incorporation provisions
43. Licensing and registration
    - drafting standard components
44. Legislation implementing international standards and treaties
    - methodology for determining which treaty provisions require statutory implementation
    - direct and indirect implementation

X. *Drafting subsidiary legislation*

45. Preparatory procedures
    - avoiding *ultra vires* instruments
46. Form and content of subsidiary instruments
    - characteristic features
47. Parliamentary scrutiny and post-enactment procedures
    - when to include

D. Training delivery

15. Ideally, foundation training should be provided for those who have already been assigned to drafting duties and have been exposed for a time to the drafting process and the work of a drafting office. This enables the trainers to proceed on reliable assumptions about the trainees' knowledge of what the work entails and of their future responsibilities. Trainees are more likely to benefit from formal training if they have become familiar with the role and operations of their drafting office. A group that mixes such officers with other participants who have no drafting work experience or who may not be engaged in the work when the training is completed will not share the same footings and may not have the same motivation. This ideal is not always achievable, but better results appear to be obtained when all the participants are being trained specifically to work as drafters in government

service. This helps confirm that training is to be seen as an integral part of the development of such persons.

16. For similar reasons, trainees, on returning from training, should be given as full as possible opportunities to put into effect what they have learnt. Drafting offices should see this as an important responsibility. Experience is the best teacher and immediate experience is essential to consolidate and reinforce what has been learnt on a formal course. If this practice is to be followed, those delivering the training have a reciprocal responsibility to ensure that the training they provide equips the trainees to perform their duties consistently with the practice in that office.

17. Delivery of a foundation course may be organised in different ways.

(a) In-house

18. Those drafting offices that are staffed with an adequate number of senior drafters may be in a position to provide all the necessary training they require from internal resources. It is helpful then if an experienced drafter is charged with the responsibility for organising training (for all levels of staff), in particular for ensuring that the individual trainees on the foundation programme cover the core elements of the training syllabus. Knowledge transfer can be achieved by working through suitable course materials prepared for the office and in training sessions run by the more experienced drafters and appropriately qualified persons from outside the office. To cover the course syllabus, these may have to be provided at regular intervals, programmed with the trainees' general work commitments, over a period of several months. A positive benefit is that the learning process can be integrated with actual drafting assignments suitable for the trainees' stage of development. By working on these alongside and under the supervision of a senior drafter, trainees can learn their practical skills on-the-job under the constraints of actual practice.

19. Such arrangements make considerable demands upon the personnel resources of a drafting office and may be justified where the size of the office calls for a steady flow of new officers requiring training. They are also heavily dependent upon the time, willingness and patience of senior drafters to provide detailed feedback, advice and guidance. Many Commonwealth drafting offices are not well placed to deliver training in this form.

(b) Full-time courses

20. In principle, it is feasible to deliver the syllabus in a full-time course lasting for a period in the order of 12 weeks, provided that it is concerned exclusively with drafting. Such a course would need to be instructor-led. By way of illustration, the following is a structure that has been successfully used:

(1) A first module, lasting the first 4 weeks, aims at providing the **basic elements** of analysis, methodology, composition skills and essential knowledge of drafting processes (Parts I, II, V-VI).

(2) The second, in the following 3-4 weeks, is concerned with **expanding** these, in particular to take in more demanding skills, the drafting of particular statutory components and to begin to take account of the constraints on drafters (Parts III, IV, VII & VIII).

(3) The third, in the final 4-5 weeks, places the emphasis upon **application** of what was derived from the earlier modules to new circumstances (Parts IX and X) as well as revisiting and reinforcing the factors that influence actual practice.

21. A full-time course permits the following training methods to be used:

- presentations by the instructor(s), in a seminar setting, on the processes and fundamental principles of legislative drafting, with heavy use of legislative examples and precedents, designed to demonstrate and develop good drafting standards;

- interactive group analyses of specific legislative proposals/problems and critiques of legislative texts, designed to improve critical and analytical skills;

- regular (e.g. twice weekly) practical drafting exercises, involving redrafting of earlier legislation or preparing a range of short Bills or instruments on instructions. These should be devised and designed to integrate with the seminar work and to develop compositional and analytical skills;

- individual discussion and tuition with an instructor involving an appraisal of each drafting exercise, designed to strengthen basic drafting skills;

- class critiques of exercise drafts, designed to develop the capacity to give and receive criticism and learn from other participants' approaches;

- simulated "inter-departmental" discussions/"consultation" concerning a legislative project, designed to high-light e.g. constitutional constraints or policy considerations that may influence the content of proposed legislation and the choice of drafting approach;

- individual study of a course and legislative materials to prepare for and reinforce presentations and drafting exercises;

- occasional seminar classes with external legislative practitioners/experts and visits to institutions and bodies concerned with the legislative process.

22. Courses of this kind are intensive and demanding on both instructors and trainees. Good course materials are needed, although substantial use can be made of those available from the Commonwealth Distance Course. Contact hours are greatly in excess of those for typical academic courses. The drafting assignments, which should become progressively more exacting, are time-consuming if the trainees are to follow good practice. Unless the number of participants is small, a single instructor may not suffice. In any case, the numbers should be restricted (e.g. to a maximum of 10-12) to allow individualised feedback on drafting assignments.

23. If participants have to reside away from their homes, this mode of training tends to be expensive. Obviously, the trainees are unavailable to their offices throughout the course and may be required to live away from their homes.

(c) Distance training

24. At present no training institution is offering a Commonwealth-wide distance course. However, the course programme and materials are obtainable on licence from the Commonwealth of Learning by any training institution that wishes to institute this form of training in their region. It is designed to facilitate part-time self-learning while engaged in drafting on the job. It allows flexibility as to personal start dates and, as trainees remain in their offices, it is a more cost-effective form of training.

25. The COL course covers most of the suggested syllabus. It includes a series of drafting projects, some or all of which the trainees are expected to submit for assessment and personalised feedback. Provided that trainees are permitted (indeed guaranteed) adequate and regular time off, in addition to their own personal time, to work on the course, it can be completed in 6 –9 months.

26. Learning in this way calls for strong personal motivation and commitment, which can be hard to maintain. Accordingly, completion is more likely to occur if the delivery agency institutes effective support arrangements. These include a central director with considerable drafting experience to co-ordinate the programme, to maintain common standards for all participants and to oversee their progress. The director should also be responsible for the assessment and feedback of the course work that trainees would be required to submit. Essential too are adequate links between the institution and the individual trainees, such as e-mail and other electronic links, and for distribution of course materials, trainees' drafting assignments and trainers' feedback, and generally for keeping in regular contact. Local mentors should be identified for each of the individual trainees, to provide encouragement and guidance, and if suitably qualified, advice on the work on the course and the drafting projects.

(d) Combined distance and institutional training

27. Using an arrangement widely used for post-qualification learning, a foundation course may be offered through a combination of distance and institutional arrangements. Trainees would remain for the most part in their offices carrying out their normal duties, but they would be expected to work on a distance programme managed by a training institution. This would be coupled with a requirement to participate in short intensive instructor-led training organised by the institution at intervals in a residential centre. Such a scheme increases motivation, as well as providing the trainees with face-to-face guidance on their progress and regular opportunities to explore the more difficult drafting tasks with an experienced instructor.

28. This approach could offer flexibility as to individual start-dates and to the length of the programme but it can be expected that the training might last on this part-time basis between six and eight months. The cost savings compared with full-time courses are significant but rather less that what can be achieved by a completely distance course. The advantages of this scheme are that the trainees remain available to their office, continue to work for the most part in a drafting environment and are able to spread their study over a sufficiently long period to begin to apply the content of the programme to the live projects to which they are assigned. However, similar considerations concerning the provision of good individual support (see para.25, above) apply here too.

(e) Conclusion

29. A foundation course in legislative drafting should be viewed, by governments, drafting officers and trainees, as an essential step in equipping new entrants to perform this exacting and specialist activity, and not as a voluntary add-on. Those assigned to drafting duties should have the expectation of receiving this grounding as a matter of course. Some newcomers to drafting are predisposed against the work typically through a lack of familiarity with what it entails and fears about its apparent complexities and intellectual demands. A guarantee of early training of the kind outlined here may go some way to dispel such inhibitions.

BUILDING INTEGRITY AND COMBATING CORRUPTION IN COMMONWEALTH JUDICIARIES – AN UPDATE

Paper by the Commonwealth Secretariat

Introduction

1. Law Ministers will recall that at their meeting in St Vincent and the Grenadines in 2002, they considered the conclusions and recommendations contained in the report of the Commonwealth Judicial Colloquium on Combating Corruption within the Judiciary which was held in Limassol, Cyprus in June 2002.

2. Law Ministers will further recall that the Colloquium conclusions and recommendations cover a range of subjects and areas but those of importance are:

The Colloquium:

i. recommends the adoption of guidelines on judicial ethics as a means of underpinning the integrity of the judiciary and promoting better public awareness of the requisite ethical standards. Such guidelines should be formulated by judicial officers and kept under constant review by them. Judicial officers should take responsibility for ensuring compliance with those guidelines;

ii. urges all national and international legal professional organisations within the Commonwealth to promote anti-corruption programmes for the legal profession;

iii. encourages the formulation of national strategies aimed at eliminating conflicts in interest and corrupt practices within the judiciary;

iv. recognising that transparency assists in combating corruption, encourages judicial officers and their court staff to foster greater public awareness of the court's operations, role and functions;

v. place on record its support in principle for the Latimer House Guidelines and their footnotes as they relate to the judiciary; and

vi. notes that traditional or customary courts and other tribunals recognised in some national constitutions make a positive contribution to the administration of justice. The public that is served by such bodies should continue to expect and receive fair and just resolution of their disputes.

3. The Colloquium also expressed the view that in considering action within courts:

vii. judicial training programmes should be available and should include training on ethical and corruption issues. For newly appointed judicial officers the practice of mentoring should be encouraged; and

viii. there should be greater interaction between judicial officers at all levels nationally, regionally, and internationally in order to promote the best judicial practice.

Activities

4. In furtherance of the Limassol Conclusions, the Commonwealth Secretariat by its Legal and Constitutional Affairs Division and the Commonwealth Magistrates and Judges Association conducted a workshop on Judicial Ethics and Anti-Corruption in June 2003 for judicial trainers in the Caribbean. Amongst the recommendations of the workshop are that appointments to the magistracy and terms and conditions of service for magistrates should be made by a body that is independent of the executive branch of the government. They also recommended that magistrates had a duty to be accountable to the public they serve, and each individual magistrate is responsible for upholding high ethical standards. Participants recognised that support staff have a vital role to play in the smooth running of the administration of justice and greater attention should be given to the training needs of support staff.

5. Taking a holistic approach to the legal sector, a workshop for the judiciary, the legal profession, and court staff in Zanzibar was conducted in June 2004 on Integrity in the Courts. In this workshop it was emphasised that the terms and conditions of service needed to be improved both for the judiciary and the court staff in order to smooth and prevent them falling into temptations which might compromise their integrity in the administration of justice.

6. Also in June 2004, a workshop was held in Mauritius on Combating Corruption and Enhancing the Integrity of the Judiciaries of the SADC region. Besides dealing with substantive issues relating to judicial independence, codes of conduct and separation of powers, the workshop discussed practical issues such as challenges in presiding over corruption cases, the importance of mentoring for newly appointed judicial officers and the training of judicial mentors, delay and time management and judgment writing.

7. Questionnaires have been developed to canvass information from countries on issues such as integrity of the court, institutional capabilities and vulnerabilities, continuing judicial education, transparency and accountability. A survey instrument is being developed on the terms and conditions of service for Judges.

8. Needs assessment missions on the judiciary and the legal sector have been carried out in a number of countries.

9. Future activities revolve around specific requests from countries for building capacity for the judiciary.

Legal Development Issues

UPDATE ON THE ESTABLISHMENT OF FINAL / REGIONAL APPELLATE COURTS

Paper by the Commonwealth Secretariat

Background

1. The evolving jurisprudential landscape in the Commonwealth has been of significant importance to the Commonwealth Secretariat.

2. Commonwealth Law Ministers will recall that at their Meeting in St Vincent and the Grenadines, in November 2002, the matter of regional and final appellate Courts was discussed. These Courts, at that time, were at various stages of readiness in replacing the appellate jurisdiction of the Judicial Committee of the Privy Council (JCPC) as the final Court of Appeal.

3. Law Ministers will again recall that they acknowledged the challenges confronted by those member countries who were faced with this transitional process. It was further recognised that within this judicial evolutionary progression, there would be the need to ensure that traditional standards of the judiciary were maintained on one hand, and on the other, to foster the development of the jurisprudence of the region in question. Note was also taken of the fact that the emergence of regional Courts was integral to the various treaties of regional association and their responsiveness to the realities of an increasingly globalised world

Activity

4. In light of the foregoing, Law Ministers will remember that they mandated the Secretariat to convene an Expert Group to examine the issues and processes involved in the transition from the JCPC to the respective regional Court as the final Court of Appeal. That Expert Group Meeting was held in London from 10 to 13 June, 2003 and was charged with the following mandate, which it fulfilled:

- an examination of the steps other regions and countries have taken towards removal of jurisdiction from the JCPC;
- a pronouncement on the processes involved in cutting ties with the JCPC;
- an examination of the effects on national constitutions for those Member Countries which face constitutional requirements, to effect such a transition;
- making recommendations as appropriate; and
- consideration of any future implications arising from the emergence of regional/final appellate courts

5. Since that meeting of Experts, profound changes in the Commonwealth have occurred. The Supreme Court of New Zealand became a reality in July, 2004; the Caribbean Court of Justice (CCJ) of the Caribbean Community (CARICOM) was inaugurated in April, 2005; the Justices to the Court of Justice of the Economic Community of West African States (ECOWAS) have been appointed; and there have been fresh appointments to the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA).

6. The Legal and Constitutional Affairs Division has:

- engaged in an ongoing dialogue with the Court of Justice of COMESA and the International Court of Justice since 2003;
- visited the newly inaugurated Supreme Court of New Zealand in November 2004 and held valuable discussions with its Justices who emphasised the importance of sharing such experiences, particularly for Justices appointed to newly established Courts;
- commenced constructive relations with the Court of Justice of ECOWAS since 2004; and
- initiated enriching discourse with the Supreme Court of Canada in 2005.

7. The activity to continue this mandate will see a coming together of Justices and Registrars of the Supreme Courts of New Zealand and Canada; the High Court of Australia and the regional Courts of the CCJ, COMESA and ECOWAS early in 2006.

8. The Commonwealth Secretariat will, at the conclusion of these activities, produce an administrative guide to embody best practice.

IMPLEMENTING INTERNATIONAL ENVIRONMENT INSTRUMENTS IN SMALL STATES

Paper by the Commonwealth Secretariat

Background

1. Recalling the 1999 Commonwealth Heads of Government Meeting (CHOGM) where the Secretariat was mandated to extend assistance to member countries regarding the implementation of international conventions relating to global warming and biological diversity. Recalling also the 2002/2004 Meetings of Law Ministers of Small Commonwealth Jurisdictions where the Secretariat was further requested to:

- assist member countries to implement the relevant environmental conventions/agreements and to build awareness for the legislative arrangements needed in implementation;
- develop legislation on the protection of coastal resources, regulation of cruise ship waste disposal and management; and
- encourage, as appropriate, collaboration at the regional level.

The Commonwealth Secretariat, in 2005, convened a cross-regional small states Seminar on the Implementation of International (Environment) Instruments and Policy Development, which sought to highlight the obligations of small states under the key environmental conventions; to give guidance as to the implementing legislation required; and to ascertain the difficulties being experienced by these states in giving effect to these conventions. There was unanimous support for a programme of assistance that would secure the strengthening of existing Environmental Protection Acts so as to facilitate the implementation of international and regional instruments.

2. Ministers are here invited to consider endorsing the capacity-building initiatives outlined in this paper aimed at assisting small and developing states to implement the provisions of pertinent environmental conventions.

Summary of International Environment Agreements

3. There has been, to date, a plethora of international environment agreements for the protection of the environment. These include the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITIES), the 1992 United Nations Framework Convention on Climate Change(UNFCCC), the 1992 Convention on Biological Diversity (CBD) and the 1994 Convention to Combat Desertification (UNCCD), to name but a few.

4. UNCLOS is a complex and comprehensive instrument that is concerned with the conservation and equitable utilisation of the biological and mineral resources of the seas/oceans and the protection of the environment. It articulates the rights and duties of State Parties in respect of the various zones (internal waters, territorial sea, exclusive economic zone and high seas), and gives special recognition to the interests of developing and landlocked states (transfer of science and technology etc.)

5. CITIES is an important international treaty that seeks to control or prevent international commercial trade in endangered species, or their products. It covers both plant and animal species. It provides sanctions for non-compliance and has thus been noted as a means through which the CBD's aims can be prosecuted. [1]

6. The CBD is a framework treaty which takes a broad, all-encompassing approach to environmental management, and has three main objectives: conservation, sustainable use and benefit-sharing. It is therefore complimentary to other environmental conventions. The Rio principles of *precautionary action*, and *common but differentiated responsibility* are here explicitly noted and applied. State Parties to the Convention have adopted the *ecosystem approach* which seeks to reconcile the need for environmental conservation with the concern for economic development. The need to undertake an environmental impact assessment of all development projects is specifically called for.

7. The objective of the UNFCCC is to stabilise greenhouse gas (GHG) emissions "at a level that would prevent dangerous anthropogenic interference with the climate system." All State Parties are required to undertake inventories of GHG emissions, sustainably manage ecosystems, integrate climate change considerations into social, economic and environmental policies and so forth. Developed State Parties have more extensive commitments, and are specifically required to reduce GHG emissions. The 1997 Kyoto Protocol, now in force, sets quantified objectives for emissions limitation by developed state parties.

8. The UNCCD seeks to address the problem of desertification which is defined as "land degradation in arid, semi-arid and dry sub-humid areas resulting from various factors, including climatic variations and human activities." The emphasis is on the management of drainage basins, soil conservation and Early Warning Systems. Its general commitments relate to exchange of information, research and capacity building and it calls for Regional and Sub-regional Action Programmes based on participation/partnership and decentralisation of management activities.

9. The latter three instruments were conceived and/or endorsed at the United Nations Conference on Environment and Development (UNCED) held in 1992 in Brazil. The principles laid down in the Rio Declaration and Agenda 21, the programme of action which addresses issues ranging from poverty alleviation to desertification, was, as is often noted, intended to promote the implementation of the concept of *sustainable development* which is both explicitly and implicitly given effect to in those instruments.

10. Inherent in the concept of *sustainable development* is the need to preserve, conserve and manage the natural environment for the benefit of future generations. This calls for the development of integrated and comprehensive legislation, plans and policies. The terms conservation and preservation, although often used interchangeably, are however distinguishable. Conservation implies the protection of the environment in a manner that does *not* preclude the use of its resources. Preservation however is an exclusively protectionist concept, and may be justified where an ecosystem has been so severely damaged that any use whatever may impair its restorative capacity.

11. Small and developing states have been internationally recognised as being a "special case" for sustainable development given their economic and environmental vulnerabilities. Protecting/moderating the use of the fragile ecological resources of small states is of crucial importance, not only to the development prospects of those states, but in the wider sphere of international co-operation for sustainable development.

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[1] Birnie and Boyle, *International Law and The Environment* 2nd Edition, p. 626

12. The *Mauritius Strategy* endorsed at the 2005 Mauritius International Meeting on Small Island Developing States, requires the international community, and accordingly thereto the Commonwealth Secretariat, to commit itself to facilitating, "the development of human resources and institutional capacity within small island developing states for the implementation of the obligations of multilateral environmental agreements."[2]

13. As is evident from the attached List of State Parties to International Environment Instruments **(Annex)**, many Commonwealth small states have ratified/acceded to the key environmental conventions. These states have however, often not implemented (or not fully implemented) the provisions of these agreements[3] due to resource and capacity constraints. The Commonwealth Secretariat may provide much needed assistance to these states in developing and updating laws for the protection of the environment.

Conclusions and Submissions

14. Developing countries and small island developing states belonging to the Commonwealth are by virtue of a history of collaboration in capacity-building initiatives well placed to participate in programmes complementary to other existing international efforts.[4] The Commonwealth Secretariat, as part of its mandate to assist countries to negotiate and implement international conventions/agreements and to formulate and implement national policies for sustainable development, is well placed to offer legal and technical assistance to these countries.[5]

15. Thus, Law Ministers are asked to examine and endorse the capacity-building initiatives that could be developed in the following areas:

- the sensitisation of member countries to become State Parties to relevant conventions, both international and regional;
- the development of comprehensive model legislation and regulations to guide member states' implementation of international environment instruments, in particular, that which relates to the protection of coastal resources, the regulation of pollution/wastes, biodiversity and bio-safety;

also member states should be urged to collaborate at the regional level with the aim of further harmonising their laws and strategies in keeping with their international obligations under the relevant instruments.

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2 A/CONF.207/CRP7, para. 85(h)

3 Commonwealth Secretariat Report on the Commonwealth Seminar on the implementation of International Environment Instruments and Policy Development, pps. 3 and 10

4 LMSCJ(04)5

5 *Id*

PARTIES TO CONVENTIONS FOR THE CONSERVATION AND MANAGEMENT OF THE ENVIRONMENT AND RELATED AGREEMENTS

		1992 Convention on Biological Diversity	Cartagena Protocol on Biosafety of 2000	2004 Treaty on Plant Genetic Resources	1994 UN Convention to Combat Desertification	UN Framework Convention on Climate Change	1997 Kyoto Protocol to UNFCCC	Ramsar Convention on Wetlands of 1971	1972 World Heritage Convention	Conv on Conservation of Migratory Species	1982 UN Convention on the Law of the Sea	Agreement relating to Part XI of UNCLOS	Agreement pursuant to UNCLOS	1973 CITIES
	COUNTRIES													
1	Antigua & Barbuda	R	R		R	R	R		At		R			Ac
2	Australia	R		S	R	R	S	R	R	R	R	R	R	R
3	The Bahamas	R	R		Ac	R	Ac	R			R	R	Ac	Ac
4	Bangladesh	R	R	R	R	R	Ac	R	At		R	Ac		R
5	Barbados	R	Ac		R	R	Ac		At		R	SP	Ac	Ac
6	Belize	R	Ac		Ac	R	Ac	R	R		R	S		Ds
7	Botswana	R	R		R	R	Ac	R	At		R	Ac		Ac
8	Brunei Darussalam				Ac						R	P		Ac
9	Cameroon	R	R	S	R	R	Ac		R	R	R	R		Ac
10	Canada	R		R	R	R	R	R	At		R	R	R	R
11	Cyprus	R	Ac	R	Ac	R	Ac	R	At	R	R	R	Ac	R

		1992 Convention on Biological Diversity	Cartagena Protocol on Biosafety of 2000	2004 Treaty on Plant Genetic Resources	1994 UN Convention to Combat Desertification	UN Framework Convention on Climate Change	1997 Kyoto Protocol to UNFCCC	Ramsar Convention on Wetlands of 1971	1972 World Heritage Convention	Conv on Conservation of Migratory Species	1982 UN Convention on the Law of the Sea	Agreement relating to Part XI of UNCLOS	Agreement pursuant to UNCLOS	1973 CITIES
12	Dominica	R	Ac		Ac	Ac	Ac		R		R			Ac
13	Fiji	R	R		Ac	R	R		R		R	R	R	Ac
14	The Gambia	R	R		R	R	Ac	R	R	R	R			Ac
15	Ghana	R	Ac	R	R	R	Ac	R	R	R	R			R
16	Grenada	R	R		Ac	R	Ac		At		R	SP		Ac
17	Guyana	R			Ac	R	Ac		At		R			Ac
18	India	R	R	R	R	R	Ac	R	R	R	R	R	Ac	R
19	Jamaica	R	S		Ac	R	Ac	R	At		R	SP		Ac
20	Kenya	R	R	Ac	R	R	Ac	R	At	R	R	S	Ac	R
21	Kiribati	Ac			Ac	R	Ac		At		Ac	P		
22	Lesotho	R	Ac		R	R	Ac	R	At		S			R
23	Malawi	R	S	R	R	R	Ac	R	R		S			Ac
24	Malaysia	R	R	Ac	R	R	R	R	R		R	P		Ac
25	Maldives	R	Ac		Ac	R	R		At		R	R	R	
26	Malta	R		S	R	R	R	R	At	R	R	R	Ac	Ac
27	Mauritius	R	Ac	Ac	R	R	Ac	R	R	R	R	P	Ac	R
28	Mozambique	R	R		R	R	Ac	R	R		R	Ac		Ac

		1992 Convention on Biological Diversity	Cartagena Protocol on Biosafety of 2000	2004 Treaty on Plant Genetic Resources	1994 UN Convention to Combat Desertification	UN Framework Convention on Climate Change	1997 Kyoto Protocol to UNFCCC	Ramsar Convention on Wetlands of 1971	1972 World Heritage Convention	Conv on Conservation of Migratory Species	1982 UN Convention on the Law of the Sea	Agreement relating to Part XI of UNCLOS	Agreement pursuant to UNCLOS	1973 CITIES
29	Namibia	R	R	R	R	R	Ac	R	At		R	SP	R	Ac
30	Nauru	R	Ac		Ac	R	R		R		R	P	Ac	
31	New Zealand	R	Ac		Ac	R	R	R	R	R	R	R	R	Ac
32	Nigeria	R	R	S	R	R	Ac	R	R	R	R	SP		R
33	Pakistan	R	S	Ac	R	R	Ac	R	R	R	R	p		Ac
34	Papua New Guinea	R			Ac	R	R	R	At		R	p		Ac
35	St. Kitts & Nevis	R	Ac		Ac	R			At		R			Ac
36	St. Lucia	Ac		Ac	Ac	R	R	R	R		R		S	Ac
37	St. Vincent & The Grenadines	Ac	Ac		R	R	R		R		R			Ac
38	Samoa	R			Ac	R	R	R	At		R	P	R	Ac
39	Seychelles	R	R		R	R	R	R	At		R	R	R	Ac
40	Sierra Leone	Ac		Ac	R	R		R	R		R	P		Ac
41	Singapore	R			Ac	R					R	P		Ac
42	Solomon Islands	R	Ac		Ac	R	R		Ac		R	P	Ac	
43	South Africa	R	Ac		R	R	Ac	R	R	R	R	R	Ac	R

		1992 Convention on Biological Diversity	Cartagena Protocol on Biosafety of 2000	2004 Treaty on Plant Genetic Resources	1994 UN Convention to Combat Desertification	UN Framework Convention on Climate Change	1997 Kyoto Protocol to UNFCCC	Ramsar Convention on Wetlands of 1971	1972 World Heritage Convention	Conv on Conservation of Migratory Species	1982 UN Convention on the Law of the Sea	Agreement relating to Part XI of UNCLOS	Agreement pursuant to UNCLOS	1973 CITIES
44	Sri Lanka	R	R		Ac	R	Ac	R	At	R	R	SP	R	Ac
45	Swaziland	R		S	R	R					S	S		Ac
46	Tonga	Ac	Ac		Ac	Ac			At		Ac	P		
47	Trinidad & Tobago	R	Ac	Ac	Ac	R	R	R	R		R	SP		Ac
48	Tuvalu	R			Ac	R	R				R	P		
49	Uganda	R	R	Ac	R	R	Ac	R	At		R	SP		Ac
50	United Kingdom	R	R	R	R	R	R	R	R	R	Ac	R	R	R
51	United Republic of Tanzania	R	Ac	Ac	R	R	Ac	R	R	R	R	R		R
52	Vanuatu	R			R	R	Ac		R		R	P		Ac
53	Zambia	R	Ac	S	R	R	S	R	R		R	SP		Ac

= Small States R=Ratification At=Acceptance Ap=Approval Ac=Accession S=Signature

Ds=Declaration of succession P=Consent to be bound SP=Simplified Procedure

UPDATE ON DEVELOPMENTS ON THE COMMONWEATLH LAW BULLETIN

Paper by the Commonwealth Secretariat

BACKGROUND

1. ***The Commonwealth Law Bulletin***, first published in 1974, is the flagship publication of the Legal and Constitutional Affairs Division (LCAD). A comprehensive periodical of the law and legal affairs, *The Bulletin* provides essential reading for judges, Attorneys General, Law Ministers, law reform agencies, academics and private practitioners and others who must keep abreast of the law and legal developments. *The Bulletin* also helps foster harmonised approaches to emerging legal issues throughout the Commonwealth. In a legal literature environment that is increasingly geared towards specialist concerns, *The Bulletin* stands out as a unique publication and is widely read and often referred to by the Commonwealth legal community.

2. Intended to serve as a one-stop reference manual, *The Bulletin* has proved to be indispensable for legal research, particularly in jurisdictions where a wide range of Commonwealth legal journals are unavailable. *The Bulletin* also fills a gap in many countries whose legal systems are based on common law precedent but lack the necessary jurisprudence on particular topics.

IMPORTANT CHANGES IMPLEMENTED IN 2005

3. LCAD is committed to the production and publication of a respected and timely law journal and in 2005 significant changes were introduced to improve the publication process and make *The Bulletin* more relevant, engaging and thought-provoking.

4. Beginning with the first issue of 2005 (Vol 31 No 1), publishing responsibilities were taken over by Cavendish Publishing Limited (Cavendish) the well-known legal publishers, who are also responsible for printing and marketing. LCAD will continue to select material for publication in *The Bulletin* and provide these materials to Cavendish for processing. Cavendish will endeavour to publish *The Bulletin* within three months from receipt of manuscripts.

5. Cavendish also ensures that *The Bulletin* is properly recorded with the various national and international bibliographic agencies. They make extracts from each issue of *The Bulletin* available to all relevant information brokers and digitalise the contents so that the electronic version is also available online. Cavendish market *The Bulletin* nationally and internationally to all potential subscribers.

6. The *Bulletin* has now returned to its traditional publication schedule of four issues per year and it is anticipated that each edition will consist of approximately 200-250 pages. Roughly half of each edition is devoted to scholarly legal research on a variety of Commonwealth legal topics and international developments, while the other half of the journal consists of recent Commonwealth legal decisions, law reform reports and legislation. To help attract potential new writers to *The Bulletin*, the Commonwealth Secretariat's website now includes a call for submissions of legal writing and the journal's Guidelines for Authors can also be found online.

7. The year 2005 also saw a major push to produce all back issues of *The Bulletin* that remained outstanding up to 2005. Out of 800 printed copies, 450 are mailed to paid subscribers and the balance provided free of charge to member states. The Secretariat's Communications and Public

Affairs Division (CPAD) will continue to be responsible for mailing *The Bulletin* to current subscribers, a procedure which it has outsourced to a third party.

EDITORIAL ADVISORY BOARD

8. To help provide guidance to *The Bulletin*, an Editorial Advisory Board was established consisting of eminent legal scholars from around the Commonwealth. The Board will essentially provide direction for *The Bulletin's* development. Amongst other things, it is mandated to identify significant legal developments throughout the Commonwealth, help secure potential contributors of scholarly articles for the journal and highlight new laws and important legal decisions of their respective jurisdictions for possible inclusion in *The Bulletin*. The Board also has the right to conduct regular reviews of *The Bulletin* and make recommendations as appropriate.

CONCLUSION

9. The future looks bright for *The Bulletin*. A new and contemporary-looking layout and cover have been developed by Cavendish, who are now responsible for production and marketing of the journal. A pool of scholarly legal writers from around the Commonwealth is currently being developed. Electronic versions of Commonwealth judicial decisions and law reform agency reports are being secured, thereby ensuring accurate and timely publication of these materials.

10. Implementation of these measures has often been time consuming and complex. Nevertheless, LCAD is confident that the changes are absolutely essential to enhance and build upon *The Bulletin's* reputation as a strong voice on Commonwealth legal affairs.

TRIPS & PUBLIC HEALTH

The 30 August WTO General Council Decision, WT/L/540, "Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health"

Paper by the Commonwealth Secretariat

BACKGROUND

1. Commonwealth Heads of Government at Aso Rock welcomed the 30 August 2003 WTO agreement on affordable drugs and called for its interpretation and implementation in a manner that makes appropriate drugs available at low cost to poor countries. Heads of Government recognised:

> "that diseases such as HIV/AIDS, malaria and tuberculosis are not only health problems but are also development issues. ... [and called] for reforms at the national level to create effective health delivery systems, as well as adequate external support to achieve this." (Aso Rock Declaration).

2. Commonwealth developing countries are among the highest HIV/population ratio worldwide: "the threat from HIV/AIDS is especially great in Sub-Saharan Africa, which has two-thirds of the world's 40 million persons living with HIV/AIDS, and in the Caribbean." (Aso Rock Declaration) Commonwealth developing countries with insufficient or no manufacturing capacities in the pharmaceutical sector – mainly small states and least developed countries (LDCs) – require technical assistance at both the national and regional level, if they are to benefit from the Decision.

3. The 30 August 2003 WTO General Council Decision, WT/L/540, "Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health" addresses the instruction of the WTO Ministerial Conference to find an expeditious solution to the problem of the difficulties that Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face in making effective use of compulsory licensing under the TRIPS Agreement. WTO Ministers at Doha agreed "that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all."

4. The 30 August Decision is designed to be part of the wider national and international action to address problems associated with access to medicines. Many fear that the problems encountered in making drugs available to those who need them at affordable prices may be further exacerbated with the end of WTO transitional arrangements for the extension of product patent protection to pharmaceuticals in 2005 (LDCs are excepted until 2016). The TRIPS Agreement allowed countries that had not provided patent protection for pharmaceutical products at the time of its entry into force in 1995 a 10-year grace period, at the end of which (1 January 2005) they were required to introduce a national system for granting product patents.

5. Significantly, concerns have been expressed over the fact that with the expiry of the 2005 deadline, India is now obliged to provide a product patent protection and to review an estimated

7000[1] mailbox patent applications that production of generic versions of medicines in India will be adversely affected, and consequently, its supply to other developing countries. It is worth noting that Indian generic manufacturers are currently the main suppliers of affordable antiretroviral and other HIV-related medicines to many developing countries, and comprise the majority of generic firms on the WHO Prequalification List for antiretroviral products.[2]

6. WT/L/504 offers an important avenue for addressing Members' concerns. The effectiveness of the Decision in fulfilling its objectives will depend on how far in practice the concerned exporting and importing countries are able to implement these procedures effectively.

THE 30 AUGUST 2003 DECISION

7. The Decision elaborates a system that would permit countries with insufficient or no manufacturing capacities in the pharmaceutical sector to import cheaper generic versions made in other countries under compulsory licenses. The system also provides for rules that would enable countries belonging to regional economic groupings (of which at least half of the members are LDCs) to export products imported under the system to other countries in the region and, where the potential exists, gradually develop a pharmaceutical industry that could produce drugs that are needed for the treatment of diseases prevailing in the region. The provisions of the Decision apply to patented products and products manufactured through patented processes that are required for the treatment of all diseases affecting human beings. These terms include "active ingredients necessary for the manufacture of patented products" and the "diagnostic kits" needed for their use.

8. The Decision imposes complimentary obligations on importing and exporting countries. The obligations imposed on importing countries are in fact less onerous than those to be implemented by exporting countries.

9. The importing country is required to make a notification to the Council for TRIPS. The notification shall contain:

- a specification of the names and expected quantities of the products needed;
- a confirmation that the importing country (other than a least developed country), has established that it has insufficient or no manufacturing capacities in the pharmaceutical sector for the products; and
- a confirmation that – where a pharmaceutical product is patented in its territory – the country has granted or intends to grant a compulsory license in accordance with Article 31 of the TRIPS Agreement and the provisions of the 30 August Decision on the implementation of paragraph 6 of the Doha Declaration.

10. TRIPS obligations with respect to payment of remuneration to the patent holder by the importing country are waived in respect of those products for which remuneration is paid in the exporting country.

11. Exporting countries are required to implement the following procedures:

- Notification to the Council for TRIPS of the grant of the license, including the conditions attached to it. The notification shall include:
  - the name and address of the licensee,
  - the products for which the license has been granted,

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1 Estimates from various sources vary between a range of 5000-9000 applications for pharmaceutical and agro-chemical products that are currently filed in the mailbox.

2 See the list of pre-qualified manufacturers and products in http://mednet3.who.int/prequal/ .

    * the quantity for which it has been granted,
    * the countries to which the products are to be supplied,
    * the duration of the license,
    * the address of the website where the information is posted.[3]

- The compulsory license issued by the exporting country shall contain the following conditions:

    * only the amount necessary to meet the needs of the importing country may be manufactured under the license; and
    * the entire quantity of this production shall be exported to the country which has notified its needs to the Council for TRIPS.

12. Adequate remuneration shall be paid in the exporting country, taking into account the economic value to the importing country of the use that has been authorised in the exporting country.

13. WTO Members opting to use the system as importing or exporting countries must have in place appropriate domestic regulations to allow for importation or exportation. Canada was the first WTO Member to introduce necessary legislative amendments to facilitate exportation to developing countries seeking to access medicines in the context of the 30 August Decision. Other Commonwealth countries, such as India, have more recently adopted the necessary implementing legislation and/or regulations.

SASD'S ECONOMIC AND LEGAL SECTION (ELS) PROGRAMME OF TECHNICAL ASSISTANCE

14. ELS is implementing a programme of technical assistance for Commonwealth developing countries. The overall project objective is to assist developing countries in establishing appropriate frameworks and effective procedures to implement WTO Decision WT/L/540. ELS initially commissioned nine (9) national case studies.[4] The case studies provide an assessment of the institutional framework and procedures that may have to be built up at the national level and examine the possibilities for regional solutions. The studies were presented at a highly successful workshop held in Geneva in October 2004 bringing together a number of significant actors in the field. The report on the Geneva workshop contains various recommendations on the steps that could be taken at national level and by regional organisations, for the implementation of the provisions in the WTO Decision on Access to Medicines, relating to the development of trade and production of pharmaceutical products in order to meet the requirements for the pharmaceutical products needed for treatment of diseases prevailing in the countries that are members of regional economic groupings.

15. The Workshop's recommendations address issues such as:

- co-operation between countries through pooling of import requirements of pharmaceutical products;

- development of inter-regional trade in imported products by member countries of regional economic groupings;

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[3] The Decision imposes obligations on the licensed firm/licensee, before shipment begins, to post on a website information relating to the quantities being supplied to each destination and the distinguishing features of the products.

[4] Bangladesh, Barbados, India, Jamaica, Kenya, Mauritius, South Africa, Tanzania and Uganda.

- development of pharmaceutical products on a regional basis to meet public health requirements of the countries in the region;

- development of regional patent systems.

16. The group of Commonwealth developing countries in Geneva has proposed that the Commonwealth Secretariat in conjunction with the ACP Secretariat and the Agency for International Trade Information & Co-operation (AITIC), sponsor a workshop with the aim of examining the practical steps that could be taken to implement the workshop recommendations, *viz.* to develop trade and production in countries with insufficient manufacturing capacities, of pharmaceutical products needed for the treatment of diseases prevailing in the region (taking into account the relevant provisions in the Decision) and for ensuring quality and safety standards of such products. The delegation of Mauritius has offered to provide host facilities. The proposal highlights the need for workshop participants to be selected with a view to ensuring that the deliberations remain practically oriented and result in concrete proposals for investment, to develop production and trade. In this regard, separate discussions are also ongoing with other agencies, such as the German Development Agency (GTZ) which has expressed its commitment to a narrower programme of assistance focused on promoting the development of production capacity in LDCs through taking advantage of TRIPS flexibilities, particularly the 30 August Decision and the Doha Ministerial Declaration on the TRIPS Agreement and public health.

17. The importance of co-operation at the regional level with a view to harnessing economies of scale for the purposes of enhancing purchasing power for, and facilitating the local production of, pharmaceutical products is an important feature of the 30 August General Council Decision, particularly for smaller Commonwealth members and Africa.

18. ELS is collaborating with strategic partners such as DfID, WHO, WTO and UNCTAD, with a view to defining appropriate legislative systems to promote the effective management of the pharmaceutical cycle in the context of WT/L/504 – at national and/or regional levels. Examples of existing institutional structures for regional co-operation include the Commonwealth Regional Health Community Secretariat in Eastern and Southern Africa, the African Association of Central Medical Stores for Generic Essential Drugs (ACAME) for French-speaking West African countries and the Organisation of Eastern Caribbean States (OECS) in the Caribbean. ELS is engaging with strategic partners in discussions on, *inter alia*, co-ordination mechanisms for bulk procurement (as exists in the Pacific and Eastern Caribbean) as well as regional patenting systems whether based on mutual recognition or other formalised arrangements (such as the African Intellectual Property Organisation (OAPI) and the African Regional Intellectual Property Organisation (ARIPO)).

19. ELS has pursued consultations with a number of strategic partners, including DFID, WHO, the World Bank and UNCTAD. There was overwhelming endorsement of the contribution made by ELS' programme of assistance and agreement on moving forward with work at national and regional levels - the focus moving away from Geneva to capitals. The very positive response to the national case studies - which have been requested by numerous agencies as a reference - provided strong impetus for the commissioning of six regional studies: three in Africa, and one in each of the following regions – Asia, the Caribbean, and the Pacific.

20. The six regional studies build on the work already undertaken at the national level, extending the scope of coverage to facilitate a greater appreciation of the challenges posed to a larger sampling of vulnerable Commonwealth developing countries, with a view to designing appropriate national and/or regional solutions depending on the circumstances, in particular as regards:

- the steps that need to be taken at national, sub-regional and regional levels in order to facilitate trade in essential medicines (i.e. exports and re-exports of imported drugs) between regional partners facing similar health problems;

- the steps that need to be taken at national, sub-regional and regional levels to facilitate joint procurement arrangements for sourcing essential medicines for distribution within smaller jurisdictions, with a view to providing an integrated/co-ordinated response to countries facing similar health problems;

- the potential capacity for the development of production facilities by making judicious use of the right to grant compulsory licences, where this could be implemented on a competitive basis; and measures that could be taken to encourage the transfer of technology for the development of the manufacturing industry in countries with no or insufficient manufacturing capacities;

- measures that are necessary for furthering development of regional patents and co-operation in the area of compulsory licenses;

- modifications that may have to be made in the national patent laws to permit the development of trade on a regional basis, in products imported under a compulsory license and the development of a national industry to enter the regional market.

21. The six regional studies as well as the formerly commissioned nine national studies will comprise a part of the documentation (a package of research material) to be utilised in national and/or regional workshops bringing together key regional stakeholders and decision makers, with contributions of in-house expertise from, *inter alia*, WHO, ICTSD, DfID Health Resource Centre, UKPO, UNCTAD, the World Bank, and the Commonwealth Secretariat. DfID has committed £120,000 towards the organisation of such workshops. WHO, UNCTAD and the World Bank are committed to either providing and/or funding the necessary expertise. In addition to commissioning the regional studies, the Commonwealth Secretariat will provide in-house expertise as well as fund the participation of the regional experts retained to undertake the six case studies. An agreement in principle with our strategic partners has been secured in placing the focus on Commonwealth countries with a view to achieving economies of scope with work undertaken by partnering institutions in parallel.

CONCLUSION

22. The ELS programme of assistance focuses on the revision of national laws and establishment of appropriate national and regional frameworks. This focus derives from the fact that the 30 August 2003 Decision will have little positive impact on access to essential medicines at affordable prices without revisions to the existing legal framework: to the extent that national laws are not revised to implement the terms of the Decision, patent owners may invoke this and prevent a government from exporting or importing medicines under the more flexible regime provided for by the 30 August Decision.

23. The World Bank has produced a *Guide and Model Documents for Implementation of the Doha Declaration Paragraph 6 Decision*. The documentation includes draft notifications and draft patent act amendments to assist WTO Members in implementing the 30 August 2003 Decision. The World Bank guide expressly provides:

> "this Guide can only provide a starting point. The actual implementation of the Paragraph 6 Decision will take place within the contours of each country's existing legislative and

regulatory framework, practice and jurisprudence. The authorities of each country will have to work with their own legal experts to arrive at a solution that is right for their situation."

24. ELS is working with, *inter alia*, World Bank consultant and co-author of the World Bank Guide, Fred Abbot, with a view to assisting Commonwealth developing countries and regions with the effective implementation of the 30 August 2003 Decision in a manner that addresses their individual circumstances.

25. It is generally observed that the new post-2005 environment (wherein nearly all countries in the world have to implement the TRIPS Agreement) will require a re-thinking of medicines procurement strategies which address the impact of intellectual property protection (in particular patent protection). Our expectation is that with appropriate legislative frameworks in place, appropriate regional mechanisms operative, and desirable public/private sector partnerships established – there will be a greater sense of "pharmaceutical security" – so to speak – security in sources of supply, and where feasible, enhanced regional production, on a competitive basis, for the provision of high quality medicines at low prices for all.

INTRODUCTORY NOTE ON ISSUES CONCERNING RIGHTS/OBLIGATIONS AND DEADLINES UNDER PART VI OF UNCLOS IN RELATION TO THE EXTENDED CONTINENTAL SHELF

Paper by Professor Philippe Sands QC[1]

1. In October 2004 Commonwealth Law Ministers of Small Jurisdictions issued a Communiqué concerning the implementation of Article 76 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Ministers recommended that: "The Commonwealth Secretariat should prepare a summary of the rights and obligations in respect of an extended continental shelf under UNCLOS." The Special Advisory Services Division (SASD) of the Commonwealth Secretariat subsequently decided to expand the focus of this report to include a legal opinion on the situation post-2009 for countries that failed to meet the deadline imposed under UNCLOS for submission to the Commission on the Limits of the Continental Shelf (Commission) or (CLCS) established pursuant to Annex II of UNCLOS.

2. In accordance with these decisions I have been asked to prepare:

(a) a short report (no more than 5 pages), on the rights and obligations in respect of the extended continental shelf under UNCLOS;

(b) a short discussion paper on the likely post-2009 situation for those countries who will have failed to meet the UN deadline for the submission of extended continental shelf claims to the CLCS.

3. This Introductory Note addresses both issues and is divided into two parts. Part I reports on the rights and obligations of states in respect of the extended continental shelf under UNCLOS; Part II discusses the legal situation for those states that might fail to meet the UNCLOS deadline for submission of information on the limits of the continental shelf beyond 200 nautical miles from baselines.

I. The Rights and Obligations of States in respect of the Extended Continental Shelf under UNCLOS

3. UNCLOS was adopted on 10 December 1982 and entered into force on 16 November The Rights and Obligations of States in respect of the Extended Continental Shelf under 1994. One hundred and forty seven (147) states and the European Community are parties. Part VI of UNCLOS (Articles 76 to 85) addresses the continental shelf.

4. Article 76(1) provides:

"The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the

[1] Professor of Law, University College London, and Barrister, Matrix Chambers. This Note has been prepared with the assistance of Douglas Guilfoyle, doctoral student, Faculty of Law, University of Cambridge. I am grateful also to Maurice Sheridan of Matrix Chambers for his comments. This Introductory Note has been prepared for the purposes of discussion only and is not to be treated as a legal opinion or legal advice. It touches upon legal issues arising under UNCLOS and of general international law that have not yet been the subject of authoritative determination. Any views expressed are those of the author alone and are not to be ascribed to the Commonwealth Secretariat or to any State or States.

continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

Under Article 76(1) there is therefore a distinction between the legal definition of the continental shelf and its geographical definition. Article 76(2) and 76(4) to (6) establish the substantive rules governing the geographical location of the outer limits of the extended continental shelf. Articles 76(7) to (9) set out the steps that are to be taken by a coastal state in delineating and establishing an extended continental shelf. In sum, the rules provide that areas of the sea-bed that lie beyond the continental margin are included in the continental shelf so long as they are within 200 miles of the coast. Where the continental margin (which is defined in Article 76(3) as the shelf, slope and rise and excluding the deep oceanic floor with its ocean ridges) extends beyond 200 miles, specific rules provide for the calculation for the purposes of UNCLOS of the outer limit of the continental shelf.

5. Where the continental shelf extends beyond 200 nautical miles from baselines, a coastal state may delineate and establish the outer limits of its continental shelf up to the outer seaward limit permitted by Article 76(4) to (6) of UNCLOS, which is either

- up to 350 miles from the baselines, or
- within 100 miles of the 2,500 metre isobath.

Within those outer limits, Article 76(4)(a) provides that the outer edge of the delimited shelf must be a line that is either

- where "the thickness of sedimentary rocks [forming the sea bed] is at least 1 per cent of the shortest distance from such point to the foot of the continental slope"; or
- of "fixed points not more than 60 nautical miles from the foot of the continental slope."

For the purposes of this paper the area of continental shelf beyond the 200 mile limit and up to the outer limit is referred to as "the extended continental shelf".

6. What are the rights and obligations of the coastal state in its extended continental shelf? The rights of the coastal state are addressed by Article 77 of UNCLOS. On its face this provision draws no distinction between the rights of a coastal state in the continental shelf up to 200 miles and the rights over an extended continental shelf that lies beyond 200 miles. Article 77(1) provides that

> "The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."

Article 77(4) defines the natural resources in question as "the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species". It is clear therefore that the non-living resources include oil and gas.

7. As mentioned, in general the rights of a coastal in the extended continental shelf are the same as in the area up to 200 miles, although there are certain differences, not least because in the extended continental shelf certain obligations are imposed (see below).[2] Rights in the extended continental shelf are exclusive: if the coastal state does not explore the extended continental shelf or exploit its natural resources no one else may do so without the express consent of the coastal state (Article 77(3)). Article 81 emphasises that

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[2] Since the living organisms which may be exploited are limited to sedentary species, and since the waters superjacent to the extended continental shelf will be high seas and subject to fisheries freedoms, issues may arise as to whether a particular species is a sedentary species (subject to the exclusive rights of the coastal state) or non-sedentary species (and subject to high seas fishing freedoms).

> "The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes."

This applies to all parts of the continental shelf, including the area beyond 200 miles.

8. Within the extended continental shelf the coastal state also has the exclusive right to construct and to authorise and regulate the construction, operation and use of artificial islands and certain installations and structures (Article 80). The exclusive rights of the coastal state in the extended continental shelf are without prejudice to the rights of all states to lay submarine cables and pipelines on the extended continental shelf, subject to certain conditions defined by UNCLOS (Article 79). One material difference between the continental shelf and the extended continental shelf concerns the status of superajacent waters: in the former they will form part of the exclusive economic zone (if it has been established under Part V of UNCLOS) over which the coastal state exercises sovereign rights, including in respect of fisheries, whereas the waters lying above the extended continental shelf are part of the high seas and therefore subject to the regime of high seas freedoms, including fisheries.

9. As regards obligations within the extended continental shelf, it is clear the exercise of sovereign rights is not dependent upon occupation, whether effective or notional: see Article 77(3). Article 77(3) also makes it clear that "express proclamation" is not required for a coastal state to exercise rights over the continental shelf. This does not mean, however, that a coastal State is free from procedural requirements in relation to any extended continental shelf over which it may wish to exercise sovereign rights.

10. Article 76(7) requires a coastal state to delineate the outer limits of its continental shelf in accordance with certain principles:

> "The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude."

11. The obligation to delineate in accordance with these principles applies to any extended continental shelf. Where a coastal state has delineated an extended continental shelf it is required to provide information to the CLCS. Article 76(8) states:

> "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

Article 76(8) (together with Article 4 of Annex II of UNCLOS, on which see further below) makes clear that a coastal state is required by UNCLOS to provide "information" on the outer limits of an extended continental shelf, and that it will be bound as a matter of international law by any recommendations which might be made by the CLCS. Relatedly, a coastal state is required to deposit with the Secretary-General of the United Nations charts and relevant information (including geodetic data) that permanently describes the outer limit of its continental shelf (Article 76(9)). This applies also to the extended continental shelf.

12. The relationship between the exercise of rights in an extended continental shelf and the fulfilment of informational and procedural requirements under Article 76(8) and (9) remains an open question that lies beyond the scope of this paper.[3] What is clear – as developed below – is that under UNCLOS the limits of an extended coastal shelf - and rights exercised within such limits – will only be "final and binding" if they are established on the basis of a recommendation of the Commission.

13. A coastal state will also have other obligations in respect of the extended continental shelf that do not arise in relation to the continental shelf in the area up to 200 miles. Article 82(1) provides that

> "The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."

Oil and gas exploitation in the extended continental shelf will be subject to this obligation. Payments or contributions will be made to the Authority, which shall distribute them to the States Parties in accordance with defined criteria (Article 82(4)). In accordance with Article 82(2) payments or contributions are to be made annually in respect of all production at a site. However, such payments or contributions are only to be made after the first five years of production at a site, beginning in the sixth year at a rate of 1 per cent of the value or volume of production at the site and rising by 1 per cent for each subsequent year until, the twelfth year. Thereafter the payment or contribution will remain at the rate of 7 per cent. A developing state that is a net importer of a mineral resource produced from its continental shelf will be exempt from such payments or contributions (Article 82(3)).

14. Finally, it must be stressed that the rights which a coastal state may exercise in an extended continental shelf are without prejudice to any issues of delimitation of the continental shelf as between states with opposite or adjacent coasts (Article 76(10)). Such delimitation will be subject to the principles concerning delimitation outlined in Article 83 of UNCLOS. They will also need to take into account any recommendations that may have been made by the CLCS.

II. The Likely Post-2009 Situation for Countries that will have failed to meet the UNCLOS Deadline for Submission of Information on the Limits of the Continental Shelf beyond 200 nautical miles from Baselines

15. As indicated above (at paragraph 11), Article 76(8) requires a coastal state to provide information to the CLCS on the limits of an extended continental shelf. Annex II of UNCLOS provides further guidance to the parties and to the CLCS. Article 4 of Annex II elaborates on that requirement:

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[3] One view is that failure to meet the procedural requirements incurs "no sanction" and does not affect a state's exercise of rights in an extended shelf, other than its facing "a degree of uncertainty": Tomas H. Heidar, "Legal Aspects of Continental Shelf Limits" in M. Nordquist et al (eds), Legal and Scientific Aspects of Continental Shelf Limits (2004), 19 at 30-31. Other commentators acknowledge the procedural requirements without addressing whether non-compliance with a deadline will have any consequences: see Ted L. McDorman, "The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime", 10 Int'l Journal of Marine & Coastal Law 165 (1995), 176 and "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World", 17 Int'l Journal of Marine & Coastal Law 301 (2002), 302; Barry Hart Dubner "Recent Developments in the International Law of the Sea", 36 International Lawyer 721 (2002) at 730. The view has also been expressed that the negotiators of UNCLOS did not turn their minds to the consequences (if any) of non-compliance with a deadline: Myron H. Nordquist (editor-in-chief), United Nations Convention on the Law of the Sea, 1982: A Commentary, Vol. 2 (1993), 1000-1018.

"Where a coastal State intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that State. The coastal State shall at the same time give the names of any Commission members who have provided it with scientific and technical advice."

16. Article 76(8) and Article 4 of Annex 2 provide that the information to be submitted is subject to a deadline of ten years from the entry into force of the Convention for the state in question. For those states that were parties to the Convention when it entered into force on 16 November 1994 the ten-year deadline would have expired on 15 November 2004. However, in May 2001 the Meeting of States Parties to UNCLOS adopted Decision SPLOS/72 (Decision 72).[4] By this Decision the States Parties decided:

"(a) In the case of a State Party for which the Convention entered into force before 13 May 1999, it is understood that the ten-year time period referred to in article 4 of Annex II to the Convention shall be taken to have commenced on 13 May 1999;

(b) The general issue of the ability of States, particularly developing States, to fulfil the requirements of Article 4 of Annex II to the Convention be kept under review."

The preamble to the Decision identifies the reasons for that Decision, including: (1) delays in the election of the members of the Commission; (2) delays in the adoption by the Commission of its Scientific and Technical Guidelines; and (3) "the problems encountered by States Parties, in particular developing countries, including small island developing States, in complying with the time limit set out in Article 4 of Annex II to UNCLOS". The Decision followed requests for extensions premised *inter alia* on the disadvantages arising for states as a result of delays as well as difficulties faced by developing states.[5]

17. For the purposes of the situation that may arise post-2009, Decision 72 is significant for at least two reasons:

First, it recognises the right of the States Parties to amend a timetable adopted in the Convention by means of a Decision adopted at the Meeting of the States Parties;
Second, it expressly recognises the problems that developing States – and in particular small island developing States – have in fulfilling the requirements of Article 4 of Annex II.

18. Decision 72 extends to 12 May 2009 the deadline by which states that became parties to UNCLOS before 13 May 1999 are to submit the information to the Commission in accordance with Article 76(8) and Article 4 of Annex II. What might be the consequences for these states of failing to meet that deadline? The same question may also be asked in relation to those states which became parties to UNCLOS after 13 May 1999 and which miss their ten-year deadline. Whilst the principles would appear to be analogous, for the purposes of this discussion paper the focus will be on the states falling within the scope of operative paragraph (a) of Decision 72.

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4 Decision regarding the date of commencement of the ten-year period for making submissions to the CLCS set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea (29 May 2001), SPLOS/72.

5 See: Position Paper on the time frame for submissions to the Commission on the Limits of the Continental Shelf, Submitted by Australia, Fiji, Marshall Islands, Micronesia (Federated States of), Nauru, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu (10 May 2001), SPLOS/67; Notes Verbales from the Government of Seychelles regarding the extension of the time period for submission to the Commission on the Limits of the Continental Shelf; Note by the Secretariat (10 May 2001), SPLOS/66.

19. The question posed is of course connected to the broader issue identified at paragraph 12 above: what is the relationship between a coastal state's right to exercise sovereign rights in an extended continental shelf and the timely submission of information to the Commission in accordance with Article 76(8)?

20. UNCLOS does not address that issue, and it has not been subjected to an authoritative determination. It is an issue that turns on the proper interpretation of UNCLOS and issues of general international law, neither of which may (at this time) point to a definitive view on the consequences, if any, that arise where a coastal state has delineated an extended continental shelf but then failed to provide on a timely basis the requisite information to the Commission, or where a coastal state has not made a delineation within the time limit. The language of Article 76(8) and Article 4 of Annex II suggests that a coastal state's ability to rely upon the established outer limits of a continental shelf beyond 200 miles (and then to exercise sovereign rights over that extended continental shelf) could be dependent upon its having submitted the requisite information to the Commission within the agreed deadline. This is consistent with the approach taken in a background paper prepared by the Secretariat to the Meeting of the States Parties on Article 4 of Annex II, that notes the "compelling reasons" for the coastal states to make submissions to the Commission "in the manner laid down in the Convention":

> "By establishing the Commission, the Convention accorded to the coastal State a special procedure for establishing the outer limits of the submarine continuation of the continent where its land territory is located, by means that would be legally accepted and respected by all States Parties to the Convention. There is no other legal means to establish that aim."[6]

21. The Secretariat's Background Paper (which is not binding in any way but which may provide authoritative guidance to the extent that it meets with the approval of the States Parties) adds:

> "The Convention does not state that the coastal State loses its right to the continental shelf beyond 200 nautical miles if it does not make a timely submission to the Commission. The Convention offers a means to do two things not provided for by customary law. First, it accords a coastal State a "legal" continental shelf up to 200 nautical miles without asking for any evidence that the shelf exists on geological or geomorphologic grounds — the evidence required for the sea floor to be identified as a submerged continuation of the land territory of a particular State. Second, the Convention permits a coastal State to establish the outer limit of its continental shelf even beyond 200 nautical miles, but in this case upon provision of certain scientific data, with these data to be submitted to the Commission within a 10-year time limit specified in the Convention. The extended legal continental shelf, with an additional 60 to 100 nautical miles past the edge of the continental margin, and with boundaries marked as "final and binding" — two benefits extended by the Convention — are the major impetus for States to submit the particulars of the outer limit line of the continental shelf to the Commission."[7]

22. Against this background (but without prejudice to the answer to the general issue identified above) this paper assumes that the safest course would be for a coastal state to proceed on the basis that the effective exercise of sovereign rights in any extended continental shelf is dependent upon its having: (1) delineated the outer limits of an extended continental shelf; and (2) submitted the information required under Article 76(8) to the Commission within the deadline.

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6 Issues with respect to article 4 of Annex II to UNCLOS, Background Paper prepared by the Secretariat, SPLOS/64, 1 May 2001, para. 43.

7 *Ibid*, para. 45. The background Paper notes at footnote 15 that "It is only beyond 200 nautical miles that the coastal State has the obligation to prove that its submarine land territory extends beyond 200 nautical miles."

The Consequences of Fulfilling Article 76 Requirements

23. Article 76 provides clear advantages to a coastal state that submits information under Article 76(8) and then obtains a recommendation of the Commission recognising the outer limits of an extended continental shelf. The limits of an extended continental shelf which are consistent with such a recommendation will be "final and binding". In these circumstances the coastal state will be able to rely on such outer limits against all other Parties to UNCLOS, and within those limits will be able to exercise the rights identified above (at paragraphs 6- 8). The coastal state thereby benefits from a high degree of legal certainty that would not otherwise exist. Such legal certainty will in turn give rise to conditions under which costly and long-term investments are more likely to be made within the extended continental shelf. The possibility cannot be excluded that the outer limits of an extended continental shelf may also be opposable against non-Parties to UNCLOS.[8]

24. A coastal state that does not obtain a recommendation from the Commission will not be able to establish limits to an extended continental shelf that are "final and binding". This will undermine the ability of the coastal state to rely on its limits against third states, and will also lessen the legal certainty that may be required to attract investments that are inevitably costly. There are therefore considerable advantages associated with following the procedure envisaged by Article 76(8), and doing so within the requisite time limits.

25. At present, in order to benefit from those advantages a state which became a party to UNCLOS prior to 13 May 1999 must submit information on the limits of its extended continental shelf before 13 May 2009. What are the different scenarios for a coastal state that has failed to meet the revised deadline for the submission of extended continental shelf claims to the Commission? At least four scenarios may be envisaged (and no doubt others can be conceived of).

26. *Scenario One*: recognising that it will not meet the deadline the coastal state abstains from delineating the outer limits of its extended continental shelf. In such circumstances the coastal state would deprive itself of the ability to exercise any rights in an extended continental shelf. It is difficult to see why a coastal state would adopt such an approach: as described below, there is no reason to suppose that a state that misses the deadline will necessarily have lost forever the ability to exercise rights over an extended continental shelf.

27. *Scenario Two*: the coastal state delineates the outer limits of its continental shelf but fails to submit any information to the Commission within the Article 76(8) deadline. In such circumstances the coastal state might seek to exercise sovereign right in its extended continental shelf. As described above, however, it would have no legal certainty in the exercise of its rights, with respect to other State Parties or non-Parties, and could not regard its limits as "final and binding". It may also face objections from other states concerning its purported exercise of sovereign rights over an extended continental shelf established without being based on a Commission recommendation.

28. *Scenario Three*: the coastal state delineates the outer limits of its continental shelf and makes only a partial submission of information to the Commission prior to the deadline of 13 May 2009. For example, it might submit "particulars of ... limits" of its extended continental shelf but fail to provide some or all of the supporting scientific and technical data that the Commission might consider to be necessary for the purposes of adopting a recommendation. In such circumstances the question arises whether the Commission would decline to enter into any consideration of the information submitted or whether it might be willing to accept additional information after 13 May 2009. This is discussed further below.

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[8] This raises questions of general international law which go beyond the scope of this paper: see, for example: Ted L. McDorman, "The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime", 10 *Int'l Journal of Marine & Coastal Law* 165 (1995), 179 ff.

29. *Scenario Four*: the coastal state delineates the outer limits of its continental shelf and submits all information (particulars of limits, supporting scientific and technical data) to the Commission but only after the deadline of 13 May 2009 has passed. In such circumstances the question arises whether the Commission or the States Parties might be willing to extend the deadline, either upon receipt of the information or in advance of its late submission.

30. The safest route will be for a coastal state to submit all the information before the deadline of 13 May 2009. That is the only situation in which the coastal state can be reasonably certain that it will be able to establish "final and binding" limits of an extended continental shelf on the basis of a Commission recommendation. Beyond that, two possibilities exist: a further extension of the May 2009 deadline, and the submission of partial information within the deadline to be followed by additional information after the deadline.

Further Extension of the May 2009 Deadline

31. There appears to be no legal impediment to a Decision by the States Parties further extending the deadline beyond 13 May 2009 (since the deadline is established by UNCLOS and has been extended by action of the States Parties it would not appear to be open to the Commission itself to extend the deadline, although it could be authorised to do so by the States Parties on a "case-by-case" basis or more generally). Having extended the deadline on one occasion a precedent has been set and there would appear to be no reason in principle why the States Parties might not adopt a further Decision to extend the deadline. Operative paragraph (b) of Decision 72 indicates that the Meeting of the Parties is conscious of the "general issue of the ability of States, particularly developing States, to fulfil the requirements of Article 4 of Annex II" and intends to keep the issue "under review". This suggests that the Meeting of the Parties would be willing to consider a further request by Parties to extend the deadline, particularly if good reasons could be shown by one or more States that have not been able to meet the deadline. There can be no guarantees, however, that an extension would be forthcoming.

32. Further, the possibility cannot be excluded that the Commission may be willing to consider a submission that has been made after the 13 May 2009 deadline has passed. Article 4 of Annex II (as amended by Decision 72) imposes an obligation on the coastal state to submit information "as soon as possible but in any case within 10 years of [13 May 2009]". Article 4 is silent as to right of the Commission to consider information submitted after the deadline. The States Parties could adopt a Decision authorising the Commission to consider late submissions, under appropriate conditions. The Commission has not been established for a finite period, and its activities will extend over a lengthy period: as new states join UNCLOS each will have its own ten year deadline after becoming a Party to make submissions to the Commission.

Partial Submissions

33. A further possibility is that a coastal state might be able to "stop the clock" by making a partial submission within the deadline, comprising information that represents the best available at the time (and within the resources available to the state) and which will be supplemented as further information becomes available.

34. There appears to be no provision of UNCLOS or the Commission's Rules of Procedure that would expressly prohibit this approach. It is contemplated that the Commission may request such further information in the course of considering a submission.[9]

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[9] Para 10(1), Annexe III, Rules of Procedure of the Commission on the Limits of the Continental Shelf (2 July 2004), CLCS/40 ("CLCS Rules of Procedure"), provides that "[a]t any stage ... should the sub-commission arrive at the conclusion that there is a need for additional data, information or clarifications, its Chairperson shall request the coastal State to provide such data or information or to make clarifications".

35. The completeness or adequacy of information that has been submitted will turn on the facts of each case. Two examples illustrate possible situations. A coastal state might submit complete and timely information and data regarding only a limited area (for example, a delineation may be made identifying points A, B, C and D but supporting data would only be presented as to the scientific basis for line B-C). There is already provision for the submitting coastal state to provide further information at a later date in respect of certain areas in the case of a submission involving a disputed delimitation.[10] However, the fact that this scenario is expressly contemplated could exclude other scenarios for no rules have been provided.

36. Alternatively, a coastal state might present incomplete data in relation to all parts of a delineated extended continental shelf. The Commission is empowered to request supplementary information from States Parties.[11] However, where Parties seek to alter their submissions significantly, two issues may arise. First, there is no obligation for the Commission to accept unsolicited further information. Second, there may be an issue of notice to other States Parties. In 2001 the Secretariat stated that "the Commission should have the option of not accepting for consideration a submission that appears to be so bereft of data and material relevant to the outer limits that it cannot proceed with a genuine evaluation of the outer limit line." States Parties may thus risk the rejection of submissions found to be too incomplete to be useful (presumably by reference to the Commission's guidelines[12]).

37. In April 2005, at its last Session, the Commission posed the following question to its Legal Counsel:

> "Is it permissible, under the United Nations Convention on the Law of the Sea and the rules of procedure of the Commission, for a coastal State, which has made a submission to the Commission in accordance with article 76 of the Convention, to provide to the Commission in the course of the examination by it of the submission, additional material and information relating to the limits of its continental shelf or substantial part thereof, which constitute a significant departure from the original limits and formulae lines that were given due publicity by the Secretary-General of the United Nations in accordance with rule 50 of the rules of procedure of the Commission?"[13]

38. That question has not yet been answered. It appears to be premised on considerations of fairness to other States Parties if a submission was allowed to be so altered by supplementary information that other Parties were effectively denied the opportunity to comment upon the proposal actually and finally considered by the Commission. A state seeking to revise its submission to the Commission could perhaps obviate this concern by requesting of its own initiative that the Depository, the Secretary-General, circulate a summary of the proposed changes to States Parties.

III. Conclusion

39. Under Part VI of UNCLOS a State Party has valuable rights of exploration and exploitation of the natural resources of its extended continental shelf. The exercise of those rights imposes certain obligations that do not arise in relation to the continental shelf up to 200 miles. As noted at paragraph 30 above, it is only by making a submission to the Commission before the 13 May 2009 deadline that a State Party for which the Convention entered into force before 13 May 1999 can be

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10 Para 3, Annexe I, CLCS Rules of Procedure.

11 Para 10, Annexe III, CLCS Rules of Procedure.

12 Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf (13 May 1999), CLCS/11.

13 Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the progress of work in the Commission - Fifteenth session (3 May 2005), CLCS 44, 3 at para [13].

reasonably certain that it will be able to establish "final and binding" limits of an extended continental shelf, on the basis of a Commission recommendation. The possibility exists (and may indeed already have been envisaged) for the States Parties to further extend the May 2009 deadline, although whether (and under what conditions) they might do so raises no legal considerations that cannot be predicted. Similarly, the Commission could conceivably be authorised to consider out-of-time submissions on a case-by-case basis. Finally, the Commission may be able to receive partial submissions before the deadline and then seek additional information after the deadline. Given the legal uncertainties that arise if the deadline is missed, the safest route will be for a State Party falling within paragraph (a) of Decision 72 to make every effort to submit information that is as complete as possible before the deadline of 13 May 2009.

REPORT ON ACTIVITIES BY THE HUMAN RIGHTS UNIT

Paper by the Commonwealth Secretariat

Mandate of the Human Rights Unit (HRU)

1. The Human Rights Unit's activities support the attainment of the Commonwealth's strategic goal of strengthening democracy and respect for human rights in Commonwealth countries.

2. The 1971 Singapore Declaration of Commonwealth Principles confirms members' belief in "the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic processes in framing the society in which they live". The 1991 Harare Declaration establishes the scope of the mandate of the Secretariat's activities to promote both civil and political rights and economic, social and cultural rights. It specifically enjoins members "to extend the benefits of development within a framework of respect for human rights".

3. In addition to the general thrust of the Latimer House Guidelines and Millbrook Programme of Action, the HRU's mandate derives further recent support from the Aso Rock Declaration (Abuja CHOGM 2003, in particular Article 7), the Coolum Communique (Coolum CHOGM 2002, incorporating the High Level Group Report), and various occasional ministerial-level communiqués, lately the St Vincent & The Grenadines Communique (November 2002 Articles 4-7) and the London meeting of Law Ministers of Small Commonwealth Jurisdictions (Oct. 2004).

4. The HRU's core function under its mandate is to promote awareness of and respect for human rights. HRU was originally set up in 1985 following a decision made at the Melbourne CHOGM in 1981. On establishment it was expressly stated that the mandate of the HRU was to promote human rights within the Commonwealth, and not to be involved in any investigative or enforcement role.

5. The HRU was initially within the Political Affairs Division (PAD), after which it moved to the Legal and Constitutional Affairs Division (LCAD). Upon the recommendation of an "Evaluation Study of the Commonwealth Secretariat's Role in the Promotion of Human Rights 1997 – 2000," the Secretary-General decided to set up the HRU as a free-standing unit reporting directly to a Deputy Secretary-General. This was in order to give more prominence to human rights within the Secretariat's work. The HRU has been short on staff for much of 2005. Appointment of a replacement Head of the Unit is ongoing.

Objectives

6. The mandate upon which the HRU acts is presently as follows:

- to integrate human rights-based approaches to project and other work within all Divisions of the Secretariat;

- to develop assistance and other programmes that support, entrench and illustrate the Commonwealth's commitment to the promotion and protection of fundamental human rights, including programmes that emphasise the indivisibility of civil, political, economic and social rights;

- to assist in securing as wide as possible ratification and domestic implementation by member countries of the major international instruments setting out universal human rights standards;

- to develop, publish and distribute for use in member countries educational and training materials in human rights and on specific thematic issues;

- to collaborate and co-operate with other international, regional and Commonwealth government and non-government actors whose work relates to the field of human rights, including the UN system;

- to provide the Secretary-General with advice on the Commonwealth Ministerial Action Group (CMAG) and other human rights issues from time to time.

Strategic Framework

7. The HRU's programme activities support attainment of the Secretariat's strategic goal of strengthening democracy and respect for human rights within the Commonwealth. In order to achieve this, the HRU focuses on the following thematic areas:

- determining and distributing 'best practice' guidelines and standard setting in a common law context of existing international human rights standards. This includes ratification and implementation of international human rights conventions;

- strengthening the capacity of national and regional human rights institutions to fulfil their mandates; facilitating interaction between civil society, media and professions, national human rights institutions, government, and the public;

- increasing knowledge and awareness of, and respect for, human rights throughout the Commonwealth, especially among decision-makers, law enforcement officials, women and young people; and

- mainstreaming human rights across the Secretariat's various programmes.

Activities A: Determining Commonwealth Best Practice on Human Rights Issues

8. ***Ratification of human rights instruments*** – Promoting awareness of, encouraging and assisting technically in the ratification and domestication of international human rights instruments is one area that HRU is involved in. Under the 'Secretary-General's Human Rights Initiative', it is hoped that 18 Commonwealth countries might be encouraged and/or assisted to ratify two major human rights Conventions (ICCPR and ICSECR), or to implement into national law these and other Conventions (such as the Convention on the Rights of the Child) already ratified. Technical assistance work has already begun with certain countries that have expressed interest in ratifying these Conventions. This sort of work would normally be done together with LCAD, whose drafting expertise is particularly useful in preparing domestic implementing legislation for these Conventions.

9. ***Promoting the Relationship between Governments and Human Rights NGOs*** – In September 2004 the HRU finished a series of regional consultations in Africa, Asia and the Caribbean bringing together government officials, local human rights practitioners and NGO members, and staff members of national human rights institutions. These Workshops took place with different partners including the UN Office of the High Commissioner for Human Rights (UNOHCHR), UN Development Programme (UNDP), Asia–Pacific Forum on Human Rights Institutions, Fiji Human Rights Commission, National Human Rights Commissions and Ministries

of Justice. The purpose of the Workshops was to assist in creating an interface between NGOs and government institutions to ensure respect for human rights, and highlight their mutually complementary roles in achieving this. The outcome (so far) of these interactions is recorded in HRU reports for the regional Workshops, and has already seen commissions and local NGOs information-sharing, joint visits, consultation on human rights reports, and consultation with civil society on appointments to commissions.

10. Following the mandate of the Law Ministers of Small Commonwealth Jurisdictions (October 2004), the HRU is planning a forum for small states and human rights organisations on emerging human rights issues, to create a similar interface.

11. ***Thematic Issues - Expert Group Meetings*** – Since the last Ministers' meeting, the HRU has convened a number of Expert Groups to determine best practices to promote certain human rights related issues such as Trafficking in Women and Children, Treatment of Victims of Crime, and Freedom of Expression and Assembly.[1]

12. The HRU has published and continues to disseminate the resulting Best Practice Guidelines. The HRU is now taking certain of these thematic issues forward. Issues of treatment of victims of crime are partly addressed through various police human rights training programmes by HRU. Trafficking in women and children for commercial and sexual exploitation is one of the fastest growing areas of international criminal activity and of increasing concern to the international community, including the Commonwealth. In 2005/6, HRU will be working with STPD and LCAD (Criminal Law Section) in order to co-ordinate with UN and regional initiatives on trafficking, including awareness programmes for law enforcement officials aimed at reversing the mind-set of trafficked persons as perpetrators, rather than often victims, of crime.

Activities B: Strengthening National and Regional Human Rights Mechanisms

13. ***National Human Rights Institutions*** – In addition to creating an interface between national human rights institutions and civil society (above), which has resulted in networking and comparative learning between members of national human rights institutions, a core activity of HRU is supporting and strengthening such institutions to enable them carry out their mandates. This is also in response to the Commonwealth High Level Review Group's recommendation on the matter.

14. A Workshop for National Human Rights Institutions for Southern and Eastern African Commonwealth countries has been held in collaboration with the Human Rights Centre of the University of Pretoria. National Human Rights Institutions from Ghana, Kenya, Lesotho, Malawi, Mauritius, Seychelles, Tanzania, Uganda and Zambia participated in this Workshop. Similar workshops will be held in other regions of the Commonwealth as well.

15. The HRU has assisted the Cameroon National Commission on Human Rights and Freedoms in the drafting of new legislation for its establishment, to replace the Presidential Decree that was previously its founding legislation. In collaboration with PAD and with the support of CIDA, a programme of assistance has been developed for the Commission, pending its re-constitution.

16. The Unit has been in contact with the Government of Solomon Islands, as well as the Pacific Islands Forum, in order to explore the creation of a national reconciliation mechanism and

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[1] Part of the St Vincent & the Grenadines meeting mandate (Art. 36) was for the Secretariat to examine legal issues concerning freedom of the press. The HRU considers knowledge and awareness of the importance of press freedom as central to achievement of the Commonwealth's strategic goals in relation to democracy and human rights. It is looking at programme work to manifest this.

standing human rights commission, following the Expert Group Report on the Regional Assistance Mission to Solomon Islands.

17. The UNOHCHR section on national institutions now consults regularly with the HRU, after the relationship was re-vitalised in June 2005. In all activities in establishing and strengthening human rights commission, the Unit refers to both the Paris Principles and the Commonwealth Best Practice Guidelines on the Establishment of National Human Rights Institutions developed by HRU a few years ago. The UNOHCHR has expressed interest in working with HRU to adapt these guidelines for wider use.

18. ***Other Collaborations*** – The HRU has been actively seeking to co-operate and collaborate, where appropriate, with international and regional bodies and mechanisms. In recognition of the potential for more efficient and effective programme delivery, HRU has begun to work more closely with the UNOHCHR where there is proper scope for this. It also, for example, maintains strong contacts with the Organisation of American States (OAS) in relation to ratification issues and general issues relating to human rights promotion, and with the Pacific Islands Forum Secretariat in relation to regional human rights programmes.

19. The HRU has maintained contact amongst Commonwealth countries in Africa in relation to furthering the realisation of the African Court of Human Rights. Since such a court would be a significant new feature of the politico-legal geography of Africa, the Unit organised a meeting of experts, government officials, and human rights activists to look at the establishment of the court, particularly in view of the decision of the Assembly of the African Union to merge the court with the African Court of Justice.

Activities C: Human Rights Awareness and Education

20. ***Young People*** - In its last report to Law Ministers, the HRU detailed human rights training for tutors of the Commonwealth Youth Programme (CYP) Youth In Development programme in collaboration with CYP Asia Centre. The CYP programme covers some 25 institutions and 2,000 students across the Commonwealth. A similar training programme was carried out by HRU in Zambia in collaboration with the CYP Africa Centre, where representative CYP tutors from some 17 Commonwealth African countries were present. The HRU considers educating youth in human rights, in collaboration with the Youth Affairs Unit, an important part of its work. It has reworked the human rights content component of the programme. The HRU and CYP met in June 2005 to plan further joint initiatives.

21. ***Police and Law Enforcement Officers*** - A central HRU concern has been to contribute to more peaceful, stable communities by helping to build a human rights and community-based approach to policing into police training at all stages. This also responds to the request in the 2002 Law Ministers Meeting Communiqué. In April 2005 the Unit finalised its Human Rights Training Manual for Police Training Schools and Academies in West Africa. This followed consultations with senior West African law enforcement officials and trainers in The Gambia in 2004, and in Ghana in April 2005 when the draft training resource was tested and completed. In July 2005 over 35 police trainers from five West African countries (Cameroon, The Gambia, Ghana, Nigeria and Sierra Leone) met in Abuja for a training workshop on how to use the manual to build human rights training into existing police training programmes. The HRU will be evaluating police training curricula in the region after a suitable period. The Manual is easily adaptable to other regions, and HRU is looking at taking the Manual to other places and for this reason is now consulting with the Pacific Islands Police Chiefs forum, the Royal Solomon Islands police, and other Commonwealth police services.

22. ***Commonwealth Model Human Rights Curricula*** - In collaboration with the Commonwealth Legal Education Association (CLEA), the HRU has developed model human rights curricula as a resource for universities and other tertiary education institutions wishing to establish or develop courses in human rights, or build human rights elements into existing courses. The courses (Orientation, Certificate, Diploma, and Degree-Component courses) include India-specific content, but are adaptable with suitable modification to any part of the Commonwealth. The courses are designed to be offered by universities, but are not law courses as such, and not aimed only at students. The HRU is particularly interested in entering into arrangements with distance learning institutions. The institutions can hold out their courses as based on the Commonwealth model by arrangement with HRU after a quality control process.

23. As a pilot, the HRU and CLEA worked with Indian educators and in May 2005 in Mumbai launched the model courses with four major Indian universities, who undertook to establish and run such courses. A diploma course in 'Women's Rights as Human Rights' was also developed with the SNDT Women's University, Mumbai. The women's rights course is likewise adaptable. CLEA and the HRU have also produced a teachers manual accompanying the models (with effective human rights teaching methodologies set out), and a very comprehensive, fully web-linked model human rights law curricula for Commonwealth law schools.

24. The first fruit of this project came in July–August 2005 when a first batch of 160 police officers in the State of Maharashtra in India completed an Orientation course in human rights based on the Commonwealth model, through the YCM Open University in Nashik.

Activities D: Mainstreaming of Human Rights across the Secretariat

25. ***The Mainstreaming Project*** - The Mainstreaming project involves ensuring Secretariat activities are founded in and draw their focus and principles from international human rights standards, and are designed with the explicit goal of fulfilling civil and political, social and economic rights. After two consultants met with individual Commonwealth Secretariat Divisions to consider the applicability of human rights standards in the project activities being carried out by the various Divisions, and linking human rights to development, Richard Longhurst, our consultant on the second phase of the project, has met with and discussed the initial report with all Divisions, identified Divisional pilot projects to be tested, and formulated a final report on how each Division can bring their programmes more explicitly onto a human-rights based footing. HRU intends to conduct internal seminars for staff on international human rights standards.

26. Related to and a product of mainstreaming are the ongoing collaborations between HRU and other divisions, for example with the Health Section of the Social Transformation Programmes Division (STPD) in relation to a rights-based approach to treatment for HIV/AIDS as a life-threatening illness, with LCAD in ensuring training materials on counter-terrorism refer to the human rights imperatives inherent in long-term legal counter-measures, etc.

27. ***Advice to the Secretary-General*** – The HRU is now included in meetings relating to the political affairs of the Commonwealth. The HRU makes an input on human rights issues at these meetings and also independently raises any issues relating to human rights with the Office of the Secretary-General and PAD and other Divisions on a day-to-day basis.

Activities E: Publication and Dissemination of Information

28. The HRU has, amongst others, published and disseminated the following:

1. Unconstitutional Overthrow of Governments: Emerging Trends in the Commonwealth;
2. Introduction to Law and Human Rights for Young Persons;

3. Report on the Expert Group Meeting on Trafficking of Women and Children;
4. Best Practice for Commonwealth Countries in respect of Freedom of Association, Assembly and Expression;
5. Best Practice Commonwealth Guidelines on the Treatment of Victims of Crime;
6. 'Compilation of International and Regional Instruments for the Protection of Human Rights Defenders' in collaboration with International Services for Human Rights;
7. Report of the Expert Group Meeting on Internal Displacement in the Commonwealth: Common Themes and Best Practice Guidelines;
8. Human Rights Implications of Rising Sea Levels; (occasional paper)
9. Introduction to Citizenship for Young Persons in the Commonwealth.

29. In collaboration with Interights in the United Kingdom, the "Commonwealth Human Rights Law Digest" setting out human rights cases from across the Commonwealth is published on a bi-annual basis. The HRU has also published the "African Human Rights Law Reports" (in collaboration with the Centre for Human Rights Studies for Africa) which collates cases applying international and regional human rights instruments at national level in Africa. This is the first collection of the judgements from courts in Africa on human rights as well as the decisions of the African Commission on Human and Peoples Rights. The HRU newsletter, "Human Rights Update" has been revived and five issues have been printed to date.

Activities F: Collaboration with Other Organisations

30. The Commonwealth Secretariat has a Memorandum of Understanding (MOU) with the United Nations High Commissioner for Human Rights (UNHCHR) which was signed in 1998. Regular meetings are held with various officials from UNHCHR and there is a regular exchange of information. The Secretariat has invited them to participate in its activities and similarly, the UNHCHR keeps the HRU abreast of the latest developments in international human rights. The Unit has also collaborated on workshops with the UNHCHR, UNDP and national human rights institutions. The Secretariat has observer status with the Commission on Human Rights which meets in Geneva annually. The HRU also relates with the Inter- American Commission on Human Rights and the African Commission on Human and Peoples Rights and other regional bodies.

31. The HRU also has regular and fruitful meetings with international non-governmental organisations such as Amnesty International, Human Rights Watch and Association for the Prevention of Torture. The Unit has planned and executed joint activities with the Centre for Human Rights in South Africa, International Services for Human Rights in Geneva and South Asia Human Rights Documentation Centre in India, Asia-Pacific Forum for National Human Rights Institutions, CLEA and the Commonwealth Human Rights Initiative.

CO-OPERATION WITH PARTNER ORGANISATIONS REPORTS FROM PARTNER ORGANISATIONS

Paper prepared for the Commonwealth Secretariat

1. The Commonwealth High Level Group, which met in Coolum, Australia, 2-5 March 2002, called upon Commonwealth professionals to join with Commonwealth officials to help improve Commonwealth fundamental values. The Secretariat was asked to form stronger links and better two-way communication and co-ordination between officials and non-governmental organisations (NGOs) to give their activities greater impact and to produce lasting benefits. At the 2003 meeting in Abuja, Nigeria, Commonwealth Heads of Government expressed their appreciation for the positive contribution of civil society in advocacy and capacity building for democracy and sustainable development in member countries. The activities of our partner organisations in the promotion of Commonwealth fundamental values are detailed below.

COMMONWEALTH LEGAL EDUCATION ASSOCIATION (CLEA)

2. Founded in 1971 CLEA has as its broad objectives:

- fostering and promoting high standards of legal education in the Commonwealth;
- strengthening links between legal educators;
- disseminating information and literature concerning legal education and research;
- publishing and supporting the publishing of legal materials, particularly for the benefit of law schools in developing Commonwealth countries.

3. It is a Commonwealth-wide body with regional and national Chapters in South Asia, Southern Africa, West Africa, the Caribbean, India, Pakistan, Nigeria, Sri Lanka and the United Kingdom. Membership is open to individuals, law schools and other institutions concerned with legal education and research.

4. The Association has developed a six point *Programme of Action* designed to achieve sustainable improvement in legal education throughout the Commonwealth:

A. *Developing human resources*

- Training of law teachers
- Development of and support for research

B. *Developing non-human resources*

- Improving library facilities
- Developing the use of electronically produced information

C. *Curriculum Development*

- Developing new courses in areas relevant to Commonwealth countries
- Exchanging information and experiences on the development of courses incorporating a comparative legal approach

D. Professional training

- Strengthening links between law school and vocational training institutions
- Addressing the needs of vocational training institutions

E. Strengthening links between Commonwealth law schools

5. In carrying out this *Programme of Action*, the Association undertakes a wide range of activities.

PROGRAMMES 2003-5

Publications

6. The Association publishes a wide range of books and periodicals. These include three regular publications:

- *Commonwealth Legal Education:* is published three times a year and contains news and articles about law and legal education developments in the Commonwealth. It is sent free of charge to all known law school and law libraries in the Commonwealth and is also available on-line from the CLEA web site www.cleaonline.org;
- *Journal of Commonwealth Law and Legal Education:* launched in 2002 and published twice a year, this is the CLEA's own fully refereed journal;
- *Directory of Commonwealth Law Schools:* is a biennial publication that contains details of Commonwealth law schools and research institutions as well as the texts of all major Commonwealth declarations.

7. The Association also has an e-book programme. This is designed to disseminate books and other materials produced on CD-ROMS quickly and cheaply to Commonwealth law schools. There are currently two books in this series: (i) *Legal Education and the Administration of Justice in West Africa*; and (ii) *Curriculum Development for the 21st Century.*

8. The Association has also commenced a *print on demand* project. This enables it to have law books produced quickly, cheaply and in whatever numbers are required at the time. Further copies can be produced equally swiftly and cheaply. This is aimed especially at supporting small jurisdictions and/or publications on specialist subjects that might not otherwise attract the interest of other law publishers.

www.cleaonline.org

9. The new CLEA website hosted by the Queensland University of Technology, is being developed to include a wide range of legal materials and information relating to the Commonwealth.

Conferences/Seminars

10. The Association organises/co-sponsors a wide range of conferences and seminars. These cover topics such as Administrative Law and Justice; Law and Development; Human Rights and Just and Honest Government; and Reparations as well as a range of legal education issues.

11. Recognising that legal education needs and interests vary around the Commonwealth, the Association has launched a series of regional conferences/meetings designed to enable academics and practitioners from a particular region to meet regularly to discuss matters of common concern. In South Asia, for example, there are now regular regional meetings, the first two taking place in India and Pakistan.

12. Venues for recent CLEA events include: Australia, Barbados, Botswana, Fiji, Ghana, India, Kenya, Pakistan, South Africa, Sri Lanka, UK and Zambia.

COMMONWEALTH MAGISTRATES' AND JUDGES' ASSOCIATION (CMJA)

13. The Association was founded in 1970, and its aims are:

- to promote the independence of the judiciaries in the Commonwealth;
- to advance education in the law, the administration of justice, the treatment of offenders and the prevention of crime in the Commonwealth;
- to disseminate information and literature on all matters of interest concerning the legal process within the various countries comprising the Commonwealth.

14. The CMJA is in a unique position being the only international judicial organisation bringing together judicial officers of all ranks and from all parts of the Commonwealth representing the judicial arm of government. It provides a forum for promoting the highest judicial standards at all levels.

15. The importance of an independent judiciary as an essential element for safeguarding fundamental liberties and human rights is expressed in Article 10 of the Universal Declaration of Human Rights which states:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal"*

PROTECTION AND PROMOTION OF JUDICIAL INDEPENDENCE

16. It is recognised that "a robust legal system is critical to development and essential to democracy[1]". Every state needs a strong, independent and impartial judiciary to sustain a robust legal system.

17. The CMJA plays a role within the international judicial community in promoting the UN Basic Principles on the Independence of the Judiciary and the international instruments that safeguard this independence.

18. The CMJA was one of the Commonwealth Associations involved in formulating the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and the Independence of the Judiciary and in their distillation into the Commonwealth Principles (Latimer House) on the Accountability of and Relationship Between the Three Branches of Government endorsed by CHOGM in Abuja in December 2003. The CMJA has continued assiduously to promote these Principles to its membership in the Commonwealth.

19. Despite the fact that Commonwealth countries have agreed to the principles contained in the Harare Declaration and Millbrook Plan of Action and those of Latimer House, the CMJA has been increasingly called upon by members in defence of these principles in certain countries of the Commonwealth.

20. The CMJA has expressed its concern on a number of occasions to the Commonwealth Secretariat on the erosion of the independence of the judiciary in a number of jurisdictions around the Commonwealth.

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1 "Democracy and Development", Commonwealth Secretary-General's Report 2003.

21. It worked closely with the Legal and Constitutional Affairs Division (LCAD) on the representation from the judiciary at the Pan-African Forum on the Implementation of the Commonwealth Principles (Latimer House) on the Accountability of and Relationship Between the Three Branches of Government held in Nairobi, Kenya in April 2005.

JUDICIAL EDUCATION AND TRAINING

22. The Commonwealth, as distinct from the general community of nations across the globe, is an organisation particularly suited to mutual co-operation in the judicial sphere as virtually all its membership consists of countries sharing a basic common legal and judicial system. The role of an independent judiciary at all levels is a cornerstone of democracy, human rights and good governance. It is the right of every citizen in the Commonwealth. As such the quality of a country's judiciary is an important element not only of the fundamental well being of the people but also of the stability of the society and its economic development. The CMJA's judicial network promotes the highest standards of judicial behaviour and can provide guidance and support to those members of the judiciary who may be vulnerable.

General

23. The educational element of the CMJA's work is central to its purposes. The CMJA promotes the provision of judicial education and where this is difficult to provide, by invitation from the host judiciary, can call upon our judicial network to assist in the provision of judicial education programmes.

24. The CMJA promotes judicial training through its Director of Studies, a Circuit Judge from the UK, who is given partial release from his other judicial duties by the UK authorities to carry out this function. His responsibilities include the continued promotion and development of the CMJA's training programme, the devising and supervision of training courses for judicial officers where required, and assistance with the programming of regional seminars/conferences. He has co-ordinated the education programme for regional conferences in the Caribbean and has been a facilitator at regional conferences in the Pacific and East Africa. The CMJA is a member of the International Organisation for Judicial Training (IOJT) formed in 2003.

25. The Director of Studies was involved in a seminar on the promotion of the civil procedure rules in Lagos, Nigeria in November 2003. He was a Keynote Speaker at the East African Magistrates and Judges Association Meeting held in Mombasa, Kenya in April 2005. He also assisted in the formulation of the programme (in particular the judicial content) for the Commonwealth Law Conference being held in September 2005 in London.

26. At the invitation of the Jersey judiciary, the CMJA held a conference in Jersey in September 2004 on: "Justice at the Grassroots: Local Courts and the Delivery of Justice" which attracted 180 delegates from 23 jurisdictions of the Commonwealth. The CMJA was grateful to the Government and Judiciary of Jersey for hosting the conference.

27. In July/August 2005 at the invitation of the Ghanaian Judiciary, the CMJA held a conference in Accra on "Judicial Reform: Impact, Driving Force and the Future" which was attended by 300 delegates from 22 jurisdictions of the Commonwealth. The CMJA was extremely grateful to the Government and Judiciary of Ghana for hosting the conference which called upon the Law Ministers to support the Chief Justices of their jurisdiction in the promotion of judicial reform and judicial training.

28. The CMJA has also updated it's Training Manual, *The Magistrate in the Commonwealth*, first published in 1991 which is now available on CD. The Training Manual now integrates information on ethical standards and anti-corruption measures.

29. The CMJA is currently preparing for the 14th Triennial Conference on the theme: "Protecting our People, Preserving our Environment: The Judging of Diversity, the Diversity of Judging" being held in Toronto, Canada from 10 to15 September 2006.

Awareness and Training in Human Rights

30. The CMJA aims to provide a framework where judicial officers may discuss problems of mutual concern, and by doing so raise judicial awareness and knowledge.

HIV/AIDS Awareness

31. Many examples can be given where HIV/AIDS awareness can be of direct benefit, these include domestic violence, gender equality and the rights of people suffering from HIV/AIDS. The CMJA, together with the CLA, undertook a survey in 2001 on the impact of HIV/AIDS on human resources and human rights awareness within the Commonwealth's legal and judicial professions. As a result of this, the human rights implications of the HIV/AIDS pandemic has figured in the programmes of the CMJA.

Gender and Human Rights

32. From the beginning the Association has concerned itself with the rights of women. In 1994, the CMJA issued a Declaration on the Rights of Women. A number of colloquia on the rights of women and the girl-child have been held in conjunction with the Gender and Youth Affairs Sections of the Commonwealth Secretariat and the CMJA set up its own Gender Section.

33. At the invitation of the Gender Division of the Commonwealth Secretariat, the CMJA contributed to the Commonwealth Plan of Action on Gender and Equality adopted by the Women's Affairs Ministers Meeting in Fiji in May 2004.

34. In addition, the CMJA, together with the CLA and the LCAD of the Commonwealth Secretariat, has drafted a Gender and Human Rights Toolkit for use by paralegals, lawyers and judicial officers of the Commonwealth.

35. In May 2004, the first draft of this toolkit formed part of a Gender and Human Rights Workshop held in Fiji for participants from the Pacific islands.

Socio, economic and cultural rights

36. All Commonwealth countries are affected by economic globalisation and there is a need for more international co-operation between judiciaries to deal with the many problems that arise as a result.

37. "Human Rights, Human Needs: Seeking a Judicial Talisman" was the theme of the CMJA's 13th Triennial Conference, which was held in Malawi from 24 to 29 August 2002 and focused on the role of judicial officers in maintaining and developing a vibrant human rights environment in particular in the area of economic and social rights. At this Conference the Association also adopted a resolution on the promotion of awareness of environmental issues amongst members of the judiciary in association with the UN Environment Programme (UNEP) and has been working on promoting the soon to be published UNEP Judges Handbook.

Ethics and the fight against Corruption

Ethics

38. Since 1998 the CMJA has acted as the repository for Codes of Conduct and Ethics for judicial officers within the Commonwealth, which serve as models in the drafting of codes in jurisdictions where they do not as yet exist.

Anti-Corruption mechanisms

39. The CMJA collaborated with the LCAD of the Commonwealth Secretariat on the Anti-Corruption Colloquium held in Limassol, Cyprus in June 2002 and held a follow up session at the Jubilee Conference it held in London from 23 to 26 September 2002 on ways of combating corruption around the Commonwealth.

40. In May 2003, a Regional Colloquium, organised by the regional representatives of the CMJA was held in Pretoria, South Africa on combating corruption to further progress the Limassol Conclusions.

41. The CMJA collaborated in the organisation of the Colloquium held in St Lucia in June 2003.

42. In May 2004, the CMJA and LCAD organised a training course on integrity for legal and judicial officers and court administrators in Zanzibar.

43. In June 2004, it collaborated in the SADC region, on a Seminar on judicial integrity for judicial officers, which was held in Mauritius.

Court Administration

44. In order to assist in fulfilling the recommendations of the Limassol Conclusions (see above) the CMJA is considering setting up a Court Administration Section for those dealing with court administration on a daily basis. The CMJA is also considering running training programmes for court administrators and is co-operating with the Commonwealth Secretariat with regard to a proposal for a court administrator's code of conduct.

PARTICIPATORY ROLE OF THE CMJA IN THE IMPLEMENTATION OF COMMONWEALTH IDEALS

45. Just as the Commonwealth Parliamentary Association represents the parliaments of the Commonwealth, so the CMJA represents the third branch of power within the Commonwealth, the judiciary. However, the Commonwealth has not always considered the importance of the judiciary as leaders who are able to influence civil society.

46. The CMJA has been consulted by a number of jurisdictions on Commonwealth judicial issues: such as procedural reforms, impact of constitutional changes on judicial independence, and the impact of legislative reform on courts etc.

47. Promotion of education and training is all well and good but sometimes there are more fundamental problems such as delays in the administration of justice and a lack of basic facilities. The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, ensure that good governance and democracy is sustained and to provide for the effective and efficient administration of justice.

48. The CMJA is a valuable network for its members who often face similar problems and great pressures, albeit under widely varying personal circumstances. The network is maintained and developed through our regional, triennial and other conferences and through the *Commonwealth Judicial Journal*, our regular newsletter and the promotion of e-mail and other forms of electronic communication. The CMJA also has encouraged the holding of more regional meetings on subjects of interest to particular regions.

49. The CMJA works closely with NGOs and intergovernmental organisations (IGOs) in the promotion of the fundamental values of the Commonwealth. There has been public acknowledgment that co-operation between NGOs and IGOs, as illustrated in the case of the Latimer House process (see above), is a model for future Commonwealth work.

50. The CMJA has also been called upon to assist the Commonwealth Secretariat, the United Nations and other international bodies seeking judicial officers to assist with projects and programmes in different parts of the Commonwealth.

COMMONWEALTH HUMAN RIGHTS INITIATIVE (CHRI)

51. The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international NGO mandated to work for the *practical* realisation of human rights in countries of the Commonwealth. Activities are implemented from its network of offices based in New Delhi, India; Accra, Ghana; and London, UK. As well as a broad programme to advocate human rights in the Commonwealth, CHRI focuses on two detailed areas: access to information, and access to justice. It acts as a resource for civil society and government on human rights issues, particularly of a legal nature. Legal activities since 2002 are summarised below.

ACCESS TO INFORMATION

52. This programme largely focuses on the Right to Information (RTI), an area recognised as crucial in the Commonwealth by Commonwealth Law Ministers (2002), Commonwealth Heads of Government (2003), and the Commonwealth Expert Group on Democracy and Development (2003). Highlights include:

- review of draft Government RTI Bills from Uganda, Kenya, Jersey Islands, India and an Opposition Bill from Pakistan. The Uganda Bill has since been passed;
- submissions to Parliamentary Committees reviewing draft RTI Bills in Nigeria, Uganda and India;
- review of draft civil society RTI Bills from Mozambique, Uganda, Kenya, Ghana, Fiji, and Sri Lanka;
- review of draft civil society RTI rules from India and Pakistan;
- submission to the Freedom of Information Act Review undertaken in 2004 by the Australian Labour Party (the Opposition);
- production of comparative legal analyses of all Commonwealth RTI laws and all Indian RTI laws;
- outlining and publicising key principles required for an effective Right to Information Act;
- having a Key team member in the CPA RTI Study Group which produced Best Practice RTI Principles to guide policy-makers when drafting RTI laws.

53. Related to this work are activities on constitutionalism. These include: research and hosting a forum on constitutionalism in West Africa; in India, activities aimed at raising citizens' awareness of the nation's most important law, including workshops, publications and media activities.

ACCESS TO JUSTICE

54. CHRI's Access to Justice programme has three main programmatic areas - police reforms, prisons reforms and judicial exchanges – as well as covering other important areas related to citizens' capacity to access justice. Legal activities conducted in this period include:

55. *Human Rights Acts*

- A Citizen's Handbook to India's National Human Rights Commission was published, which encapsulates the practical working of the Protection of Human Rights Act, 1993, which governs India's national and 14 state human rights commissions.
- A submission was made to the Government of Pakistan on the National Commission for Human Rights Bill, 2005, including analysis of the Bill against international standards and Commonwealth best practice.

Police Reforms

56. As law enforcement officials, the police are mandated to ensure that the rule of law is implemented fully, in letter and spirit, for all citizens. Unfortunately, this is not the case across many Commonwealth countries. CHRI conducts strategic activities to catalyse reform, including relevant legal reform. This work has focused on:

- analysis of the Police Acts of Kenya, Uganda and Tanzania as part of study on police accountability and political interference in the region;
- submissions on human rights, particularly related to policing, to the constitutional review process in Kenya in 2003;
- collation of Police Acts from all Commonwealth countries;
- analysis of international legal standards related to policing, as part of a pan-Commonwealth report on police accountability;
- publishing a book entitled "Human Rights and Policing: Landmark Supreme Court Directives and National Human Rights Commission Guidelines" which encapsulates the core of India's jurisprudence on human rights and police work;
- examining and preparing a report on Pakistan's Police Ordinance 2002;
- preparing submissions to the Indian parliamentary committee examining the Central Vigilance Commission Act 2003;
- in Chhattisgarh, a tribal state of India, conducting legal literacy programmes for the local citizen liaison groups, the police and the local government.

Judicial Exchanges

57. These Exchanges are facilitated by CHRI in collaboration with INTERIGHTS, and aim to create a space for judges to deliberate on issues that inhibit access to justice, particularly for the poor, vulnerable and marginalised. Highlights include:

- a regional South Asian Colloquium in November 2002 for 30 senior judges from superior courts of the region, as well as from Canada, South Africa and Zimbabwe;
- a Maharashtra Judicial Exchange in November 2003 for judges and jurists, as well as activists and academics; focusing on access to justice in the context of poverty and marginalisation;
- a Chennai Judicial Exchange in November 2004 for over 30 District and Sessions Judges, focusing on due process and rights of the accused and victims;
- a detailed report of the Chennai Judicial Exchange, including Indian Supreme Court decisions which support the issues advocated for during the Exchange.

58. *Security legislation*

- Hosting a seminar on anti-terror legislation in the Commonwealth.
- Critiquing the model anti-terror law drafted by the Commonwealth Secretariat, against basic human rights standards, as well as provisions of anti-terror laws in Australia, Canada and UK.

Access to Justice in Gujarat

59. This project focuses on the Indian State of Gujarat and activities included:

- documenting the investigation and trial procedure in courts related to ten cases that followed communal riots in 2002;
- creating permanent community-based legal resources by training and supporting paralegals with trial court skills.

60. Law Ministers are invited to reflect upon the work of the CRHI to date.

COMMONWEALTH LAWYERS ASSOCIATION (CLA)

GENERAL

61. The Commonwealth Lawyers' Association (CLA) exists to maintain and promote the rule of law throughout the Commonwealth, by ensuring that the people of the Commonwealth are served by an independent and efficient legal profession.

62. Commonwealth countries share a substantial common ground in their legal systems, and the lawyers of these countries have much to learn from the comparative experience of their colleagues in other jurisdictions. This common ground also extends to many aspects of legal education and legal practice, and here too there is much to be shared. The profession around the Commonwealth is committed to the preservation of the highest standards of ethics and integrity, and to the furtherance of the rule of law for the benefit of society. As a pan-Commonwealth organisation, the CLA provides invaluable support in the pursuit of these ideals.

63. The CLA's objectives, as enshrined in its Constitution, are to maintain and promote the rule of law in the Commonwealth. This is achieved by:

- ensuring that the common bond of Commonwealth is preserved and fostered;
- strengthening professional links between members of the legal profession;
- maintaining the honour and integrity of the profession, and the promotion of uniformity in the standards of professional ethics; and
- encouraging improved standards of education and the promotion of exchanges of lawyers and students.

64. The CLA moved into its new premises at the Institute of Commonwealth Studies (ICS), 28 Russell Square, London on 7 June 2003.

65. The Secretariat, *inter alia*, provides administrative services to members, represents the CLA externally, develops projects, services the CLA's elected Council and promotes and supports the organisation of the Commonwealth Law Conference.

66. The President and Council are elected by the Association at its General Meeting held at the Commonwealth Law Conference and they hold office until the next Conference. CLA Council

Members attend an annual meeting in London. There is an Executive Committee which meets quarterly in London.

67. As a professional association/non-profit organisation, the CLA is primarily reliant upon membership subscriptions for funding in order to maintain its office and conduct its project work. There are three types of membership available – individual, institutional and corporate. Most of the national law societies and bar associations throughout the Commonwealth are institutional members of the CLA.

ACTIVITIES OF THE CLA 2002 – 2005

Projects

Canadian Bar Association (CBA) Survey

68. At its meeting in April in Melbourne 2003, the Council of the CLA approved a joint project proposal to survey and gather information about the institutional members of the CLA. The results of the survey would provide the CLA with a comprehensive database on the current structure and functioning of the various legal associations, recognise the needs and challenges faced by its members, their capacities and current work and identify potential for engagement in legal and judicial initiatives in both domestic and international fora.

69. The CLA assisted the CBA with this survey, both in the drafting of the initial questionnaire and the identification of legal institutions and organisations who should be included in the survey.

70. The results of the survey were published in May 2005. These have been made available to the CLA and all of the institutions that participated in the survey. The survey will be formally launched at the 14th Commonwealth Law Conference in London in September 2005. Additional copies are available on request.

Native Title to Land & Indigenous Peoples

71. The impetus for this project came from the Commonwealth Law Ministers Kingstown Declaration of 2002. An intern was recruited in September 2003 to research and produce a paper discussing various legal aspects of native title to land of indigenous peoples in 12 Commonwealth countries.

72. The paper entitled *Indigenous Land Rights in the Commonwealth – Legal Aspects* was completed and circulated in March 2004.

73. The CLA subsequently committed itself to a 6-month inception phase of the proposed joint long-term project between the CLA and the Commonwealth Policy Studies Unit (CPSU).

74. A project development officer was recruited in June 2004 to work on the project and undertook an inception study, further research and developed funding proposals in support of the project.

75. In April 2005, an application was submitted to the European Union by the CPSU for a 3-year project focusing on Indigenous Land Rights and Resource Management in the Commonwealth. The project will focus on the following countries: Bangladesh, Belize, Botswana, Cameroon, Guyana, India, Papua New Guinea, South Africa, Tanzania and Uganda.

76. The project will build the capacity of indigenous peoples' organisations and their legal representatives so that they may more effectively defend their land rights and manage their resources, thereby promoting their human rights and helping to reduce poverty and injustice for some of the most marginalised communities in the Commonwealth.

77. The project will identify, facilitate and exchange best practice in relation to indigenous peoples' land rights and resource management in the Commonwealth. It will lobby intergovernmental and non-governmental Commonwealth bodies. It will promote the training of indigenous peoples' lawyers and awareness among indigenous communities of the scope for legal redress.

78. The CLA and CLEA will effectively be subcontracted to complete various aspects of the project and the work will be carried out over the 3-year period.

79. A decision as to the outcome of the funding application is not expected until February 2006.

Gender & Human Rights Toolkit

80. The CLA assisted the CMJA with the development of a 'toolkit' for utilisation by paralegals, lawyers and the judiciary throughout the Commonwealth, in order to sensitise and raise awareness of gender issues.

81. The toolkit was 'tested' at a workshop held in Nadi, Fiji on 28 - 29 May 2004. The report of the workshop was published and distributed accordingly. Additional copies are available on request.

82. Ultimately, it is anticipated that the toolkit will be distributed across the Commonwealth and will result in improved delivery of appropriate legal services by both legal practitioners and the judiciary.

Institute of Legal Executives (ILEX) Survey

83. It was proposed that the CLA and ILEX undertake a joint survey, similar to that conducted by the CBA, to identify the different types of people offering legal services throughout the Commonwealth, as well as their qualifications, regulation and the nature of the services they provide.

84. The Executive Secretary began initial work on a project proposal and funding application. It was envisaged that the project would be of 12 months duration and would require a project officer based within the CLA on a part-time basis.

85. Unfortunately, however, to date, no further progress has been made in relation to this project.

Seminars, Workshops & Meetings

Medico - Legal Conference Kuala Lumpur, Malaysia 17 – 19 January 2003

86. The CLA in partnership with the Commonwealth Medical Association (CMA), the Commonwealth Dental Association (CDA) and the Royal Commonwealth Society (RCS) organised a medico - legal conference on *'Perspectives in tackling Medico – Legal Controversies'* which took place in Kuala Lumpur, Malaysia.

Commonwealth Heads of Government Meeting (CHOGM) Abuja, Nigeria 5 – 8 December 2003

87. The CLA was represented by the President and Executive Secretary. Activities in which the CLA participated included:

(a) Opening Ceremony Commonwealth Heads of Government Meeting - 5 December 2003.
(b) Tuesday 2nd December 2003 - Talk by Colin Nicholls QC, President of the CLA, and reception organised by the CLA, CMJA and CLEA and held in the Supreme Court of Nigeria. Hosted by the Honourable M L Uwais GCON, Chief Justice of Nigeria.
(c) Thursday 4th December 2003 - Talk by Colin Nicholls QC, President of the CLA, 'Law in the Commonwealth' School of Law, Abuja.
(d) Friday 5th December 2003 - Talk by Colin Nicholls QC, President of the CLA, 'Lawyers in the Commonwealth' Abuja Branch of the Nigerian Bar Association (NBA).
(e) Commonwealth Peoples Forum - Civil Society Meeting on Development and Democracy - Commonwealth Foundation, 1 - 3 December 2003; Commonwealth Human Rights Forum – CHRI, 3 - 4 December 2003; Dialogue on Indigenous Rights in the Commonwealth - Commonwealth Association of Indigenous Peoples (CAIP), 5 December 2003.

88. Overall, the trip was a success. The CLA succeeded in holding joint events with the CMJA and CLEA and publicising the CLA, the Latimer House Guidelines and the CLA brief on Guantanamo Bay. The events at the Supreme Court, the Law School and the NBA increased local awareness of the CLA and its activities. It promoted a suitable environment for the CLA to get further involved in West Africa.

89. The President subsequently wrote an article on Abuja and the Latimer House Guidelines. An edited version was published in The Times Law Supplement, 16 December 2003. The full article was published in the 'The Commonwealth Lawyer'.

Human Rights Defenders in the Commonwealth – What Can be Done? London, UK 22 April 2004

90. The CLA and Interights held a joint event focusing on the issue of human rights defenders within the Commonwealth. It was a half-day seminar followed by a keynote address and reception and was held at the ICS.

91. Helena Kennedy QC delivered the keynote address. The Chairmen were Iain Byrne (Commonwealth Law Officer, Interights) and Colin Nicholls QC (President, CLA). Andrew Anderson (Deputy Director, Frontline), Jane Winter (Director, British Irish Rights Watch) and Irene Petras (Co-ordinator, Zimbabwe Lawyers for Human Rights) were speakers.

Gender & Human Rights Toolkit - Pacific Region –Nadi, Fiji 28 - 29 May 2004

92. The CLA in partnership with the CMJA and the LCAD of the Commonwealth Secretariat organised a 2-day workshop which was held in Nadi, Fiji on 28 - 29 May 2004. The Executive Secretary attended the workshop and was also a resource person.

93. Lawyers and judicial officers from Commonwealth countries in the Pacific took part in the workshop which focused on Gender & Human Rights and took place prior to the 7th Meeting of Commonwealth Ministers Responsible for Women's Affairs (7WAMM).

94. The focus was on the issue of women's rights and the overall aim was to develop a gender toolkit for utilisation by paralegals, lawyers and the judiciary. Recommendations were produced, identifying the role of the legal profession and the judiciary in promoting the equality of women.

95. At the end of the meeting, general recommendations were made on all of the issues that had been discussed over the two days. These were named the Tanoa Recommendations.

96. These Recommendations were publicised and also circulated to the 7WAMM that was held in Nadi, Fiji from 29 May to 3 June 2004. The CLA also held a joint briefing with the CMJA for the Ministers and was the Rapporteur for the working group on Gender, Human Rights & Law.

Open Meeting – London, UK 10th June 2004

97. The annual Open Meeting was held on Thursday 10th June 2004 at the British Institute of International and Comparative Law (BIICL). The Rt. Hon. Lord Bingham of Cornhill, Senior Law Lord, delivered an address on '*An old constitution in a new world*'. The meeting was followed by a reception.

HIV/AIDS, Asylum & the Commonwealth – London, UK 20 January 2005

98. The CLA and Para. 55 Commonwealth HIV/AIDS Action Group held a joint event focusing on the issue of HIV/AIDS & Asylum in the Commonwealth. It was an evening meeting which was followed by a reception and was held at The Commonwealth Club.

99. The Chair was Stephen Knafler (Barrister, Two Garden Court Chambers) and the panel included Dr Anton Pozniak (Consultant Physician & Honorary Senior Lecturer St. Stephen's Centre, Chelsea & Westminster NHS Trust), Professor Alan Whiteside (Director Health Economics & HIV/AIDS Research Division (HEARD) University of Natal) and Dr. Mandeep Dhaliwal (Head: Care & Impact Mitigation Team, International HIV/AIDS Alliance).

Commonwealth Law Conference (CLC)

100. The best known activity of the CLA is the Commonwealth Law Conference. The Conferences began in 1955. They were organised by an informal body called the Commonwealth Legal Bureau which included a member of the Secretariat and a number of prominent Commonwealth lawyers. Later, the Secretariat ceased to play a part and delegated organisation of the Conferences to the Law Associations of the host countries.

13th Commonwealth Law Conference, 13 – 17 April 2003 Melbourne, Australia

101. This successful Conference was held in Melbourne, Australia and was attended by over 1500 delegates from across the Commonwealth. Sessions covering issues such as Human Rights and the Rule of Law, Technology and the Law and Litigation in the New Millennium were held. Satellite meetings also took place in the wings of the Conference, organised by the Commonwealth Association of Legislative Council (CALC), the Commonwealth Association of Public Sector Lawyers (CAPSL) and Commonwealth Chief Justices.

102. The CLA organised a Legal Writing Competition in the run up to the conference. The prize was complete sponsorship to attend the Commonwealth Law Conference.

14th Commonwealth Law Conference, 11- 15 September 2005, London, UK

103. The CLA has been heavily involved in all aspects of the organisation of this conference and preparations are well underway. The Conference will be the jubilee celebrating 50 years of Commonwealth Law Conferences and the first time that the Conference has been held in London since 1955. The theme for the Conference is *Developing Law & Justice.* Sessions will cover human rights, criminal law and practice and corporate and commercial law issues amongst others. Various

associations will meet in the wings of the Conference and several important publications will also be launched.

104. The CLA has organised a Legal Writing Competition in the run up to this Conference, It was open to young lawyers from across the Commonwealth and entrants were required to answer the question *'Is International Law Really Law?'* The winner will be announced shortly and will receive full sponsorship to attend the Commonwealth Law Conference.

Other

Amicus Brief – United States Supreme Court - Guantanamo Bay Detainees

105. The CLA submitted an *Amicus* brief in the US Supreme Court Appeal relating to the Commonwealth detainees at Guantanamo Bay on 3 October 2003. *Certiorari* was granted and a further brief as to the merits was submitted on 14 January 2004. The authors of the brief were Sir Sydney Kentridge QC, Colin Nicholls QC and Timothy Otty together with the CLA's US attorneys, Shea & Gardner. The team travelled to Washington DC, in April 2004 to attend the hearing. Judgment was awarded in favour of the CLAs brief (6/3) with the judges adopting some of the Commonwealth argument in their judgment.

Intervention – A & Others vs SSD

106. The CLA has submitted a Petition for Leave to Intervene in this important case. This is a joint petition, together with the Human Rights Institute of the International Bar Association and the International Commission of Jurists.

Opinion - Malaysian Bar Council

107. The CLA assisted in the drafting of an *Opinion* for the Malaysian Bar Council in litigation relating to judicial accountability in April 2004.

Latimer House Guidelines

108. The CLA is one of four organisations that formulated the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence. The Guidelines were endorsed by Commonwealth Heads of Government at their meeting in Abuja, Nigeria in December 2003 and were renamed the *'Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government.'*

109. The CLA assisted with the publication of the Principles in April 2004 and attended the formal launch of the Principles that was held at Marlborough House on the 12 May 2004. The CLA has since disseminated copies to all of its individual and institutional members.

110. A Pan-African Forum on the Commonwealth (Latimer House) Principles was held in Nairobi, Kenya from 4 to 6 April 2005. It was organised by the LCAD of the Commonwealth Secretariat and was convened to consider ways and means of promoting and advancing the Principles following their adoption in 2003. The CLA was invited to participate and was represented by the President who delivered a paper focusing on 'The Role of an Independent Legal Profession'.

Gibraltar Human Rights Symposium, 2-3 September 2004

111. The CLA supported the Gibraltar Human Rights Symposium that was held in Gibraltar on 2-3 September 2004. The CLA was invited to participate and the President presented a paper on 'Security Laws and Human Rights – Getting the Balance Right'.

Governance Workshop for Law Societies/Bar Associations of Africa, 4- 6 May 2005

112. The Association was invited to participate in a Governance Workshop for Law Societies/Bar Associations of Africa that was held in Entebbe, Uganda from 4 to 6 May 2005. The Workshop was organised by the Canadian Bar Association (CBA) and hosted by the Uganda Law Society (ULS) and East Africa Law Society (EALS). The Executive Secretary attended the workshop and represented the CLA.

'Official' Commonwealth

113. The CLA submitted an application for re-accreditation to the Commonwealth in June 2004. This was granted on 8 December 2004.

114. The CLA attended the Commonwealth civil society consultation on Development and Democracy on 12 June 2003 and the Commonwealth civil society meeting on the Committee of the Whole on 10th November 2003.

115. The CLA attended a Consultative meeting on the Commonwealth Gender Programme and New Plan of Action on Gender & Development (2005 – 2015) on the 17 November 2003.

116. The CLA was represented at the Commonwealth Heads of Government Meeting (CHOGM) that took place in Abuja, Nigeria in December 2003 and participated in the 7WAMM that took place in Nadi, Fiji from 30 May to 2 June 2004.

117. The CLA was granted official observer status and attended the Meeting of Senior Officials of Commonwealth Law Ministries and the Meeting of Law Ministers and Attorneys General of Small Jurisdictions that took place in London, UK from 18 to 22 October 2005. A written report on CLA activities since their last meeting was submitted prior to the meeting and subsequently included in the materials distributed to delegates. The Executive Secretary also made an oral presentation highlighting the CLA's recent successes to the delegates.

118. The CLA participated in the following civil society consultations organised by the Commonwealth Foundation: 17 March 2004; 24 November 2004; and 23 May 2005. At the Consultation on the 17 March 2004, the Executive Secretary made a presentation on the CLA's attendance and experience of the CHOGM 2003.

119. The CLA was also represented at the annual Commonwealth Day celebrations.

Commonwealth Human Rights Initiative (CHRI)

120. The CLA is a Founder and Trustee of the CHRI and is also represented on the Initiative's Advisory Commission. The CLA regularly attends meetings of the Trustee and Advisory Commission, as well as providing ongoing support for programme activities.

121. The CLA has been involved in the ongoing redrafting of CHRI's Memorandum of Understanding.

Para. 55

122. The CLA is a member of the Para. 55 Group in the fight against HIV/AIDS and regularly attends meetings of the Group, as well as participating in its activities.

Collaboration

123. The CLA has continued to work closely with the CMJA, the CLEA, and other Commonwealth professional associations, non-governmental and civil society organisations. The CLA has also continued to work with the LCAD of the Commonwealth Secretariat on matters of mutual interest and concern.

PUBLICATIONS

124. *The Commonwealth Lawyer:* The CLA publishes this journal three times a year. It is circulated free of charge to members. The journal is also circulated to law societies and bar associations across the Commonwealth, as well as partner organisations and other related organisations. *The Commonwealth Lawyer* provides a topical and provocative forum for discussion of issues relating to the legal profession. A wide range of Commonwealth views and developments is reflected in in-depth articles, case reports, short notes and book reviews.

125. *The Clarion:* The CLA publishes this newsletter three times a year. It is circulated free of charge to members. The newsletter is also circulated to law societies and bar associations across the Commonwealth, as well as partner organisations and other related organisations. It provides information on current legal issues of interest around the Commonwealth and the CLA's activities.

126. *Directory of Members:* The CLA publishes jointly with the LCAD of the Commonwealth Secretariat a Directory of Members, listing all individual and institutional members of the Association. A new edition was published before the Melbourne Conference and another will be prepared for the London Conference.

COMMONWEALTH PARLIAMENTARY ASSOCIATION (CPA)

127. The CPA is an Association of Commonwealth Parliamentarians who, irrespective of gender, race, religion or culture, are united by community of interest, respect for the rule of law and individual rights and freedoms, and by pursuit of the positive ideals of parliamentary democracy.

128. The Association's mission is to promote the advancement of parliamentary democracy by enhancing knowledge and understanding of democratic governance. It seeks to build an informed parliamentary community able to deepen the Commonwealth's democratic commitment and to further co-operation among its parliaments and legislatures. This mission is achieved through a Strategic Plan that ensures that CPA activities continue to meet the changing needs of today's parliamentarians.

129. CPA programmes provide the sole means of regular consultation among Commonwealth members, fostering co-operation and understanding and promoting the study of and respect for good parliamentary practice. This role is endorsed by Commonwealth parliaments and Heads of Government. In 2003, governments bound themselves to an additional set of Commonwealth Principles based on a CPA initiative with legal professionals to define the proper relationships between the branches of government.

130. The CPA pursues its objectives by means of:

- annual Commonwealth Parliamentary Conferences, Regional Conferences and other symposiums;
- interparliamentary visits;
- Parliamentary Seminars and Workshops;
- publications, notably *The Parliamentarian* and a newsletter on CPA activities and parliamentary and political events; and
- Parliamentary Information and Reference Centre communications.

131. Active CPA Branches now exist in 162 national, state, provincial and territorial parliaments, with a total membership of approximately 15,000 parliamentarians.

ACTIVITIES IN 2004

50th Commonwealth Parliamentary Conference, Canada

132. More than 500 members of Commonwealth parliaments and legislatures questioned intergovernmental agencies about the effects of global programmes on their societies when they met at the 50th Commonwealth Parliamentary Conference in early September in Canada.

133. The Conference, held in Ottawa, Quebec City and Toronto from 30 August to 9 September, enabled parliaments from around the Commonwealth to debate the theme "Responsibilities and Rights of People and Parliaments in a Global Community" with senior representatives of such influential international agencies as the World Bank, the International Monetary Fund (IMF), the Organization for Economic Co-operation and Development (OECD) and the Commonwealth Secretariat.

134. The Governor-General of Canada, H.E. Rt Hon. Adrienne Clarkson, opened the Conference at a ceremony in Quebec City. It was chaired by the 2004 President of the CPA, Hon. Peter Milliken, MP, Speaker of the Canadian House of Commons. The Conference was hosted by the federal, provincial and territorial branches in Canada.

135. The Conference period also included meetings of the Small Countries Conference, the Commonwealth Women Parliamentarians and the Society of Clerks-at-the-Table. The Summary Report of the plenary Conference discussions was later to be published in *The Parliamentarian* for circulation to Commonwealth Heads of Government, to Opposition Leaders and to relevant intergovernmental agencies.

136. Commonwealth Secretary-General, H.E. Rt Hon. Don McKinnon, addressed delegates on current Commonwealth issues and answered questions on Commonwealth policy. Senior Commonwealth Secretariat officials were among representatives of international agencies who participated in some of the discussions.

137. CPA Secretary-General, Hon. Denis Marshall, QSO, updated parliamentarians at the Conference on the Association's work in promoting the development of democratic institutions and in assisting members to function more effectively in their parliaments and in the global community. He said:

> *"My belief is that membership of the CPA produces a significant and tangible benefit for Parliamentarians — not only in helping them to develop in a professional way, but also in contributing to the social and economic development of millions of people through greatly strengthened democracies."*

138. The main Conference in Quebec City and Toronto featured opportunities for MPs to debate issues not just with each other and with Commonwealth officials, but also with representatives from: the World Bank, the International Monetary Fund, the United Nations Educational, Scientific and Cultural Organization, the Commonwealth Foundation, the CHRI and the Caribbean Community Secretariat. They were also joined by representatives of Canada's Parliamentary Centre and the National Democratic Institute of the United States. Issues discussed included: poverty reduction; AIDS; racism; proper democratic relationships between Parliaments and the executive and judicial branches of government; free access to information; public health issues; and the effects of multinational parliaments on domestic democratic governance.

139. A Conference plenary session was devoted to a parliamentary debate on "The Commonwealth Plan of Action for Gender Equality, 2005 to 2015" and featured an examination by leading Commonwealth MPs of gender aspects of democratic representation, poverty reduction, control of AIDS and legal issues in the field of human rights.

24th Commonwealth Parliamentary Conference of Members from Small Countries, Quebec

140. The 24th meeting of the Commonwealth Parliamentary Conference of Members from Small Countries, in sessions on 31 August and 1 September in the Quebec National Assembly in Quebec City, Canada, considered the Barbados Programme of Action on the Sustainable Development of Small Developing Island States. The parliamentarians constituting the 24th meeting agreed that governments should press for specific changes to the global economic order to augment the minimal protection now afforded to the most vulnerable members of the international community. The meeting was officially opened through a videoconference link between the National Assembly and the Executive Committee meeting at Meech Lake outside Ottawa.

141. The meeting was composed of 60 parliamentarians, 20 from 12 Commonwealth nations in the Caribbean, the Pacific and Europe, and 40 from 17 subnational Commonwealth jurisdictions, all with populations of 400,000 people or fewer. Meeting sessions were chaired by delegates and some discussions included participation by representatives of the OECD, the Commonwealth Secretariat and the Caribbean Community Secretariat. Summaries of meeting sessions, prepared with the assistance of Commonwealth clerks from small jurisdictions, were later published in *The Parliamentarian* and circulated to relevant international organisations and to all Commonwealth governments and Opposition Leaders.

142. The lack of adequate representation for small countries in international agencies and fora was repeatedly raised by delegates who concluded that this was a major impediment to the voicing of their concerns in the institutions that take important decisions which have a major impact on their populations.

143. The 24th meeting concluded that the CPA and Commonwealth national and subnational governments should take urgent steps to sustain the development of all small countries, and especially small island developing states.

144. Participants called for the development of vulnerability profiles that took into consideration the particular circumstances of small states, including the fact that they were particularly vulnerable to environmental factors, such as rising sea levels, caused by conditions outside their control and to which they have not contributed. This should be specifically recognised in ratings to determine Least Developed Country (LDC) status and in other concessionary multilateral arrangements. They also encouraged the CPA, the Commonwealth and other intergovernmental organisations to work on developing a Resilience Index on a regional basis, and to use these indices in advocating the application of good governance and sound macro-economic management in small states.

145. Delegates' deep concern with respect to paragraph 35 of the World Trade Organization (WTO) Doha Declaration (which recognises the vulnerability of small economies but does not accord them exceptional treatment within the WTO) was expressed in their agreement that parliamentarians and the Commonwealth should urge the WTO to offer concessions that assist small economies to cope with the increasing liberalisation of international trade.

146. Delegates' concern over the impact of the OECD's campaign against what it describes as "harmful" tax practices led them to agree that the Commonwealth and Commonwealth parliamentarians should urge the OECD to:

a) affirm that tax competition is not a "harmful" tax practice,
b) press its own member states to the same degree as small states to conform to OECD standards; and
c) encourage the international community to make human, technical and financial assistance available to help small countries meet compliance criteria and deadlines where these are lacking.

147. Representatives of small states' provincial and territorial jurisdictions expressed concern that too large a part of the proceeds from the exploitation of their natural wealth went to their metropolitan government and requested that due regard be given by those governments to the needs of the territories from which this wealth came.

148. Delegates agreed that sustainable tourism must be promoted only as part of an overall strategy for sustainable development that dealt with economic delivery, environmental preservation and social exclusion.

149. The 24th meeting concluded that the objectives of programmes such as the Barbados Programme of Action for Small Island Developing States would only be achieved if small economies had the moral, financial and technical support and the necessary investment of the larger countries within the Commonwealth and beyond to reap the benefits of sustainable tourism.

35th British Islands and Mediterranean Regional Conference, Falkland Islands

150. The Falkland Islands hosted this CPA regional conference from 16 to 20 February. At an impressive ceremony in the Council Chamber, Falklands Governor H.E. Howard Pearce gave the opening address, and then the Stanley school choir entertained participants. After a briefing by the Chief Executive of the Falkland Islands Government, delegates got down to the business of the topic of their first session.

151. At the Annual General Meeting of the region, a paper was tabled by Scotland Branch seeking discussion on ways the Branches could be more proactive in CPA activities. This was referred to Branches for discussion before next year's meeting. The Conference discussed: The Ability of Small Countries and Overseas Territories to Defend Themselves and to Safeguard their Status and Independence; Tourism; Educational Issues Relating to Small Countries; and Environment Concerns versus Commercial Development.

29th Caribbean, the Americas and Atlantic Regional Conference, Grenada

152. The CPA Grenada Branch hosted the 29th Caribbean, the Americas and the Atlantic Regional Conference in St George's from 25 to 31 July.

153. Forty delegates from 12 of 17 CPA Branches in the region participated in meetings held at the Grenada Grand Beach Conference Centre. Baroness Rosalind Howells, originally from Grenada

but now a member of the United Kingdom House of Lords, attended the conference as an observer. CPA Secretary-General Hon. Denis Marshall, QSO, joined the early stages of the Conference en route to Guyana. The Conference was officially opened by the Prime Minister of Grenada, Dr the Rt Hon. Keith Mitchell, MP.

154. Topics discussed included: the Caribbean Single Market Economy; the role of dispute resolution in easing the burden on civil courts; strengthening the family structure and promoting the rights of women and children through legislation; and new initiatives in the field of HIV/AIDS. The closing session was presented by the host country, Grenada, on "General Agreement on Trade in Services with Special Reference to Health-Related Services".

155. Each participating Branch also sent two young persons aged between 20 and 26 years for the Region's Youth Parliament, which followed the Conference. The Youth Parliament, convened at Parliament, debated a Bill on making abortion illegal and a motion on reducing poverty by enhancing education. Twenty Caribbean young people participated. Conference participants, local parliamentarians and many local students attended. The youth "Parliamentarians" debated in an orderly parliamentary manner, adapting well to parliamentary procedures.

35th African Regional Conference, Swaziland

156. King Mswati III of Swaziland told delegates at the 35th CPA African Regional Conference that his country was nearing the end of a national constitutional consultative process involving all Swazis. He said consultation was integral to the Swazi Tinkhundla system of government, which involved meetings around the country on all major issues so that the Government and Parliament could implement policies and laws that reflected the views of the people.

157. Swaziland's monarchy-led system was described to the Conference as an attempt to provide an African alternative to the Westminster model, combining the best of customary governance and community organisation with democratic processes.

158. A new constitution was being drafted and governance issues and alternatives were under consideration across the country. The draft would be revised based on the views received and presented to Parliament for debate and passage later in the year.

159. The King recalled that a similar consultative exercise had recently produced a national economic strategy for the next two decades, which focused on infrastructure development, poverty alleviation and job creation.

160. The Speaker of the Swaziland House of Assembly, Hon. Sgayoyo Magongo, MP, described the Tinkhundla system as a co-operative alternative approach to democracy. The King, his Government and Parliament worked together to ensure the will of the Swazi people was reflected in governance.

161. The Speaker of the National Assembly of Lesotho, Hon. Ntlhoi Motsamai, MP, said King Mswati's presence at the Conference opening showed that the Monarchy recognised Parliament as central to Swaziland's democracy and good governance.

162. The Conference later discussed the Tinkhundla system, a non-party form of government in which all candidates for the 55 elected House of Assembly seats stood as individuals. The King appointed 10 further Assembly Members and 20 Senators. Ten more Senators were elected by the full House of Assembly. The country was under pressure, particularly internationally, to move to a multi-party system of government and to reduce the authority of the Monarchy.

163. Dr the Hon. Prof. Lydia Makhubu, a chemistry professor and University of Swaziland Vice-Chancellor who is one of the royal appointees to the Senate, described the form of government as a community-based system for the provision of services and administration and for elections.

164. Delegates applauded the theory behind the system as an attempt to develop an African form of democratic government, although a question was raised about the system's democratic credentials.

165. Voting was by public queuing. Each chiefdom in an Inkhundla selected a candidate in "primary" elections. The primary winners in each of the 55 Tinkhundlas stood against each other for election to Parliament. The King selected his Prime Minister and Ministers from among MPs.

27th Australian and Pacific Regional Conference, Western Australia

166. The 27th Conference of the Australian and Pacific CPA regions was held in Perth, Western Australia, to mark the centenary of its Parliament Buildings and the 175th anniversary of statehood.

167. Approximately 50 members and parliamentary officials, eight of them women, from all nine Australian states and territories and most of the Branches in the Pacific Region attended the Conference, which met from 4 to 7 October in the Legislative Assembly Chamber. The Commonwealth of Australia's Parliament was unable to send a delegation as its members were in the last week of the country's general election campaign. The Conference was shortened by a day so that Australian delegates could return home for election day. Australia is one of four Commonwealth countries that have compulsory voting, Cyprus, Fiji and Nauru being the others.

168. Pacific Branches in Nauru, Solomon Islands, Tuvalu and Vanuatu were unable send participants. Observers from the Sarawak Legislature, the Parliament of the United Kingdom and the Western Cape Provincial Legislature attended the Conference.

169. The Conference was one of several special events to mark the two milestones in Western Australia's history. The Legislative Assembly and Legislative Council both held regional sittings, the former in Albany and the latter in Kalgoorlie. New parliamentary offices and a new Parliamentary Library were opened, a history of the building was published, a Student Parliament was held and an Aboriginal gallery was opened.

170. The President of Western Australia's Legislative Council, Hon. John Cowdell, MLC, chaired the Conference, while House Speaker Hon. Fred Riebeling, MLA, was chosen as Deputy Chairman. Among the many issues discussed were: Upper Chambers and the legislative and budgetary processes; changes to Samoa's standing orders; care of the mentally ill; democratising Parliaments; the Hare-Clark voting system; governance in small jurisdictions; advocacy for children and young people; the effects of Cyclone Heta on Niue; State government relations with local authorities; induction programmes for new members; and Western Australia's relations with Asia.

171. Delegates were also given a presentation on the CPA and its role in the Commonwealth and the global community. At a short meeting of women Parliamentarians, Hon. Louise Pratt, MLC, of Western Australia, a former Member of the Commonwealth Women Parliamentarians (CWP) Steering Committee, described the measures to enhance the role and status of the CWP agreed by the CPA General Assembly a month before.

1st Asian and Indian Regional Conference, Andhra Pradesh

172. The first CPA Regional Conference for the new Asian and Indian regions met in Hyderabad, India, from 17 to 22 November. The Conference was inaugurated by the Speaker of the

Lok Sabah of India, Hon. Somnath Chatterjee, MP, in the Andhra Pradesh Legislative Assembly Hall.

173. The Conference was attended by 45 delegates, 21 secretaries and seven observers from 23 of the 31 Branches in the Indian Region and six of the eight Asian Branches.

174. Andhra Pradesh Chief Minister Dr Y.S. Rajasekhara Reddy, MLA, noted at the opening ceremony that this was the first event for India as a region since it was separated from the Asian region at the 2004 CPA General Assembly.

175. Hon. K.R. Suresh Reddy, MLA, Speaker of Andhra Pradesh's Legislative Assembly, welcomed delegates and Shri K. Rosaiah, MLA, Minister of Finance and Legislative Affairs, thanked those who organised the event on the theme, 'Strengthening Democracy and Securing Development: The Role of Parliamentarians'.

176. The theme was discussed in a plenary session opened by the Deputy Speaker of the Lok Sabah, Shri Sardar Charan Singh Atwal, MP, and Mr Sardar Mohammad Yakub, MNA, Deputy Speaker of the National Assembly of Pakistan.

177. Panel sessions discussed: Eradicating Hunger and Poverty, The Role of Parliamentarians; Corruption – A Threat to Democracy; The Role of Parliaments and Parliamentarians in Enhancing Good Governance; and Towards Sustainable Development in the Regions.

178. Participants agreed that the subjects discussed in the panels should be treated as the "Hyderabad Agenda" as they have a continuing relevance for the people and parliamentarians of both regions. They should be discussed at future Conferences to monitor progress.

COMMONWEALTH WOMEN PARLIAMENTARIANS

Workshop on "Gender, Democracy and Development" and 7th Commonwealth Women's Affairs Ministers' Meeting, Fiji

179. The Workshop was organised by the CPA, with support from the Commonwealth Secretariat and the British Council. Following on from our collaborative work on gender carried out in December 2003 in Abuja, Nigeria, this Workshop was hosted by the Parliament of Fiji.

180. The Workshop brought parliamentarians together to exchange experiences and good practices in the field of women's participation in democratic decision making and peace-building and to increase understanding of gender, development and democracy within the Commonwealth framework and with particular reference to explore poverty reduction, economic empowerment, the protection of human rights and the HIV/AIDS pandemic.

181. Holding the Workshop in Fiji at the time of 7WAMM provided an opportunity to raise the profile of the activity and highlight the issue of gender within a parliamentary context. The Workshop issued a Communiqué to Commonwealth Ministers on their deliberations. It has been posted on the CPA website and circulated to all Branches.

COMMONWEALTH SEMINARS

53rd Westminster Seminar on Parliamentary Practice and Procedure, United Kingdom

182. The 53rd Westminster Seminar on Parliamentary Practice and Procedure, held annually in London since 1952, took place in London and Hereford from 2 to 13 March. The Seminar provides an opportunity for parliamentarians to examine the workings of the Westminster Parliament. The

discussions covered the following subjects: the CPA; the Political Scene at Westminster; the Parliamentary Scene at the House; the Speaker's Role in Parliament; Party Discipline in Parliament and Communication between Parties; the UK and the Commonwealth; Parliamentary Questions and Motions; the Select Committee System; Parliament, Government and the Media; Standards and Privileges; Delegates Exchange Views; the Legislative Process; and the MP and the Constituency

16th Commonwealth Parliamentary Seminar, Malaysia

183. This seminar was held in the Sheraton Imperial Hotel, Kuala Lumpur, Malaysia, from 23 to 30 May.

POST-ELECTION SEMINARS

Zanzibar

184. The Zanzibar seminar from 16 to 19 January was attended by 76 of the 79 Members of the House of Representatives.

185. Throughout the seminar, there was active engagement by the women Members and the Speaker of the House of Representatives, Hon. Pandu Amerir Kificho, MHR, shared the chair with one of the women Backbenchers. There was a high level of criticism of the Government of Zanzibar by its own Backbenchers for its failure to seriously address the need for nationalism to be moderated if sustainable development is to be achieved. The women have also formed a cross-party group to assist in their professional development and have organised information and communication technology training for themselves.

186. The final day was devoted to two sessions organised in conjunction with the Joint Presidential Supervisory Commission of the Political Accord between CCM and CUF. This proved to be most successful with both parties agreeing to further work together. Indeed, the lack of animosity between the two parliamentary groupings was most striking. There appears to have been significant progress on resolving the problems that previously existed, at least within the House of Representatives. The key outstanding issue yet to be resolved was explained as the need to ensure proper voter registration before the expected elections in October 2005.

Turks and Caicos Islands

187. The Turks and Caicos seminar took place from 26 to 28 February against the backdrop of a general election on 24 April 2003 which saw the ruling People's Democratic Party (PDM) returned for a third term, but the opposition Progressive National Party (PNP) filed election petitions against the results in two of the thirteen constituencies. On 19 June 2003, the Chief Justice declared the results in both districts void with the result that a fresh election was required in each one. This put the governing PDM in a minority in the Legislative Council. The Chief Minister, Hon. Derek Taylor, MLC, asked the Governor to dissolve the Legislative Council and to call a new general election.

188. The Governor, acting in accordance with the Constitution of the Turks and Caicos Islands, told the Leaders of both parties on 23 June 2003 that he was denying both the PDM's request for a new general election and the PNP's request for the immediate appointment of their Leader as Chief Minister, and that he would issue writs for by-elections in the two constituencies affected to be held on 7 August 2003.

189. The PNP won both seats in the by-elections giving them a majority of 8 to 5 in the Legislative Council. Five other seats are occupied by the Attorney General, Chief Secretary (both *ex*

officio) and three appointed Members (government, opposition and a representative of the Governor).

Antigua and Barbuda

190. In March 2004 the people of Antigua and Barbuda elected a new government, the first change in government for 28 years. The long-standing Leader (and sometimes only Member) of the Opposition, Hon. Baldwin Spencer, became Prime Minister. The great majority of his Government was composed of Parliamentarians elected for the first time. It was therefore timely for the CPA to reconnect with the Parliament and offer a Post-Election Seminar, which was successfully held on 13 and 14 October.

191. The Official Opening was marked by addresses from eminent local constitutional lawyer Ms Bernice Lake, QC, and from Prime Minister Spencer who announced some initiatives in his reform programme.

192. Topics discussed included: the Development of the Commonwealth and the CPA; the Fabric of Constitutional Government: An Analysis of the Constitution of Antigua and Barbuda; How a Bill becomes Law; the Role of the Presiding Officer and Other Officials;
Standing Orders, Parliamentary Privilege, Members Ethics; Women in Parliament; and Accountability and Transparency.

SPECIALISED CONFERENCES, STUDY GROUPS AND SEMINARS

Commonwealth Workshop on Government and Opposition, Mozambique

193. Participants from 11 Commonwealth countries in the Southern African Development Community (SADC) — including senior parliamentarians, party managers and representatives of civil society — met in Maputo, Mozambique, from 26 to 30 January to discuss the contribution of government and opposition to the deepening of democracy. The workshop was organised by the Commonwealth Secretariat, in co-operation with the CPA, the SADC Parliamentary Forum and FECIV, a Mozambiquan non-governmental organisation.

194. Participants agreed that government and opposition need to work together as representatives of all the people. Each has a vital role to play in the democratic process. The Workshop was particularly timely in seeking to entrench the values and culture of democracy and multi-partyism. It was agreed that it is the equal responsibility of both ruling and opposition parties to advance gender equality and the role of young people. Participants recommitted themselves to the decisions contained in the SADC Declaration on Gender and Development and reconfirmed the importance of the target of at least 30 per cent representation of women in positions of power and decision making by 2005.

195. The meeting emphasised the need for the opposition:

- to be effective both in holding the executive to account and presenting a set of alternative policies;
- to be given adequate parliamentary time and the resources it needs to enable it to perform its tasks effectively; and
- to develop a consensus with government on issues of national importance and in the interests of national development.

CPA/WTO Regional Workshop for Pacific Parliamentarians, New Zealand

196. The third Regional Workshop for Parliamentarians, organised in partnership with the World Trade Organization (WTO) Secretariat, took place in Wellington, New Zealand, from 28 to 30 April. The Parliament of New Zealand hosted the event.

197. The Workshop was the third in a series which already included events in Cape Town, South Africa, and Port-of-Spain, Trinidad and Tobago in 2003. Holding the event in Wellington was timely for the CPA as it coincided with the relocation of the Regional Secretariat from Australia to New Zealand. This enabled publicity to be given to the new arrangement for the Pacific region, an announcement that was universally welcomed by participants attending the Workshop.

198. Twenty-six parliamentarians from 10 of the 12 Branches in the region sent representatives although the total number of participants, observers and resource persons involved in the event was 43. Women Members comprised 19 per cent of the participants compared to 39 per cent in Trinidad. The small number of women Members in the Pacific made this inevitable. Indeed, there is currently only one woman Member in each of the Cook Islands and Vanuatu Parliaments and they both took part in the Workshop.

Financing Politics, Curbing Corruption and Parliamentary Ethics, CPA/Wilton Park

199. This CPA Conference marks the 11th such collaboration with Wilton Park, an executive agency of the United Kingdom Foreign and Commonwealth Office.

200. Addressing the theme of "Financing Politics, Curbing Corruption and Parliamentary Ethics", the purpose of the Conference was to bring together Members from Commonwealth jurisdictions with non-Commonwealth parliamentarians as well as academics, consultants and representatives of organisations concerned with democracy and good governance. The Conference was designed to share information on the successful strategies currently taking place within the Commonwealth and beyond to address the challenge of curbing political corruption.

201. The programme included sessions on: How is Politics Best Financed?; How does Corruption Distort Development?; How do Incumbency and Patronage influence the Political Process?; How can Politics be funded in Small States?; Political Parties and the Financing of Politics; Does the Executive overly Control how Parliament and Members are financed?; How can Parliamentary Codes and Registers of Members' interests help?; How can Public Accounts Committees help Improve Transparency and Accountability in Politics?; How can Business Work Responsibly in Difficult Political Environments?; and How can new Governments best Curb Corruption and Build Transparency and Democracy?

202. Delegates discussed the financing of politics and the importance of the independence of parliament. During the course of discussion, the Conference made clear that in order to fight and reduce corruption, anti-corruption measures should be taken both by national and international institutions, including creating coalitions at the national level. Participants stressed that in addition to adopting anti-corruption measures, including legislation and other tools, it was absolutely crucial to enforce these anti-corruption measures with the assistance of a free media, non-governmental organisations and a strong civil society.

203. Participants heard that parliaments have varying degrees of autonomy. Most established parliaments enjoy administrative autonomy and independent internal organisation; but experience varied among participants, with some having clear independence in financial matters through statutory provisions or through long established convention, while others had varying degrees of

autonomy. A parliamentary body or committee not dominated by the executive was the most common form of budgetary authority for the parliamentary service.

Commonwealth Day — "Building a Commonwealth of Freedom"

204. Commonwealth Day was commemorated on Monday 8 March and an event was once again organised by the CPA Secretariat in London for 35 young people, most of who were between the ages of 18 and 29 and more than half of whom were women. The participants, who were drawn from 16 Branches from across the Commonwealth, joined in a programme that focused on the Commonwealth, the CPA and parliamentary democracy.

205. The day began with a tour of the UK Parliament which encouraged them to reflect on their own customs and the operation of their parliaments.

206. Following the tour, the Secretary-General spoke to them about the Commonwealth and the CPA's role and structure and answered questions about the contributions of the Commonwealth and the CPA to parliamentary democracy and to society in general.

207. Mrs Cheryl Gillan, MP, addressed the group about her job as a Member of the House of Commons and Lord Rupert Redesdale spoke to the young people about his role in the House of Lords.

208. The participants then attended the multi-faith Commonwealth Observance at Westminster Abbey which was held in the presence of HM The Queen. A highlight this year was the presence of Archbishop Desmond Tutu from South Africa. The participants then resumed their meeting to engage in a group activity designed to improve their knowledge of the Commonwealth.

209. Some of the participants were able to attend the Commonwealth Secretary-General's Commonwealth Day Reception held at Marlborough House. HM The Queen was Guest of Honour and the Duke of Edinburgh, the Prince of Wales and Commonwealth High Commissioners were present.

210. The CPA Secretariat this year collaborated with the Royal Commonwealth Society to give 10 participants the opportunity to join in a "Youth Commonwealth Heads of Government Meeting" which took place at the Commonwealth Secretariat the day after Commonwealth Day. This event brought together around 100 young people from London, Leicestershire and Cambridge, for a one-day simulation of the biennial Meeting. Commonwealth Secretary-General, the Rt Hon. Don McKinnon, and Mr Julian Robert Hunte of St Lucia, President of the United Nations General Assembly, spoke at the formal Opening Ceremony.

Commonwealth Day in Branches

211. The Association also encourages its Branches to celebrate Commonwealth Day and each year sees a further increase in the number of Branches organising events for young people. To encourage this process the Secretariat provides grants to Branches engaging in innovative activity for their young citizens. Awards were made in 2004 to the following 18 Branches:

Africa: Borno, Uganda, Lagos, Limpopo, Namibia, North West Province, Nigeria and Zambia.
Asia: Orissa, Nagaland, Gujarat, Chhattisgarh and Sikkim.
British Islands and Mediterranean: Wales.
Canada: Quebec.
Caribbean, Americas and the Atlantic: Dominica, Trinidad and Tobago.
Pacific: Fiji.

212. The activities organised for Commonwealth Day at the Secretariat and in Branches sought to enlist the enthusiasm of youth for the Commonwealth in the new century. This is crucially important as Commonwealth leaders recognise the vital role that young people play in fostering international understanding and commitment to the Commonwealth's fundamental values of democracy and good governance.

Cycle, Oversight and Public Accounts Committees, Trinidad and Tobago

213. The Seminar, held in Port-of-Spain from 5 to 8 July, was organised by the CPA, with support from the Canadian International Development Agency (CIDA). It formed part of the Association's work in the area of oversight of public expenditure and was the first time the CPA had collaborated with CIDA in this area of work in the Caribbean region. Twenty-three parliamentarians from 10 Caribbean Branches sent representatives.

214. The Seminar was organised to provide a better understanding of the budgetary cycle in the parliaments of the region and examine the role, status and oversight of poverty reduction policies in each country and their impact on the budgetary process. Ways to strengthen institutions of public financial accountability and the operations of Public Accounts Committees were also considered.

Freedom of Information Study Group, Ghana

215. Commonwealth parliamentarians meeting in Accra, Ghana, from 5 to 9 July made recommendations for the promotion of best and innovative practices in access to information. As well as offering a foundational set of standards to which the Commonwealth can aspire, they emphasised the need for parliaments and their members to become champions of access to information and to lead by example of their own openness.

216. Members from the Parliaments and Legislatures of British Columbia, Fiji, India, Nigeria, Scotland, South Africa and Trinidad and Tobago formed the CPA Study Group on Access to Information, which was hosted by the Parliament of Ghana. They met for a week and shared the experiences in their respective jurisdictions with regard to the promotion, adoption and implementation of freedom of information legislation and regimes.

217. Members of the Group also discussed access to information with Ghanaian legislators at various opportunities, while Ghana's Deputy Attorney-General, Hon. Gloria Akufo, chaired one of the sessions.

218. The Study Group was jointly organised by the CPA and the World Bank Institute (WBI), continuing the work of previous joint events on Parliament and the Media. During the course of the week members interacted with World Bank representatives through videoconferences and the attendance of officials based in Accra, elaborating on the activities of the World Bank to promote good governance and access to information in Africa in particular.

219. The Group was assisted by representatives from the CPA Secretariat, CHRI and Article 19. The Commonwealth Secretariat and the Parliamentary Centre (Canada) also sent observers to the meeting. Through the efforts of the Ghanaian office of CHRI, the Commonwealth parliamentarians were also able to meet representatives of local civil society and media.

220. The recommendations of the Study Group were posted on the CPA website and published in *The Parliamentarian* and in booklet form. The WBI agreed to publish a full report of the Study Group in 2005.

West Africa Parliamentary Programme

221. In early 2003, the CPA proposed a programme to strengthen legislatures in West Africa. The proposal provided for five national workshops and one regional workshop for Members of the Parliaments of the Commonwealth countries of West Africa (Cameroon, Sierra Leone, The Gambia, Ghana and Nigeria). The programme aimed to strengthen the abilities of participating parliamentarians and enable them to better promote good governance in their own countries, particularly in financial areas and in poverty reduction programmes. An accountable grant not exceeding £209,000 was agreed by the West Africa Department of the UK Department for International Development (DfID) for a programme that was to run into 2005.

The Gambia

222. ***Programme***: Members' Constituency Responsibilities; The Role of Parliamentarians in Combating Corruption; Parliamentary Oversight Mechanisms and PRSP Monitoring; Engaging National Assembly Members in Formulating the PRSP; The National Assembly and the Budget Process; and The Public Accounts Committee Handling Statutory Annual Reports.

223. ***Resource Team***: Hon. Benjamin Osei Kuffour, MP, Ghana; Mr Saihou Sanayang, UNDP; Mr Falu Nije, Strategy for Poverty Alleviation Co-ordination Office; Mr Jawara Gaye, Pro-Poor Action Group; Mr Niall Johnston, CPA Director of Development and Planning; and Ms Meenakshi Dhar, CPA Assistant Director of Development and Planning.

224. ***Participation***: All but five Members of the Gambian Parliament were present for the entire workshop, and the absentees were all out of the country on official business at the time. The level of engagement with the subject matter was exceptionally high and there was a strong desire by Members to equip themselves for greater involvement. Overall, Members showed an enormous appetite to undertake work to improve the effectiveness of the National Assembly, especially in terms of its committees.

Nigeria

225. ***Programme***: The National Assembly and the Budget Process; Assembly Oversight of the Executive; The Public Accounts Committee and the Auditor-General; The Role of Parliamentarians in Combating Corruption; Engaging National Assembly Members in Formulating the National Economic Empowerment an Development Strategy (NEEDS); Parliamentary Oversight Mechanisms and NEEDS/PRSP Monitoring; Members' Constituency Responsibilities; and Ethics and Transparency – Members and their Staff.

226. ***Resource Team***: Hon. Jerry Ugokwe, MHR, Nigeria; Hon. Florence Aya, former Member, Nigeria; Hon. Ibrahim Zailani, former Member, Nigeria; Mr Rick Stapenhurst, World Bank Institute; Ms Katrina Sharkey, World Bank Poverty Reduction Group; Mr Wayne Propst, National Democratic Institute for International Affairs; Ms Christine Owre, National Democratic Institute for International Affairs; Ms Fran Farmer, National Democratic Institute for International Affairs; Mr Ladipo Adamolekun, Independent Financial Consultant; Mr Niall Johnston, CPA Director of Development and Planning; and Mr Shem Baldeosingh, CPA Assistant Director of Information Services.

227. ***Participation***: A total of 32 Members of the House of Representatives and five Senators participated over the course of the workshop, including four women. The discussions were vigorous although the National Assembly was not actively involved in NEEDS monitoring.

Cameroon

228. ***Programme***: The CPA and the Role of Parliament in Good Governance and Poverty Reduction; Parliament and the Budget Process; Parliamentary Oversight of the Executive; The Public Accounts Committee and the Auditor-General; The Role of Parliamentarians in Combating Corruption; Involving Parliament and Parliamentarians in Formulation and Overseeing Poverty Reduction Strategies; and Duties of and Support for Members of Parliament: Constituency Responsibilities; Ethics and Transparency; Members and their Staff; Party and National Roles; Parliamentary Support for Members.

229. ***Resource Team***: Hon. Peter ala Adjetey, MP, Speaker of the Parliament of Ghana; Hon. Moses Wetangula, MP, Assistant Minister of Foreign Affairs, Kenya; Hon. Rebecca Kadaga, MP, Deputy Speaker of the Parliament, Uganda; Mr Vincent Auclair, MNA, Quebec National Assembly; Mr Andrew Imlach, CPA Director of Information Services; and Mr Nicolas Bouchet, CPA Assistant Editor.

230. ***Participation***: A total of 31 Cameroonian Members participated, eight of them women and 11 from the opposition, including Chief Whip and Branch Deputy Chairman Hon. Joseph Mbah-Ndam, MP. Hon. Rose Abunaw Makia, MP, Deputy Speaker and CPA African Regional Representative, also attended throughout. All Members participated actively in each of the seven sessions.

Study Group on the Role of Parliament in Conflict-Affected Countries, Sri Lanka

231. The Study Group met in Colombo, Sri Lanka, from 25 to 29 October and was organised in collaboration with the World Bank Institute. This represented a first for both the CPA and the WBI in addressing the particular role of parliament in conflict and post-conflict situations.

232. As conflict often arises from exclusion from the policy process, and poor governance is related to poverty, it becomes evident that parliament, as a multiparty representative institution, has a key role to play in the nexus between conflict and poverty reduction. Regrettably, parliament has neither been seen hitherto as a key stakeholder in poverty reduction, nor in conflict prevention and post-conflict reconstruction. Where parliaments were a key institution in participatory governance, not only were the voices of the poor people more often heard and taken up in the development of pro-poor polices, there was also less cause for conflict.

233. The Study Group explored the issues surrounding the conflict-prevention/Poverty Reduction Strategy Programme (PRSP) nexus with reference to parliaments and examined how these issues could be incorporated by parliaments into their poverty reduction work and how parliaments themselves could play a role in helping prevent conflict.

234. Discussions were divided into the following headings: Parliaments and Conflict: An Overview; Poverty Reduction and Conflict; Participation, Representation and Reconciliation; Legislation and Oversight; Dialoguing with Civil Society and a Free Media; The Role of the Opposition; Promoting Socio-Economic Equality; Rule of Law; Decentralisation; and Regional Parliamentary Peace-Building.

ACTIVITIES IN 2005

8th North East India Regional Conference, Tripura

235. The 8th CPA Conference of India's North East Region Branches attracted 66 Members and senior officials to Agartala, the capital of the state of Tripura, in January.

236. Delegates discussed "The Role of NERCPA in Strengthening Parliamentary Democracy in Northeast India", as well as the region's role in the development of communication and economic backwardness.

237. The 2006 Conference will be held in Gantok, Sikkim.

36th British Islands and Mediterranean Regional Conference, Jersey

238. Key political issues facing parliamentarians in the CPA British Islands and Mediterranean Region were discussed in Jersey at the region's 36th annual conference from 12 to 15 June. The event, which took place in the States of Jersey Chamber, was attended by all the Branches in the region, although the Welsh delegation returned to Cardiff on one day for an important Assembly vote.

239. The sessions consisted of brief initial inputs followed by small workshop groups. Substantial political issues dominated the agenda as members from this varied group of parliaments and legislatures discussed: Facing up to the Problems Caused by an Ageing Society; The Advantages and Disadvantages of Alternative Energy Sources; How the Legislature can make the Executive more Accountable; Migration Policies in Jurisdictions throughout the Region; and How to Ensure that Citizens with Special Needs are Fully Included in Society.

Commonwealth Women Parliamentarians

240. The CWP Chairperson attended her first mid-year Executive Committee meeting, following changes made to the CPA Constitution by the General Assembly at its meeting in Canada in September 2004. Hon. Lindiwe Maseko, MPL, of Gauteng attended the meeting held in Sydney, New South Wales, in April.

241. As part of the Association's continuing efforts to enable the Commonwealth Women Parliamentarians to play an important part in CPA activities, the Chairperson's presence at governance meetings will help to ensure that gender is further mainstreamed across the Association.

Gender Workshop, Papua New Guinea

242. The first in the CPA's Parliamentary Gender Workshops for the Pacific Region took place in Papua New Guinea from 27 to 29 June. Approximately 40 participants gathered at Parliament House in Port Moresby to discuss issues relating to improving gender equality in numbers, in power and responsibility.

243. Organised in collaboration with UNIFEM Pacific and Hon. Dame Carol Kidu, MP, the only female Member of Parliament in Papua New Guinea, this country-focused workshop was an historic event as it was the first time that all the nominated female Members from the 20 Provincial Assemblies of PNG were brought together. Never before had the women's political leadership in PNG had the opportunity to share ideas, discuss challenges and strategise for future action, not only amongst themselves but together with national MPs.

244. The sessions focused on the following: Gender, Equality and Good Governance; Linkages between the Beijing Platform for Action, the Commonwealth Gender Plan of Action, CEDAW and the Millennium Development Goals; Pacific Gender Plan of Action and the PNG Gender Plan of Action; Institutional Framework, Legislation and Policy Changes relating to Gender; Standing Orders of Parliament; Legislative and Policy Flow: Case Study on PNG Informal Sector Legislation; The Provincial System of Government and Promoting the Full and Equal Participation in all Areas and at all Levels of Decision-Making; Transformative Governance: Concept, Gender Budgeting,

Affirmative Action; HIV/AIDS in PNG; UNDP: Parliamentary Institutional Strengthening Programme; and Towards 2007 – How to Increase Gender Equity in the National Parliament: methods of implementing affirmative action, role of Women's NGOs, role of Political Parties and role of Government.

245. With parliamentary elections due in 2007 and the potential introduction of reserved seats for women in the National Parliament, the participants were given an unprecedented opportunity to consider, articulate and fine-tune their visions for increasing the representation of women in the National Parliament.

PARLIAMENTARY SEMINARS

Commonwealth Parliamentary Seminar, South Africa

246. The 17th Commonwealth Parliamentary Seminar was hosted in Cape Town by the Parliament of South Africa from 30 May to 3 June.

247. The programme consisted of sessions on: The Commonwealth and CPA; Oversight and Accountability; The Role of the Presiding Officer and Standing Orders; The Relationship between Parliament and the People; The Role and Responsibilities of an MP; Global Access to Information; Parliament, Gender and Human Rights; Parliamentary Ethics and Accountability; Parliamentary Committees and Committee Systems; Financial Responsibility in the Democratic Process; and The relationship between Parliament, the Executive and Public/Civil Services.

Post-Election Seminar, Pakistan

248. The CPA's first major event in Pakistan since that country's return to active CPA membership last year was a parliamentary practice seminar held from 7 to 9 February.

249. This Seminar was agreed during the visit by the Chairman of the Pakistani Senate to the CPA Secretariat last year in the period just after Pakistan's return to the Councils of the Commonwealth. Pakistan's CPA and Commonwealth governmental membership had been in suspension following the 1999 military coup.

250. The programme, agreed in advance with the Chairman and Secretary of the Senate, was comprised of sessions on: The Development of the Commonwealth and the Role of the CPA; The Role of Members and Procedures in the House; Women in Parliament; Standing Orders and Legislation; Parliamentary Committees; Financial Scrutiny of the Executive; The Role of the Opposition; Privilege, Members' Interests, Ethics and Accountability; and Parliamentary Engagement with Civil Society and the Media.

Post-Election Seminar, Malawi

251. A CPA Post-Election Seminar in Malawi in early May enabled Members of the central African country to consider parliamentary reform proposals made by an Assembly committee. A senior official of the National Assembly will be invited to attend subsequent CPA meetings, which would assist implementation of the proposals.

252. This highly successful Post-Election Seminar from 3 to 5 May was attended by nearly all of the 142 newly-elected Parliamentarians in Malawi's 193-Member National Assembly, as well as by a considerable number of the Members with more than one term's experience in Parliament. It was held at Le Meridian Capital Hotel in Lilongwe, and attendance remained at high levels throughout the seminar.

253. The programme included a discussion on the March report to the National Assembly by Members of the Business Committee entitled "Re-thinking the Strategic Plan for the Development of Parliament 2004-2008". The report contained a series of recommendations that, if adopted, would result in the Assembly becoming truly independent of the executive by taking control of its own calendar, budget and staff, as well as strengthening its powers and capacity for oversight. Although the report had been tabled in the National Assembly, the Post-Election Seminar was an opportunity for Members to give it their full attention. The report was produced with some assistance from the UK's DfID.

254. Other topics covered at the seminar were: The Development of the Commonwealth and the Role of the CPA; The Role of Members and Procedure in the House; Women in Parliament; The Role of Parliamentarians in Combating HIV/AIDS; Standing Orders and Legislation; Parliamentary Committees; Financial Scrutiny of the Executive; The Role of the Opposition' Privilege, Members' Interests, Ethics and Accountability; and Parliamentary Engagement with Civil Society and the Media.

Branch Seminar, Solomon Islands

255. A parliamentary seminar for the Members of the Solomon Islands Parliament took place from 6 to 8 April in Honiara as part of a three-year technical assistance programme being run there by the CPA and the United Nations Development Programme (UNDP).

256. A total of 41 of the country's 50 MPs attended the seminar and there was a high degree of engagement with the topics. Three Members of the Cabinet attended all sessions and a number of other Ministers attended at various points throughout the three days. The Finance Minister demonstrated a keen interest in all the topics and was very enthusiastic about participation in CPA activities.

257. The topics covered during the seminar were: The Development of the Commonwealth and the CPA; Parliaments and other Institutions of Democracy; Standing Orders and the Role of the Presiding Officer; The Electoral Process; The Role and Responsibilities of an MP; Scrutiny of the Executive; The Role of the Opposition; Right to Information; and Parliamentary Ethics and Accountability.

258. On the final afternoon of the seminar, the CPA Branch held a meeting and there was extensive and constructive discussion on the CPA-UNDP technical support programme. The Branch unanimously agreed to accept a proposed work plan.

259. The CPA is to provide resource people for an agreed joint programme of work covering a broad list of parliamentary subjects and the Association will organise a number of other events with administrative support coming from the UNDP.

260. The assistance programme seeks to reinforce the role of Parliament following ethnic tensions between factions from different islands that undermined democratic government from 1998 to 2003. A Regional Assistance Mission to the Solomon Islands, including a military intervention largely by Australia, restored order following its arrival in July 2003.

261. The CPA, the UNDP and others are now assisting the Melanesian nation to strengthen its own governmental institutions in a programme strongly supported by the Governor-General, H.E. Nathaniel Waena, a former Minister and CPA Pacific Regional Representative.

262. The core elements of the three-year programme include, among other things: professional development and capacity-building for Parliamentarians and House staff; workshops on

administration and funding of Parliament; gender awareness; post-election induction for new Members; relations between the three branches of government as a regional event in collaboration with the CMJA; and assistance with reviewing Standing Orders, library and research services, ethics and transparency rules and public information programmes and materials.

Branch Seminar, Kenya

263. The CPA Kenya Branch organised a Parliamentary Seminar on Practice and Procedure in Mombasa from 25 to 27 May. The Seminar was the second leg of an orientation seminar for Members. The first meeting took place in Nairobi in August 2003 and was attended by the CPA Secretary-General.

264. The focus of the discussions, chaired by Hon. Francis Ole Kaparo EGH, MP, Speaker of the National Assembly, centred on the Standing Orders of the National Assembly.

265. Participants agreed the lack of quorum in Parliament (including committees) was affecting the conduct of parliamentary business. There was also support for reform of the committee system. The Parliamentary Service Commission has proposed that heads of important parliamentary committees should be elected by the whole House rather than the committee in the expectation it would ensure greater independence.

266. During the seminar, there was also discussion on the number of recent ministerial appointments. The Government has 30 Ministers and 40 Assistant Ministers and President H.E. Mwai Kibaki had recently appointed some opposition Members to his Government. This had created tensions within the political system and concerns were expressed in Mombasa at the effectiveness of the whipping system in Parliament.

267. The Seminar was very well organised by the CPA Kenya Branch and there was consensus that practice and procedure seminars should be arranged in the future.

Study Group on the Role of Parliamentarians in Combating the HIV/AIDS Pandemic, India

268. A CPA Study Group on "The Role of Parliamentarians in Combating the HIV/AIDS Pandemic" made a series of recommendations to help parliaments, individual parliamentarians and the CPA Branches develop successful strategies to deal with this global epidemic that has particularly devastated the Commonwealth which has more than 60 per cent of the world's sufferers although having only 30 per cent of its population.

269. The subject has been discussed at previous CPA meetings, but the Study Group represented the Association's first in-depth study of the role of parliamentarians in combating HIV/AIDS. The Group's meeting from 31 January to 6 February was hosted in New Delhi by the CPA Indian Branch.

270. The main objective of the project was to help define ways in which Members could gain a better understanding of the issues involved and develop strategies specifically for parliamentarians to help them address the many problems created by the HIV/AIDS pandemic.

271. The Group examined the following: The Role and Responsibility of Parliamentarians: An Overview; The Global Response to HIV/AIDS; The impact of HIV/AIDS on Women and Children; International Obligations and Human Rights in addressing HIV/AIDS; The Economic Impact of HIV/AIDS; A Multi-Sectoral Approach to the Pandemic; and The Need for Political and Parliamentary Leadership.

Study Group on the Administration and Financing of Parliament, Zanzibar

272. The CPA-World Bank Institute Study Group on the Administration and Financing of Parliament, composed of 20 Members and parliamentary officials from 13 parliaments, met in Stonetown, Zanzibar, Tanzania, from 25 to 29 May to focus on the independence of parliament and the role of corporate bodies in securing that independence.

273. The Study Group was composed of a combination of parliamentarians and parliamentary staff from all CPA Regions except the British Islands and Mediterranean, whose nominee was unable to attend at the last minute. The Branches represented were: Australia, Canada, Fiji, India, Jamaica, Malawi, Malaysia, Samoa, Sri Lanka, Trinidad and Tobago, Uganda and Zambia. There were also two participants from the host Branch, the Leader of the Opposition and the Clerk of the House of Representatives. A number of observers also came from parliaments with which the Bank was working to create corporate structures and increase the level of independence from the executive.

274. The Study Group programme covered sessions on: Ensuring the Independence, Effectiveness and Accountability of Parliament – An Overview of Governance Issues; Independent Funding for Parliament and Financial Controls; The Relationship Between the Executive, the Speaker, the Corporate Body, the Clerk/Accounting Officer, and the Staff of Parliament; The Levels of Delegated Authority Granted by a Corporate Body to the Parliamentary Service and the Modus Operandi; Human Asset Management; and Accountability.

275. The Group produced a set of Key Recommendations proposing ways to release parliament from domination by the executive and to strengthen its procedures and capacities to scrutinise public policy, expenditure and implementation. They were published in the CPA newsletter *First Reading* and posted on the CPA web site. The full report was to be available for editing by late July.

West African Parliaments Programme, Sierra Leone

276. As part of the CPA West African Parliaments Programme (WAPP), Members of the Sierra Leone Parliament met from 22 to 25 February 2005 to discuss ways to strengthen their Assembly.

277. Methods to improve scrutiny of legislation and spending, the management of Parliament by its Members rather than by the executive and stronger measures to curb corruption were among the recommendations agreed by Members who attended the four days of discussion funded by the UK DfID.

278. The workshop, officially opened by Mrs Elizabeth Alpha-Lavalie, MP, Deputy Speaker of Parliament, looked at: Parliamentary Oversight: What, Why and How?; The Role of Parliamentarians in Combating Corruption; The Role of Members of Parliament in drafting and Scrutinising Legislation; Poverty Reduction Strategy Paper (PRSP) Monitoring; Parliamentary Oversight Mechanisms and PRSP Monitoring; Financial Scrutiny of the Executive: Parliament and the Public Accounts Committee; and Parliamentary Responses to Human Trafficking.

279. Almost all of the Members attended the workshop as Parliament went into a brief recess to permit attendance. Local resource people included Members of Parliament, a prominent human rights lawyer and representatives from the National Accountability Group, the Development Assistance Co-ordinating Office (DACO), the National Democratic Institute and Parnell Kerr Foster, an accountancy firm.

280. On the final day, the Members drafted an "Action Plan for the Way Forward" which, along with supporting papers, was posted on the CPA web site at www.cpahq.org.

281. This was the last country workshop in the series to strengthen the legislatures of Commonwealth West Africa.

West Africa Parliamentary Programme, Ghana

282. The CPA merged its mid-February Ghanaian WAPP workshop with one about to be run by the Parliamentary Centre Ghanaian Poverty Reduction Strategy Programme (GPRSP) funded by the Canadian International Development Agency (CIDA). The programme constructed by the Parliamentary Centre's Ghanaian office continued as planned, with the addition of a CPA topic.

283. The Parliamentary Centre's Ghanaian Parliamentary Committee Support Project goals are to strengthen accountability, transparency and participation in the country's parliamentary governance, with particular attention to achieving more effective poverty-reduction efforts by strengthening the key committees related to them.

284. The workshop was attended by about 40 MPs and 20 resource people, including committee clerks and representatives of NGOs. Most participated throughout.

285. There were presentations from MPs, NGOs and officials from Ghana's Treasury and its Audit Office and the CHRI.

286. There were presentations on the key principles of the budget process as well as discussions of details of parliamentary scrutiny processes. The workshop was helpful in that the Parliament's Standing Orders Committee was about to conduct a review to seek to improve procedures, such as empowering the Public Accounts Committee to hold hearings during the year as it identifies issues rather than waiting for the government's Audited Accounts to be completed.

"Promoting Good Governance And Development In Conflict-Affected Countries: The Role Of Parliament And Government" Wilton Park Conference 2005

287. This year's Wilton Park Conference had the theme of "Promoting Good Governance And Development In Conflict-Affected Countries: The Role Of Parliament And Government". The Conference, which took place from 6 to 10 June 2005, marked the 11th joint activity with Wilton Park, and the second to include the World Bank Institute (WBI). As part of our work in the area of promoting good governance and development in conflict-affected counties, this Conference was planned as a follow-up to the CPA/WBI Study Group for parliamentarians on the Role of Parliaments in Conflict Affected Countries, which was held in Sri Lanka in October 2004.

288. The traditional format of the Wilton Park Conference brought together our members with non-Commonwealth parliamentarians as well as academics, consultants and representatives of organisations concerned with democracy, good governance and development in conflict-affected countries. The Conference was designed to explore in greater depth how a more constructive approach to conflict management can best be practised through democratic governance. The major challenge in many conflict-affected countries is to create a more inclusive political system and it has been recognised that special attention needs to be paid to the proactive role of parliaments in accommodating social tensions and creating stability.

289. The programme consisted of sessions on: Conflict-Affected Countries: The Commonwealth Experience; To What Degree Can Governments And Parliament Contribute To Peace Building In Conflict Affected Countries?; What Role For The International Community In Conflict-Affected Countries? What Makes Peace Building Work?; Global Parliamentary Co-operation In Promoting Socio-Economic Development And Peace Building; How Can Parliament Ensure Adequate Oversight Of The Military, Police And Intelligence Services?; Concurrent Discussion Groups: Case

Studies In Building Parliamentary Democracy – Guyana, Mozambique, Serbia and Sierra Leone; Preventing Exclusion: How Can A Level Playing Field For Opposition Parties Be Ensured?; To What Extent Can Governments And Parliaments Draw Upon The Human Resources, Traditions And Political Structures Of Previous Regimes?; Ensuring The Equitable Representation Of Minorities And Women In Parliament; Concurrent Discussion Groups: How Can Federal Structures And Decentralisation Contribute To Peace Building?; How Can Public Accounts Committees Help Improve Accountability And Reduce Corruption?; Implementing And Ensuring Fair Rules Of Procedures In Parliament; How Can Trade Unions And Civil Society Best Engage With Governments And Parliaments?; How Can Parliaments In Conflict-Affected Countries Best Oversee The Executive And Prioritise Development Needs?; What Are The Prospects For Afghanistan's Parliamentary Democracy?; The Role Of Neighbouring Countries In The Development Process Of Conflict-Affected Countries; Ensuring A Balanced Framework For A Free Media Through Freedom Of Information, Privacy, Defamation And Other Legislation; How Can The Rule Of Law And Human Rights Legislation Be Best Used To Build Reconciliation?

CPA/WTO Regional Workshop for Parliamentarians, Jamaica

290. The fifth CPA/WTO Regional Workshop for Parliamentarians took place at the Pegasus Hotel in Kingston, Jamaica, from 8 to 10 June 2005. The Parliament of Jamaica hosted the event which was attended by 22 Parliamentarians from Branches in the Caribbean, the Americas and the Atlantic Region. There was also participation from the Commonwealth Secretariat, Caribbean Regional Negotiating Machinery, The World Bank and Association of Caribbean States. Dame Jennifer Smith, JP, MP, Deputy Speaker of the House of Assembly, Bermuda, represented the Executive Committee.

291. The seminar focused on the work of the WTO and aspects of the Doha Development Agenda as well as the role of parliamentarians in the rules-based international trading system. The Caribbean region has been affected by loss of trade preferences and has experienced difficulties in traditional sectors such as the banana, rice and sugar industries. However, the seminar was conducted in an informative and constructive spirit and once again there was broad support for the CPA's work to assist parliamentarians in influencing discussion and debate in the area of trade.

Parliamentary Staff Development Workshop, Malaysia

292. This workshop was held in Kuala Lumpur from 19 to 24 June and was hosted by the Malaysian federal Branch. The event was the first staff workshop since the creation of the new Indian Region and so the number of potential participants was lower than previously.

293. There were a total of 15 participants from across the two Regions, seven of whom were women. Regrettably, neither Bangladesh nor the Maldives chose to send a staff member and, of the Malaysian State Branches, only Sabah was represented. The participants came from a variety of backgrounds with the length of parliamentary service ranging from 15 years to two months.

294. Following consultation with Branches in the Region, the programme focused on the budget process. The sessions dealt with: Discussion on Regional Issues; Budget Process – Overview; Budget Process – Practical Analysis; Budget Process – Parliamentary Approval; Malaysian Budget Process; The Audit Process; The Singapore Budget Process in Parliament; and Parliamentary Research Services.

Commonwealth Day

295. To mark Commonwealth Day 2005, the CPA organised a two-day event for 22 young people from 11 CPA Branches to increase awareness of and generate enthusiasm for the Commonwealth.

296. The first day consisted of a programme on the Commonwealth and parliamentary work. On the second day, the participants joined other young people for the Royal Commonwealth Society's annual Youth Heads of Government Meeting.

297. The second day saw the Branch representatives join nearly 100 other young people from across the UK for three debates centred on education. The first debate, on the role of education in promoting freedom and democracy and in preventing terrorism, saw broad agreement that free education should be a basic global human right. The second debate on the social and economic implications of education led to agreement to cancel developing countries' debt, remove agricultural subsidies in developed nations and increase environmental protection.

298. The final debate on "The Voice of Young People" became very lively as participants argued that improving the image of MPs among young voters is one thing, but listening to their voice is another.

Commonwealth Youth Parliament, Queensland

299. The Third Commonwealth Youth Parliament voted to reduce the voting age to 16, introduce compulsory voting, invite Iraq to join the Commonwealth and make condoms freely available in schools and prisons to help combat AIDS.

300. Meeting in Brisbane, Queensland, from 19 to 23 April, over 70 delegates nominated by legislatures across the Commonwealth divided themselves into political parties and reached several conclusions as they gained practical experience in passing legislation, debating national and international issues, changing government peacefully and making and enforcing rules of conduct. Sixty per cent of delegates were from developing countries and 51 per cent of participants were women. All participants were aged between 18 and 29.

301. This was the first Commonwealth Youth Parliament held outside the UK and the first time it had taken place in a Parliament. The Acting Speaker of the Queensland Parliament, Hon. Jim Fouras, MP, served as the Speaker and the Acting Vice-Chairman of the CPA Executive Committee, Senator Jean Le Maistre of Jersey, was Deputy Speaker.

302. Participants were divided into three political parties and elected their own leaders, party names and manifestos. In a debate on poverty, they spoke as individuals rather than as party representatives. A Question Time was held, as were Adjournment Debates where participants were called without notice to speak for three minutes on an issue relating to their jurisdiction. Four Members were able to introduce Ten-Minute-Rule Bills, but six others were refused permission.

303. Speaking at the close of the Youth Parliament, CPA Secretary-General, the Hon. Denis Marshall, QSO, urged participants to become ambassadors for the Commonwealth by informing other young people about the outcomes of the Youth Parliament and by speaking about the importance of the Commonwealth and parliamentary democracy. He said the CPA remains committed to programmes to make young people aware of and promote parliamentary democracy.

304. A *Hansard* of the Youth Parliament was posted on the CPA web site together with the daily programme and the Rules Governing the Conduct of Business.

COMMONWEALTH ASSOCIATION OF PUBLIC SECTOR LAWYERS (CAPSL)

INTRODUCTION

305. The purpose of this note is to introduce to you the Association and mention two specific issues. The Association exists primarily to provide a mutual support group for lawyers employed by government legal services, national, regional or local. However, recognising that increasingly employed lawyers work with colleagues in the private sector and occasionally academia, the Association also includes them within its criteria for membership. The Association currently has 25 institutional members and 131 individual members spread across 25 jurisdictions. Its specific aims and criteria for membership are set out below.

306. The Association has its own web site at www.capsl.org and, between meetings held during each Commonwealth Law Conference, exists primarily as an e-organisation that makes the ready availability to all members of their email addresses an important issue if the Association is to achieve its principle aim.

AIMS

- To support public sector lawyers in the carrying out of their professional duties.
- To promote interest within the Commonwealth in all aspects of public sector law.
- To provide a focus and forum for the exchange of information and ideas.

MEMBERSHIP

- Any person who is qualified to be a member of the Commonwealth Lawyers Association and has a professional interest in the promotion of the aims of the Association.
- Any national, state or regional professional body (or appropriate Committee or Group thereof) that represents such persons, government legal services and the LCAD of the Commonwealth Secretariat.

THE WEB SITE

307. One of the objectives of the site, as identified at the 1999 Commonwealth Law Conference, was to be the establishment of a comprehensive database of Commonwealth Government Legal Services so as to facilitate contact between them and their respective lawyers and thereby offer opportunities for mutual support. It was felt that such a facility would be of particular benefit to the smaller jurisdictions.

308. The site therefore contains a page dedicated to this objective. It invites each such service to support the Association by contributing some very basic information about itself and becoming an institutional Member of the Association.

COMMONWEALTH LAW CONFERENCE, LONDON 2005

309. The Association will take an active role in the Commonwealth Law Conference to be held in London this September. These Conferences are the primary opportunity for the Association to demonstrate its value. At past Conferences its activities have included: an all day seminar on current legal issues of interest either immediately before or in parallel with other conference sessions; involvement in the mounting of main conference sessions; and a purely social event.

COMMONWEALTH ASSOCIATION OF LAW REFORM AGENCIES (CALRA)

310. The Commonwealth Association of Law Reform Agencies (CALRA) has recently been formed to foster and promote international co-operation on law reform.

BACKGROUND

311. A major innovation in the legal world over the last 40 years has been the establishment and development of Law Reform Agencies (LRAs). There are over 60 permanent LRAs across the world, mostly in the Commonwealth - with names such as Law Reform Commission, Law Reform Committee, Law Commission and Law Reform Institute. There is great variety between these law reform bodies, as is right and proper when one considers the great variety of countries and states that they serve. However, they can usefully learn from each others' experience.

312. Over the years, some LRAs have assisted each other from time to time, especially through the bilateral exchange of information. However, that is not always easy: they are busy, varied and often geographically distant. Their personnel tend to be with them for a fairly limited period, often without prior involvement in law reform. Inevitably, co-operation has tended to be patchy and more reactive than proactive.

313. There is scope for taking past co-operation further, using the wealth of experience that such bodies have – so as both to improve law reform itself and to reduce unnecessary duplication and effort – with the ultimate objective of improving the law and society.

SUPPORT AND STATUS

314. For many years there has been strong and widespread informal support for establishing a Commonwealth Association, to encourage, facilitate and take forward co-operative initiatives in law reform.

315. CALRA has been formally established since the last Commonwealth Law Conference. The office bearers and other members of the Executive Committee were elected by April 2004. CALRA has the strong support of the Commonwealth Secretariat. It has applied successfully for accreditation to the Commonwealth, as a civil society organisation.

316. The establishment of CALRA is timely. Many LRAs are now well established, while others are being formed or rejuvenated; many are working in an atmosphere of change – both in the law, in legal systems and in public sector management. It is also a time of particular pressure on many, and especially on their resources.

PURPOSE

317. CALRA's overall purpose is to foster international co-operation on law reform – so as to improve the law across the world. It is an association of Law Reform Agencies and others working or interested in law reform.

318. CALRA has a broad set of aims and objectives in its founding constitution (which is on its website). Possible areas for action include: mutual support and exchange of information; sharing advice about methods of law reform; exchanging information about topics for law reform; sharing information about the impact which law reform bodies can make; and innovation: exchanging information about successful ways of working.

319. CALRA will avoid duplicating work or initiatives undertaken by others.

ACTIVITIES

320. Since the first meeting of CALRA, in 2004, it has:

- organised a Commonwealth law reform conference in September 2005 on *"Law Reform: Challenges and Opportunities Today"*, in London immediately before the Commonwealth Law Conference. The Commonwealth Secretariat supports the Conference, and is represented on the platform. There is a wide spectrum of speakers from across the Commonwealth and beyond. The Law Commission for England and Wales has assisted in organising the Conference. The sessions include: Priority topics for law reform; Communicating with the public, Non-Governmental Organisations, the media and government; Challenges and opportunities of smaller Law Reform Agencies; Training for law reform;

- developed a protocol about how LRAs can best exchange law reform reports which they publish;
- established a website (www.calras.org) - with considerable assistance from the Australian Law Reform Commission. The website will be developed further but it already includes information about CALRA and its aims. Importantly, it has links to the websites of LRAs and others across the world;
- started promoting staff development, and opportunities among members for visits, secondments, exchanges and internships; CALRA could have an important role of encouragement and facilitation, to enable more such opportunities.

VALUES

321. The Commonwealth's fundamental values relate to human rights and the rule of law, gender equality, democracy and good governance, and sustainable economic and social development. The law has a vital role to play in ensuring the practical application of these values. Law reform is a key leader and participant in that process. CALRA is committed to those values and has an important place in promoting them.

MEMBERSHIP AND ORGANISATION

322. Membership of CALRA is generally open to: institutional LRAs; individuals with a current or previous tie to an LRA; and other bodies and individuals supporting the aims of CALRA.

323. CALRA is an informal body. It has no paid staff and is run by volunteers. Its only current income is members' fees. Annual membership fees have deliberately been kept low.

324. Within CALRAs' first year, over half of the LRAs in the Commonwealth had already become members. CALRA currently has some 25 members, including many LRAs. Both large and small jurisdictions are well represented among the membership, as are both developed and developing countries.

325. Those elected as the first Executive Committee have a broad variety of experience:

President:	President of the Malawi Law Commission
Vice-President:	President of the Australian Law Reform Commission
Treasurer:	Director of the Alberta Law Reform Institute, Canada
General Secretary:	the former Chief Executive of the Law Commission for England/Wales
Members:	Chairman of the Law Reform and Development Commission of Namibia
	President of the New Zealand Law Commission
	Secretary of the Law Commission of Sri Lanka and
	Solicitor General of Tonga.

FURTHER INFORMATION

326. Enquiries about CALRA are very welcome. Information and membership application forms are available from CALRAs' website or from:

Michael Sayers, General Secretary: 18 Manor Way, Onslow Village, Guildford, GU2 7RN, United Kingdom
E-mail: sayers@speed-mail.co.uk
Telephone: +44 (0)1483 575366
Website: www.calras.org

Conclusions Adopted at the International Workshop for National Human Rights Institutions and Non-Governmental Organisations Colombo, Sri Lanka, 22-25 November 2004

Reaffirming the universality of fundamental rights as enshrined in the Universal Declaration on Human Rights; the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and other international treaties deriving from the provisions of the Universal Declaration of Human Rights;

Reaffirming the Kandy Programme of Action on Co-operation between National Human Rights Institutions and Non-Governmental Organisations adopted in a workshop facilitated by the Asia Pacific Forum of National Human Rights Institutions on 26-28 July 1999 in Kandy, Sri Lanka;

Recalling and reaffirming the conclusions of the workshops facilitated by the British Council on Using the United Nations Mechanisms for Protecting Human Rights (Belfast, 2002), Using Public Enquiries and Formal Hearings (Kampala, 2003), Promoting the Rights of People with Disability: Towards a New UN Convention (New Delhi, 2003), National Human Rights Institutions: Effective or Just Existing (Belfast, 2003), National Human Rights Institutions and Legislatures: Building Effective Relationships (Abuja, 2004), Building an Effective Media and Communication Programme (Accra, 2004);
Recalling the Seoul Declaration adopted by the Seventh International Conference for National Institutions for the Promotion and Protection of Human Rights, Seoul, Republic of Korea, 14 – 17 September 2004;

Acknowledging the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (the Declaration on Human Rights Defenders) adopted by the General Assembly in its Resolution 53/144 of 9 December 1998.

Reaffirming the UN 'Principles Relating to the Status of National Institutions' ("Paris Principles") as the indicator by which the effectiveness of national human rights institutions are measured;

Mindful of the fact that the Paris Principles only constitute the minimum guidelines upon which national human rights institutions should operate;

Affirming the fundamental role of individuals, non-governmental organisations and National Human Rights Institutions in contributing to the effective elimination of all forms of human rights violations;

Reaffirming the right and responsibility of individuals, non-governmental organisations and National Human Rights Institutions to promote respect for, and foster knowledge of, human rights and fundamental freedoms at the national, regional and international levels;

Reaffirming the right of everyone, individually or in association with others, to solicit, utilise and receive resources for the express purpose of promoting and protecting rights and fundamental freedoms, through peaceful means;

Recalling the report of the Advisory Council of Jurists of the Asia Pacific Forum of National Human Rights Institutions, in Kathmandu, Nepal, 16-18 February 2004, about the increasing misuse of 'counter-terrorism' measures to erode universally accepted human rights standards;

Reaffirming the need for all national institutions to respect and function in conformity with the Principles Relating to the Status and Effective Functioning of National Institutions for the Protection and Promotion of Human Rights ('Paris Principles') as adopted by the United Nations General Assembly in its Resolution 48/134 of 20 December 1993;

Recognising the vital facilitating role of National Human Rights Institutions between States in the regional and international arena;
The Colombo International Workshop on National Human Rights Institutions and Non-Governmental Organisations of the Commonwealth recognises the importance and value of effective collaboration between NHRIs and NGOs[2]. In particular, the Workshop recognises that co-operation is strengthened if NHRIs and NGOs are independent and properly resourced to undertake their respective roles.

The workshop therefore recommends that:

National Human Rights Institutions (NHRIs) and Non-Governmental Organisations (NGOs)

1. Urge their respective governments towards the early formulation of national plans of action in conformity with the 1993 Vienna Declaration and Program of Action;

2. Undertake periodic peer review of NHRIs and their subsidiary bodies with respect to their adherence to the Paris Principles;

3. Prepare submissions to appropriate fora to consider the application of domestic legislation within member countries of the Commonwealth that restrict or seek to restrict the activities of human rights defenders in these countries;

4. Interact effectively prior to relevant meetings, such as the UN Commission on Human Rights (CHR) or CHOGM;

5. Participate in joint human rights platforms at Commonwealth meetings, such as the Commonwealth Human Rights Forum;

6. Facilitate the creation of a database of determinations made by NHRIs in Commonwealth member countries similar to case law digests available in the judicial sphere;

7. Request the International Co-ordinating Committee (ICC) of NHRIs to take initiatives beyond the Paris Principles through framing and adopting guidelines, which would specify NHRI spheres of competence and jurisdiction;

8. Engage in collaborative initiatives to develop best practices in the drafting of procedures to aid institutions in dealing with complaints and providing legal advice, amongst other public services;

9. Facilitate the creation of parliamentary human rights committees and where such parliamentary committees exist, to support their work;

10. Review national compliance of international treaties and conventions, including reporting obligations and implementation of the concluding observations;

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[2] The Workshop recognises that 'NGOs' encompasses a broad range of organisations in civil society

11. Encourage information exchange and sharing of expertise between NHRIs, NGOs, governments and all intergovernmental bodies;

12. Request appropriate regional and international bodies to establish clear guidelines for domestic legislation affecting the operation of NGOs, particularly in relation to funding arrangements, ensuring such laws are not used to restrict their activities;

13. Request appropriate regional and international bodies to review penal legislation in Commonwealth countries to bring such legislation into conformity with international standards.

Governments:

1. Harmonise domestic laws impacting on human rights with international norms and standards and facilitate access to individual complaint handling mechanisms;

2. Issue standing invitations to UN Special Rapporteurs to visit their countries and respond to their communications;

3. Facilitate human rights training of government officials by NHRIs and NGOs;

4. Engage in a regular dialogue with human rights organisations, NHRIs and other human rights defenders on the design and implementation of programmes and projects initiated by the international bodies;

5. Provide space for human rights organisations and NHRIs on the platform at international fora to enable them to raise issues of concern in countries in their respective regions;

6. Co-operate fully with the Special Representative of the Secretary-General on Human Rights Defenders, including by issuing standing invitations to visit their countries and responding to her communications;

7. Empower their NHRIs by providing adequate resources from regular government budgets;

8. Effect changes in legislation to bring their NHRIs into conformity with the Paris Principles;

9. Provide legislative or constitutional framework where existing NHRIs have been set up by executive orders;

10. Consult with NHRIs and NGOs to review accession and ratification to treaties and review any derogations and reservations made to such treaties.

Commonwealth Heads of Government Meeting:

1. Facilitate access for NHRIs and NGOs to make statements at the formal meetings of CHOGM and relevant ministerial meetings on issues of concern.

British Council:

1. Continue to support and facilitate the promotion of human rights in the Commonwealth countries;

2. Create a regular space for consultation between NHRIs and NGOs in the Commonwealth.

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