

RESOURCE IMPLICATIONS OF MUTUAL ASSISTANCE IN CRIMINAL MATTERS

A paper by the Commonwealth Secretariat

INTRODUCTION

1. Law Officers of Small Commonwealth Jurisdictions (LOSCJ) at their 1995 meeting considered the resource implications of mutual assistance in criminal matters. Their concluding statement records that the meeting "asked that the issue be placed before Law Ministers with a view to developing guidelines on the apportionment of costs in mutual assistance cases. They asked that Law Ministers be appraised of the effects on small jurisdictions of their participation in mutual assistance arrangements and be asked to ensure that the burdens incurred were shared in appropriate proportions between requesting and requested countries taking into account experience which shows that the burdens are not falling equally among members of the Commonwealth."

2. In considering resource implications LOSCJ noted the almost total "one way traffic" in requests from large developed countries to small jurisdictions and, in particular, where off-shore financial centres were concerned. The time spent responding to requests impacted upon police, advocates and prosecutors from the chambers of Attorneys-General and offices of public prosecutors, and well as upon the courts. In many cases the time spent on responding to foreign requests had resulted in backlogs in domestic work and delay in criminal trials. The time and effort taken to respond to legal challenges to decisions to grant assistance also adversely impacted on the running of a small jurisdiction law department. Law Officers expressed significant concern over the issue of costs being awarded against the authorities of a requested state when a court determined that a request should not have been acceded to.

3. In discussing possible solutions to the problems faced by their jurisdictions, LOSCJ asked that Law Ministers consider the following possible solutions:

- (a) jurisdictions should consider permitting private practitioners, briefed by the Attorney-General

of the requested jurisdiction, to represent the interests of the requesting jurisdiction before their courts;

- (b) in complex commercial cases, jurisdictions could consider using the services of resident specialist accountancy firms to undertake the work necessary to respond to foreign requests;
- (c) requesting jurisdictions should, where appropriate, be asked to bear the costs incurred in options (a) and (b) above; and
- (d) in cases involving the restraint of alleged proceeds of crime in cases where a conviction and forfeiture was not ultimately ordered, the requested jurisdiction should have the requesting jurisdiction indemnify it against loss arising from a successful action by the owner of the property for diminution of value of the property while under restraint.

BACKGROUND

4. In reaching their conclusions LOSCJ had before them a paper prepared by the Secretariat outlining some of the issues which may have been relevant to the issue of costs. To assist Ministers to understand the context in which the discussions of LOSCJ occurred, to extracts from that paper form Attachment 1 to this paper. Paragraph 24 of Attachment 1 refers to the possibility of allowing the requesting state to represent itself before the courts of the requested state. LOSCJ felt strongly that foreign officials should NOT be permitted to participate in the execution of their own requests. Such participation was seen as a threat to sovereignty and national interest and as a potential legal "minefield" should the conduct of the foreign official result in a breach of the law of the requested jurisdiction.

5. The Harare Scheme deals with the question of expenses in article 12 which provides:

EXPENSES OF COMPLIANCE

- 12(1) Except as provided in the following provisions of this paragraph, compliance with a request under this Scheme shall not give rise to any claim against the requesting country for expenses incurred by the

Central Authority or other competent authorities of the requested country.

- (2) The requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country.
- (3) If in the opinion of the requested country the expenses required in order to comply with the request are of an extraordinary nature, the Central Authority of the requested country shall consult with the Central Authority of the requesting country as to the terms and conditions under which compliance with the request may continue, and in the absence of agreement the requested country may refuse to comply further with the request.

The Commentary on the Harare Scheme provides as follows:

"Expenses of Compliance

The question of the costs entailed in responding to requests for assistance was fully examined by senior officials at the January 1986 meeting. There was agreement that in most cases the costs would be borne by the requested country. This avoids the necessity for elaborate accounting and payment procedures; and as there will be a two-way traffic in requests for assistance, most countries should find that the expenditure is balanced by the services received from other countries. Paragraph 12 states the principle that the costs fall on the requested country but indicates three exceptions and a major qualification.

The exceptions concern the travel and subsistence costs of witnesses travelling to the requesting country (and of accompanying officials in the case, for example, of witnesses transferred in custody); fees payable to expert witnesses; and the costs of any translations required by the requesting country. It is thought that these costs, which are readily

identifiable, should be met by the requesting country.

The qualification concerns exceptionally heavy costs. It is recognised that in complex cases, prolonged and extensive enquiries may be required. For example, investigations into a commercial fraud may require scrutiny of the records of the financial transactions of a group of companies over an extended period. The costs of such an enquiry would be very great, could be quite prohibitive for a small country, and would not necessarily ever be balanced by any reciprocal service from the requesting country. Paragraph 12(3) enables a requested country to negotiate special terms whenever it regards the potential expenses as "of an extraordinary nature". If terms cannot be agreed - and in some cases the required terms would include the salaries and expenses of officers seconded to a major investigation - the requested country would be entitled to refuse to comply with the request. No attempt is made to define the point at which expenses can properly be regarded as "extraordinary", which must be a matter of experience and judgement."

ISSUE FOR CONSIDERATION

6. In light of the serious concern expressed by LOSCJ it may be appropriate for Ministers to consider whether it would be appropriate for them to issue guidelines to member countries on the question of how to deal with "expenses of an extraordinary nature" so as to address the particular concerns of small states and jurisdictions.

7. Attachment 2 to this paper contains draft guidelines for consideration by Ministers if it is considered appropriate that the problems be addressed in this way. The draft guidelines draw heavily on the views expressed by LOSCJ.

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Extracts From A Paper Prepared by the Commonwealth Secretariat for Consideration by Law Officers of Small Jurisdictions on the Question of Costs of Providing Mutual Assistance in Criminal Matters

1. Although some small Commonwealth jurisdictions have enacted legislation to implement the Harare Scheme on Mutual Assistance in Criminal Matters there are still a number which have, since the Scheme was finalised nearly ten years ago, not found themselves in a position to do so. Of the jurisdictions eligible to attend the LOSCJ meeting, the Commonwealth Secretariat is aware of only six which have general "Harare Scheme" laws. Although inaction in this area may be due to scarce drafting resources, the Secretariat believes that the existence of a model law settled by senior officials during regional meetings in 1988 should have helped countries overcome this problem. This led the Secretariat to look for other reasons why countries have not taken the opportunity to put into place comprehensive mutual assistance in criminal matters laws.

2. On a number of occasions the Secretariat has heard concerns voiced about the cost to small jurisdictions of establishing mutual assistance networks. Costs can be basically broken into four categories:

- (a) the cost of drafting the necessary laws and having them passed;
- (b) the cost of establishing and maintaining a "central authority" to administer the legislation on behalf of the responsible minister;
- (c) the cost of establishing bilateral relationships with other countries; and
- (d) the costs which might be incurred in responding to requests from other countries - particularly large countries in the relevant region.

Drafting costs

3. Obviously few countries would wish to take a model law and present it to Parliament without giving consideration to the means by which it will be given effect and its inter-relationship with other laws. This does not, however, mean that countries

cannot basically rely on the Commonwealth model or on laws passed by other jurisdictions with similar systems to minimise the costs involved.

Central Authority Costs

4. The concept of having to establish and maintain a "central authority" to administer the legislation on behalf of the responsible minister is something about which concern has been expressed by some jurisdictions. There is obviously a need to assist these countries to address the real or perceived problem.

5. Officers who administer MACM laws do not themselves execute the request except in the most unusual circumstances. Requests seek one of a few different types of assistance. Some of these can be provided by the police, others by the courts, and yet others by prosecutors. What the central authority does is to ensure that requests accord with the requirements of the domestic law, that their execution will not pose any threat to national interests and that a response is forwarded, in due course, to the requesting country. In other words, the central authority is a co-ordinating body whose task it is to ensure that incoming requests are responded to and that outgoing requests comply with the law of the requested country and (if necessary) with the law of the requesting country. Central authorities often give advice to local investigatory and prosecuting authorities on how to frame requests to other countries.

6. From this list of tasks which should be performed by a central authority it may be concluded that the person who runs (or is) the central authority should have:

- (a) a working knowledge of the country's criminal justice system so that he/she can ensure that outgoing requests will produce evidence which can be used when it is supplied by the requested country;
- (b) a basic knowledge of public international law, particularly the law of treaties;
- (c) a familiarity with the domestic mutual assistance legislation, with police and court powers in their own country and, if final decisions to grant requests are made by a minister, an ability to advise ministers; and

(d) an ability to acquire a basic knowledge of the legal systems of other countries.

7. The larger countries which have introduced mutual assistance in criminal matters legislation have given its administration to those officers already having some familiarity with matters related to international law or criminal justice issues. Usually, but not always, these are the officers with responsibility for administering extradition laws. There are good reasons for following this practice. The first is that the number of people worldwide with knowledge of "international criminal law" is small and they all seem to know each other - an essential state of affairs if bilateral relations are to work with the minimum of difficulty and the maximum possible co-operation. Having a few officers whose task it is to participate in global efforts to combat crime and giving them all the relevant tasks is the most cost effective and, indeed, operationally effective way of running a mutual assistance central authority.

8. Clearly the financial resources of small states are limited and this will mean that fewer small states officers will attend global meetings - such as those of the United Nations relating to drug trafficking or crime prevention but experience shows that the time spent working at such meetings and meeting others involved in the same activities is time well spent and significantly enhances the capacity of central authority officers.

9. Concern has also been expressed about the capacity of small states to find people to staff a central authority. The number of people required will depend entirely on the number of incoming and outgoing requests which are processed each year. The number of outgoing requests will depend entirely upon the number of cases handled by the police each year which require evidence or other assistance from other countries. A realistic assessment of this number should be available from national police. The number of incoming requests will depend on the popularity of the country as a destination (final or transit) for criminals or the proceeds of their crimes. The United States has, as far as we are aware, the largest central authority. It deals with all aspects of international criminal law including policy formulation, bilateral and multilateral treaty negotiation, case work (extradition and MACM) and other relevant issues. It numbers about 20. The United Kingdom has 14 officers of whom 3 are involved in policy work and 11 in casework. Over 50% of the casework relates to the service of process (largely in respect of traffic

offences by British motorists in Europe). Australia has 3 officers full time on MACM casework. Switzerland, which handles more requests than any other country in the world, has 10 officers who handle casework, policy and treaty negotiation and transfer of prisoners.

10. If one assumes that crime problems generally decrease proportionately with population size the result must be that the central authority required by a small state is proportionately smaller than that required, say, by the United States or the United Kingdom. In fact, it is not unreasonable to say that a small country should be able to provide an adequate central authority using part of the time of one officer - indeed the entire international crime policy and administration functions in a small state should not occupy more than part of the time of one officer.

11. It remains important, however, to ensure that the person given such responsibility be given as much opportunity as possible to participate in relevant international activities so as to increase his/her familiarity with other legal systems and to build the personal relationships which have proved crucial to the smooth operation of international relations in this area.

12. The other costs involved in establishing a central authority are minimal. Law books on the subject are few and far between and those that exist are not written by experts in the field. Some academic books provide useful background information - none tell how to go about doing the job. Library costs will therefore remain minimal or non-existent. The Commonwealth Secretariat is about to distribute the first part of a loose-leaf service containing the mutual assistance laws of as many countries as can be collected - both Commonwealth and non-Commonwealth - it is free to member jurisdictions. Both of the Commonwealth Secretariat newsletters in this area are free. To date we have not come into contact with any country which has failed to provide material on its own system totally free of cost to other countries.

13. One piece of equipment is essential - a fax machine and, if possible, a dedicated one with an international line open 24 hours a day for both incoming and outgoing messages. Without this piece of equipment life will be very difficult in a central authority. As technology progresses communications will, undoubtedly, be made by E-mail but it is our assumption that the fax machine

will be the main method of communication for some time to come.

Establishing Bilateral Relationships

14. Countries which enact mutual assistance laws in the form of the Commonwealth model will incur no cost in establishing relations with other Commonwealth countries having similar laws. Even countries which add to the model a procedure for designating Commonwealth countries to which they will render assistance should only incur the administrative costs involved in preparing and gazetting the instruments of designation. This leaves the question of establishing bilateral relations with other countries.

15. The global norm for mutual assistance in criminal matters is now the United Nations model treaty on the subject. Although the model Commonwealth law is generally similar there are some differences which could make the speedy conclusion of bilateral relations with non-Commonwealth countries a little more complicated - but by no means impossible. A law based on the Commonwealth model would provide a good basis for the start of negotiations because it contains a provision which allows it to be applied to other countries subject to such "limitations, conditions, exceptions or qualifications" as may be prescribed. In other words, the application of the Act to the other country can be specified to be subject to a bilateral treaty. The model specifically provides for the making of regulations giving effect to a bilateral treaty. This does mean, however, that where the two countries involved start from different bases a comprehensive treaty may have to be negotiated to resolve the differences and find a mutually acceptable middle ground. The larger/or more developed the country you are dealing with the more likelihood that they will require a resolution of differences and the more likely is the need for a comprehensive treaty. If a large or developed countries wants a bilateral treaty relationship with a small country badly enough it will pay for the negotiations.

16. That the model law speaks of giving effect to a treaty should not, however, deter small states. There are more small and developing states in the world than there are large and developed countries. Amongst themselves small states whose need to establish mutual assistance links revolves around a few cases a year could chose to enter into treaties which do no more than commit each party to grant assistance to the other in accordance with the law of

the requested country. Of course there is less certainty in how such a treaty will operate in practice because either country can change the provisions of its law and hence change the assistance which can be made available and the rules under which it will be provided. The other side of the coin is that treaties such as these (which, provided both parties intend them to be binding at international law, are treaties despite their simplicity) can be concluded by diplomatic missions (where they exist) or even by mail between foreign ministries or between justice ministries if this accords with national practice.

17. Of course, those countries which do not yet have a law could always amend the provisions of clause 30 of the Commonwealth model to make it clear that the law can be applied to a non-Commonwealth country pursuant to treaty or otherwise.

18. There is much scope for inexpensive creativity in the creation of bilateral mutual assistance relationships between small Commonwealth jurisdictions and non-Commonwealth countries.

Responding to Requests

19. One of the most often expressed concerns of small states is that the establishment of mutual assistance relations will result in a rush of foreign requests which will consume police and court time and place immense burdens on the local system. This concern can be very real and ways of addressing it must be found if small states are to be able to participate in the international co-operation network.

20. Perhaps the first thing all countries should do is work out how many INTERPOL requests for the sort of assistance covered by mutual assistance laws and how many *commissions rogatoires* have been received in recent years. That total will roughly represent the interest other countries have in information and evidence in the country. To take a "ball park" figure, that figure could then be doubled because the range of assistance which can be provided will increase with the enactment of a mutual assistance law. Countries which do not provide off-shore financial services can assume that, in the initial stages at least, and barring major changes in criminal trends, those figures will be a guide to the amount of business likely to be generated. They can then make an assessment of the amount of police and court time (together

perhaps with legal staff time) which might be needed to respond to foreign requests.

21. Countries with problems related to drug trafficking will need to make other estimates as well. They will need to take into account possible requests for evidence to be taken and for investigations to be done in their territory. Guides to the approximate number and complexity can only be provided by past experience but it is fair to say that as assistance becomes available foreign investigators will be more likely to be seeking assistance. Countries which provide off-shore financial services are the most likely to find that the number and complexity of requests received will stretch resources. Any jurisdiction which offers international business companies, banking facilities and other products of potential use to money launderers is likely to receive requests from all of the members of the Financial Action Task Force - that is the G7 countries and 19 other developed economies.

22. Normally the costs of executing a mutual assistance request are born by the requested country - this practice being based on the presumption that requests will flow, over a period of time, equally between countries. This will never be so between large developed countries and small states (particularly small island states).

23. A number of different tests could be devised to determine who should pay and in what circumstances. The cause of international crime prevention and detection will not be helped if every small country refuses to execute a mutual assistance request unless the bills are paid. What needs to be determined is what sort of case should attract charges. If police forces serve process then they can serve foreign process (to the extent this is permitted by law) at little marginal cost. Similarly, police can locate people with little difficulty and may even be able to take voluntary witness statements without unduly disrupting their normal duties. In the normal case these services could be provided free. On the other hand a request that police conduct a surveillance exercise to detect drugs coming in by sea could use huge resources and cost a lot financially. There are two options here - one is to charge the requesting country for the unusual expenditure incurred (if the manpower to conduct the exercise can be found) and the other is to give permission to the requesting country to conduct the exercise itself with perhaps one national police officer in attendance (paid for if the time is

excessive) to ensure that arrests are validly made or searches validly carried out.

24. Investigations into major corporate fraud cases which require that a large number of bank records be produced in court - that witnesses be sworn and that technical evidence be assembled are also costly and time consuming. If personpower to undertake the work is available perhaps a charge could be levied by the requested state. If personpower is not available then consideration could be given to permitting the requesting country to represent itself in court to obtain the necessary evidence and documents.

25. Perhaps the most important thing to consider in this context is the obverse side of the coin. It is often less expensive to collect evidence in small states than in large ones. Local wages are likely to be less, legal expenses (lawyers and courts) are likely to be less. If small states insist that large ones pay for all the mutual assistance they receive then it is quite possible that the large ones will apply the same test - thereby making it impossible for small states ever to seek assistance from countries where costs are prohibitively high in their terms. The optimum way to approach the problem is on a case by case basis. To do this the norm, of the requested country paying, should continue to apply except in unusual cases where the countries agree to conduct discussions on the question of payment. An alternative approach, but more difficult to monitor and therefore not recommended, would be to agree to provide mutual assistance to a particular country to a value of \$x each year and thereafter that country would pay for assistance received. The difficulty with this approach is that each piece of assistance would have to be costed - a difficult thing to do when the people providing it are being paid from the public purse - so that the requested country would know when to start charging the requesting country.

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Law Ministers of the Commonwealth

Recalling that the purpose of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (the Harare Scheme) is to increase the level and scope of assistance rendered between Commonwealth governments in criminal matters;

Noting that Clause 12 of the Harare Scheme provides that, subject to sub-clause (2), unless expenses of an extraordinary nature are involved in responding to requests for assistance, the requested country will pay the costs of providing assistance; and

Noting the concern expressed by Law Officers of Small Commonwealth Jurisdictions over the impact on national resources caused by complying with requests for assistance

Adopted the following guidelines to assist member countries to deal with the financial and other costs incurred by jurisdictions in responding to requests for assistance:

Guidelines on the Apportionment of Costs Incurred in Providing Mutual Assistance in Criminal Matters

1. Where the execution of a request for assistance requires that the requesting country be represented before the courts of the requested country and where the human resources available to the Central Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may brief an appropriate member of the private profession to represent the requesting country on its behalf. In such case the [Attorney-General] shall use his or her best endeavours to ensure that the person so briefed has no conflict of interest and that the best interests of the requesting country are protected.
2. Where a request for assistance requires that voluminous or complex documentary or other records be located and retrieved and where the human resources available to the Central

Authority of the requested country are insufficient to meet that requirement, the Central Authority of the requested country may secure the services of appropriate specialists to undertake the work necessary to respond to the request.

3. Where the Central Authority of the requested country is of the opinion that the circumstances described in paragraphs 1 and 2 above exist, it shall, before proceeding to secure non-government persons to perform the functions, consult with the requesting country on the proposed action and secure, if necessary, the agreement of the requesting country to pay for the services so contracted for on its behalf.
4. Where a request for assistance requires the taking of action by police officers in the requested country and the Central Authority of that country is of the opinion that such action would so divert the available police resources as to cause prejudice to the peace of the country the request may be refused.
5. Where a request for assistance seeks the making or enforcement of an order restraining dealings with any property in respect of which there is reasonable cause to believe that it has been derived or obtained, directly or indirectly, from, or used in, or in connection with, the commission of an offence and where the law of the requested country would permit any person with an interest in such property to take action for damages arising from such restraint in the event that the property was not later the subject of an order confiscating it the requested country may, if it considers it appropriate, require from the requesting country an indemnity against any loss incurred by the government of the requested country as a result of such action being successful.
6. Nothing in these guidelines shall be interpreted as detracting from the requirement contained in clause 12 of the Harare Scheme that countries consult in cases where the requested country is of the opinion that the expenses required in order to comply with a request are of an extraordinary nature.