PROPOSALS FOR THE ENHANCEMENT OF THE HARARE SCHEME ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS: REPORTS FROM THE 1994 OXFORD CONFERENCE ON MUTUAL LEGAL ASSISTANCE AND THE MEETING OF SENIOR OFFICIALS OF LAW MINISTRIES

A Paper prepared by the Commonwealth Secretariat

BACKGROUND

1. The theme for the 1994 Oxford Conference organised by the Commercial Crime Unit in conjunction with the United Nations Drug Control Programme and the United Nations Inter-regional Crime and Justice Research Institute was Mutual Legal Assistance. Delegates from 50 countries and six international organisations discussed their experience in administering both mutual assistance in criminal matters, and mutual assistance between business and customs regulatory agencies.

2. The intention of the Conference was to bring together delegates from all major legal systems and so facilitate exchanges of views, experiences and details of various legal systems. Thirty of the countries represented were common law countries and the remaining 20 countries included civil, Roman Dutch, Islamic and Chinese legal systems. All continents were represented.

3. In plenary session the Conference made five recommendations and requested that those recommendations be forwarded to Commonwealth Law Ministers for consideration and such action as they may deem appropriate. Copies of the Report were distributed by the Secretariat following the Conference. An additional copy for each delegation will also be available at the Kuala Lumpur Meeting.

CONFERENCE RECOMMENDATIONS

4. The five Conference Recommendations were:

A. Delegates agreed that each of their countries would use its best efforts to prepare and update national guides containing summaries detailing the essential procedures and practices of the country and specifying the basis on which mutual assistance was available. Such guides should be provided, upon request, to other countries and should be given to relevant international and regional organisations. It was agreed that each guide should cover the basic issues and list any restrictions on the granting of assistance. Details of the appropriate point of contact in the country would be included and where a central authority had been established the details of the central authority should be provided. Countries which considered it desirable could include model requests in their national guides.

B. International organisations should work towards the compilation and distribution of collections of national mutual assistance guides and should co-ordinate their efforts to ensure that collections of guides are distributed as widely as possible.

C. Rules of evidence in common law jurisdictions should be reviewed to ensure the admissibility of evidence obtained pursuant to mutual legal assistance requests.

D. Countries should consider the desirability of removing obstacles to the successful operation of mutual assistance schemes. It is desirable that when national laws are reviewed consideration is given to the question whether it is appropriate that grounds of refusal applying to extradition requests should apply, or continue to apply, to mutual assistance requests.

E. Future similar meetings should be arranged at approximately three-yearly intervals in order to review progress and address emergent issues including improvements in technology and the possible use of such technology.

CONSIDERATION OF THE RECOMMENDATIONS BY SENIOR OFFICIALS

5. Recommendations A and B were endorsed by Senior Officials and action has been taken by the Secretariat pursuant to these endorsements. All member countries have now received the first parts of the publication entitled "Mutual Assistance in Criminal Matters - Guide to National Practice and Procedure". Co-operation with other international organisations working in the area is ongoing. Recommendation E was also endorsed by Senior

Officials and the Secretariat, subject to resources being available, will convene further conferences to consider practical issues arising from experience in the administration of mutual assistance laws.

6. While the Oxford Conference participants recognised that rules of evidence are at the heart of common law principles, particularly those relating to criminal justice, they concluded that those rules were capable of unnecessarily frustrating legitimate attempts by law enforcement and prosecutorial authorities to administer criminal laws. Recommendation C therefore suggested that common law countries review their laws to ensure that evidence obtained from overseas can be adduced in evidence.

7. Senior Officials considered that Recommendation C raised difficult issues which required further consideration by governments. They requested the Secretariat to prepare a paper for Law Ministers on possible changes in the law on the admission of evidence obtained from foreign countries. The Annex to this paper outlines national practices which are relevant to this issue and are reflected in the laws of member countries.

8. Delegates to the Oxford Conference were of the view that the time had come for countries to consider whether the effective operation of mutual assistance arrangements may be hampered by very detailed provisions on refusal of assistance. While recognising that the detailed specification of grounds of refusal eliminated uncertainty they questioned whether the incorporation of each of the traditional grounds for refusing extradition was appropriate where the assistance sought related to the provision of information or evidence rather than the surrender of a person.

9. The scope of the grounds upon which requests for mutual assistance in criminal matters can be refused was also the subject of consideration by Senior Officials. Their recommendation to Ministers is that the grounds of refusal be kept flexible. In making this recommendation Officials took account of differing national priorities.

POSSIBLE ACTION BY MINISTERS

10. Ministers may consider that the question of whether national laws could or should be modified so as to facilitate the reception into evidence of material obtained pursuant to a mutual assistance request is a matter solely for individual member governments and need not be the subject of further work by the Secretariat. Alternatively Ministers may consider that their consideration of the issue could be assisted by the Secretariat distributing to them details of developments in this area. The Secretariat would appreciate guidance from Ministers on whether this issue is one upon which it should provide assistance.

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THE RECEPTION BY COURTS OF EVIDENCE OBTAINED IN RESPONSE TO REQUESTS FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS

A Note by the Commonwealth Secretariat

1. One of the major issues to arise in recent years has been the difficulty faced by prosecutors in common law countries who seek to rely on evidence obtained from another country. The rules of evidence in many, if not most, Commonwealth countries make it difficult for prosecutors to make the best use of foreign evidence. In particular the "best evidence" rule, together with the rule against hearsay evidence have often resulted in the rejection of evidence obtained from other countries and have thus diminished the value of mutual assistance to many countries.

2. When common law countries seek to obtain evidence from other countries they face two significant obstacles. The first is getting the other country to understand that the evidence requested must be collected in precisely the way specified and the second is that there is likely to be a further request for the witness to attend the trial in person with the result that the requested country and the witness are put to the trouble of handling two processes instead of one.

3. Other problems arise in relation to the admissibility of documentary records. There are significant variations amongst Commonwealth countries and between Commonwealth and non-Commonwealth countries in the rules of evidence relating to documentary hearsay. Some countries have continuously updated their laws to take into account (particularly in relation to business records) new methods of collecting and storing information. Others have not. Even where national evidence laws on business records reflect the "state of the art" problems can still arise.

4. Although the use of foreign obtained evidence in domestic criminal proceedings is now concerning Commonwealth countries there are well established precedents, albeit in limited areas, for accepting certain foreign materials. For example, the extradition laws of most Commonwealth countries make provision for receipt into evidence of foreign material. The Extradition Act 1993 of Antigua and Barbuda provides a good example. Part VII of that Act provides that documents authenticated in accordance with the Act shall be received in evidence without further proof of authenticity. In addition, and more substantively, it provides that a duly authenticated document which purports to set out evidence given on oath in a designated (Commonwealth) country shall be admissible as evidence of the matters stated in it.

5 Some Commonwealth countries have already addressed the problem to the extent they feel is reasonable given their basic criminal justice principles. Examples of the approaches taken in various Commonwealth countries are outlined below.

Australia

6. The Foreign Evidence Act 1994 (No. 59 of 1994) sets out the requirements for testimony obtained as a result of a request made by or on behalf of the Attorney-General to a foreign country and to any exhibit annexed to such testimony. The Act requires that the testimony must have been taken on oath or affirmation; or under such caution or admonition as would be accepted by courts in the foreign country concerned for the purposes of giving testimony in proceedings before those courts.

In addition the testimony must purport to be signed or certified by a judge, magistrate or officer in or of the foreign country to which the request was made and purport to bear an official or public seal of the country, or a Minister of State, or a Department or officer of the government of the country.

7. The testimony may be reduced to writing or be recorded on an audio or video tape.

8. Having specified the prerequisites for admissibility the legislation then, in common with other laws, provides that the foreign material is not to be adduced as evidence if it appears to the court's satisfaction at the hearing of the proceedings that the person who gave the testimony is in Australia and is able to attend the hearing. Neither may it be adduced if the evidence would not have been admissible had it been adduced from the witness at the hearing.

9. In addition to the statutory prohibitions on adducing foreign material the Act gives to the court an additional discretion by permitting the court to direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence. The court is then enjoined mandatorily to take into account certain matters in exercising its discretion. The non-exclusive list of matters requires the court to consider:

- the extent to which the foreign material provides evidence that would not otherwise be available;

- the probative value of the foreign material with respect to any issue that is likely to be determined in the proceeding;

- the extent to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them;

- whether the exclusion of the foreign material would cause undue expense or delay; and

- whether exclusion of the foreign material would unfairly prejudice any party to the proceeding.

10. The Act also gives effect in Australia to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

Canada

11. The Mutual Legal Assistance in Criminal Matters Act (c. 37 of 1988) contains, in Part II, provisions to govern the admissibility in Canada of evidence obtained abroad pursuant to a treaty. The approach is somewhat different to that adopted by Australia but again gives real opportunity for the evidence to be considered.

12. The Act provides that records or copies thereof and affidavits, certificates or other statements pertaining to the record made by a person who has custody or knowledge of the record which are sent to the Minister by a foreign state are not inadmissible in evidence by reason only that a statement contained in the record, copy, affidavit, certificate or other statement is hearsay or a statement of opinion. The determination of the probative value of a record or a copy thereof admitted in evidence is left to the trier of fact who may examine the record or copy, receive oral or affidavit evidence, including evidence as to the circumstances in which the information contained in the record or copy was written, recorded, stored or reproduced and may draw any reasonable inferences from the form or content of the record or copy.

13. Things and any affidavits, certificates or other statements pertaining to things made by a person in a foreign state as to the identity and possession of the thing from the time it was obtained until it is sent to a specified person in Canada by a foreign state in accordance with a Canadian request, are not inadmissible in evidence by reason only that the affidavit, certificate or other statement contains hearsay or a statement of opinion.

14. Affidavits, certificates or other statements are, in the absence of evidence to the contrary proof of the statements contained therein without proof of the signature or official character of the person appearing to have signed the affidavit, certificate or other statement.

15. Courts are given a discretion to refuse to admit into evidence records or copies thereof, things, affidavits, certificates or other statements if the party intending to produce the evidence has not given the other party specified notice of intention to produce, and where the thing sought to be adduced in evidence is a thing, the other party should be given opportunity to inspect the thing.

United Kingdom

16. The Criminal Justice (International Co-operation) Act 1989 deals in s. 3 with overseas evidence for use in the United Kingdom. That section lays down the procedure for seeking assistance in obtaining evidence outside the UK including specification of persons authorised to make requests and the proper channel for communication of those requests.

17. The Criminal Justice Act 1988 establishes principles to be followed by the court in determining whether or not certain evidence should be admitted. The International Co-operation Act expands upon those principles by requiring the court to have regard to whether it was possible to challenge the statement by questioning the person who made it, and, whether the local law allowed

the parties to the proceedings to be legally represented when the evidence was being taken.

18. The rules laid down in the Criminal Justice Act are similar to those later adopted by Australia and include the requirement that if the court is of the opinion that in the interests of justice a statement which is admissible nevertheless ought not to be admitted, it may direct that the statement shall not be admitted. The court must also have regard to the nature and source of documents containing statements; to the extent to which the statement appears to supply evidence which would otherwise not be readily available; to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

19. A statement which is otherwise admissible in criminal proceedings shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice. In considering whether its admission would be in the interest of justice, it shall be the duty of the court to have regard to the contents of the statement; to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them; and to any other circumstances that appear to the court to be relevant.