

**A REVIEW OF THE ACTIVITIES OF
THE COMMONWEALTH
SECRETARIAT IN THE LEGAL
FIELD: FUTURE OF THE
COMMONWEALTH LEGAL
ADVISORY SERVICE**

**A Memorandum by the Government of
Britain**

INTRODUCTION

1. The purpose of this paper is to invite Commonwealth Law Ministers to:

- (i) consider the current and future demand for the services of the Commonwealth Legal Advisory Service (CLAS); and
- (ii) if Law Ministers agree that there is sufficient demand, to further agree how the continuation of CLAS might be financed by Commonwealth member countries on a more formal basis.

2. A related issue which Commonwealth Law Ministers might also review is the question of how and where CLAS's future work should be carried out.

BACKGROUND

3. CLAS was established in 1962 following a proposal at the Commonwealth Prime Minister's Conference in 1961 that there was a need to accumulate Commonwealth legal material, and provide for the interchange of ideas on legal matters between Commonwealth countries. It is administered by the British Institute of International and Comparative Law (BIICL). Originally CLAS was established with a general remit to provide information, advice and assistance in legal matters to individual Commonwealth governments, particularly small states. Its main function now, however, is to provide advice and assistance on particular legal reform problems raised by Attorneys'-General Departments, including:

- (a) receiving and analysing requests on specific legislative reform;

- (b) the preparation of a comparative survey of a particular field of Commonwealth law practice and policy in relation to the request;

- (c) the preparation of memoranda and bibliographies on a wide range of topics of general importance to different jurisdictions; the topics reflect those raised in specific requests;

- (d) advice on the drafting of legislation by reference to Commonwealth experience and practice; and

- (e) the provision of training by secondment for young Commonwealth lawyers in government service.

4. In 1974, because of concerns that there was a degree of duplication between CLAS and the Commonwealth Secretariat, a Review of Commonwealth Legal Co-operation was undertaken under the chairmanship of Sir Roy Marshall. Although there were some views to the contrary, the Review concluded that there was a considerable degree of duplication of function between CLAS and the Commonwealth Secretariat; that it would not be possible to solve the problem of overlap; and that in future the Secretariat should be charged with responsibility for the functions carried out by CLAS.

5. At the Commonwealth Law Ministers' Meeting in Lagos in February 1975 however it was decided that CLAS should remain in being, and that discussions should be held with the Secretariat to avoid duplication with the work carried out by the Legal Affairs Division - now the Legal and Constitutional Affairs Division. Since then CLAS and the Legal and Constitutional Affairs Division have continued to co-exist with a practical division of responsibilities, those of CLAS being summarised in 3 (a) to (e) above.

6. In 1994, a Working Party chaired by Lord Browne-Wilkinson, Chairman of the Commonwealth Sub-Committee of the Advisory Board of the BIICL, looked at two separate but related issues: the assessment of need for the work of CLAS, and the provision of a formal

funding arrangement for CLAS's work. The Working Party concluded that the assessment of needs was one for member states, and that the present informality of funding arrangements was unsatisfactory as it restricted forward planning and prevented adequate follow-up and evaluation. It therefore recommended that the future of CLAS should be considered by the 1996 Meeting of Commonwealth Law Ministers. In the meantime the BIICL would operate CLAS on the current basis but any continued involvement beyond April 1996 would depend upon a satisfactory method being established for the payment of contributions.

NATURE OF CLAS'S WORK

7. The main work undertaken by CLAS is responding to requests from Attorneys'-General Departments for assistance in considering law reform and in preparing legislation. The range as shown in Annex 1 is very varied. Advice usually reviews the policy factors involved, and memoranda are prepared in relation to law reform topics on which advice has been sought or where major legislative reforms are underway in several states. CLAS also offers placements for legal draftsmen and women.

8. CLAS revived from a period of low activity in 1987. The number of requests received in that year was 12 but this increased to 51 in 1991. However the variety of requests prevents a very detailed response. The take-up rate for abstracts is low (19 requests in 1994). Lord Browne-Wilkinson's Working Party concluded that CLAS was not seen by potential users as addressing a pressing need, but it was regarded as useful by a number of regular users. For the most part it appeared that CLAS's work is either marginal to the needs of most Commonwealth countries or that they are not aware of it.

FUNDING

9. From 1981 the BIICL assumed the responsibility for collecting voluntary contributions from member states. Due however to the difficulties in securing contributions, BIICL proposed to Attorneys-General in 1991 that contributions should be calculated as approximately 1 per cent of their contribution to the Commonwealth Secretariat. There remained no formal basis for this

formula derived from Law Ministers and contributions therefore remained voluntary.

10. The following member states currently contribute 1 per cent or over: The Bahamas, Malawi, Brunei Darussalam, Malta, Cyprus, Maldives, Dominica and Tanzania. Although Britain does not contribute 1 per cent (£25,000 against £29,100) it currently provides half of all Commonwealth contributions and over one third of the total cost of running the service, as indicated by the following 1994 figures:

UK contribution	£25,000
Other Commonwealth contributions	£25,097
Balance underwritten by BIICL	<u>£10,407</u>
Total	<u>£60,504</u>

11. These figures illustrate the depth of CLAS's reliance on one member state's contribution for its continued existence, and that the 1 per cent formula has not been achieved. A table of contributions over the last ten years is at Annex 2. In 1994 only 23 states out of 54 actually contributed, although additional contributions are received from British dependencies. The recent fall in income is particularly due to two states (Australia and Canada) who have reduced contributions severely over the past years. However, Canada has now doubled its contribution for the current year following a review which recognised the important role which CLAS has for member states of the Commonwealth.

12. The above figures also illustrate the extent to which the activities of CLAS are underwritten by the BIICL. For example, only 65.4 per cent of the budget was recovered in 1995.

BIICL'S CONTRIBUTION

13. In considering how and where CLAS's services should be carried out, Law Ministers will also wish to take account of the in-house services which BIICL provide and which if met elsewhere would have to be provided at cost. These include the Institute's research staff, the facilities of the library in Charles Clore House including that of the Institute of Advanced Legal Studies, and the specialist advice and supervision of the Institute's Commonwealth Advisory Board.

OPTIONS

14. The report prepared by Lord Browne-Wilkinson in 1994 concluded that CLAS was not functioning as intended. It was not responding adequately to the needs of law reform in Commonwealth developing countries, in part perhaps because of ignorance of its existence, but also because of difficulties those states have in identifying and articulating their needs. More significantly, the relatively low number of requests to CLAS and the comparatively small number of states which use the service suggested that it was marginal to the pressing needs of law reform in the Commonwealth. The Working Party identified five options for the future:

- (a) no change;
- (b) terminate CLAS without replacement;
- (c) amalgamate with Legal and Constitutional Affairs Division (or other agency without further funding);
- (d) as (c), but with full 1 per cent funding;

- (e) retain CLAS with full 1 per cent funding.

15. The report concluded finally that unless a positive decision was taken by Law Ministers, CLAS would continue to decline as funding falls. It also recommended that this course of benign neglect should be avoided.

RECOMMENDATION

16. The Government of Britain considers this situation is in need of urgent resolution. It therefore submits that if Law Ministers are assured that CLAS meets a distinct and continuing role for member states which cannot be met elsewhere at less cost, a formal arrangement for contributions should be agreed on an equitable basis.

March 1996

ASSISTANCE GIVEN TO COMMONWEALTH COUNTRIES IN 1994

1. Assistance requiring at least some research (often wide-ranging and lengthy)

- (1) Summary of Commonwealth countries assisted (number of times in brackets where more than once):

The Bahamas (3), Barbados, Cyprus (3), Ghana (3), Gibraltar, Hong Kong (5), India (2), Jersey (3), Kenya (2), Malawi, Malaysia, Malta (2), Namibia (7), Pakistan (4), Tanzania (6), Tonga, Trinidad and Tobago, Uganda (2), United Kingdom (2), Western Australia.

Total: 20 jurisdictions (including 1 state and 3 dependencies), 51 requests.

- (2) Details of assistance given and when:

Date assistance given	Country	Subject
7 January	Hong Kong	Eligibility of solicitors to be appointed judges
12 January	Hong Kong	Guardianship under the Mental Health Act of the UK
20 January - 2 February	India Pakistan	Application of Article XXI of the GATT Women's rights in the law of succession
11 February	Namibia	Constitutional limits on the right to free speech
22 February - 1 March	Gibraltar Namibia	Conventions and treaties applicable "Disciplinary force" parallels between the army and the police
10 March	Barbados	Constitutional security of tenure for magistrates
15 March	Namibia	Constitutional right to bail
28 March	Malawi	Comments on new draft constitution
25 April	The Bahamas	Legislation to regulate chiropractors
28 April	Jersey	Rights of audience in dependencies of UK qualified lawyers
17 May	UK (BBC)	Corporal punishment in the Commonwealth
1 June	UK (FCO)	Electoral laws: dual representation systems in

Date assistance given	Country	Subject
29 November	Western Australia	Legislation to control prospecting for fossils
6 December	Ghana	Statute law on defamation
7 December	Namibia	Particular constitutional powers of an Attorney-General
8 December	Malta	Legislation to control imitation firearms
16 December	Ghana	Statutory body to oversee commercial operation of public utility bodies
19 December	Namibia	Evidence to be disclosed by the prosecution before trial

2. Abstracts of work done, and other specific documents, sent in compliance with requests

Gibraltar, Hong Kong (6), Kenya (2), Malta, Namibia (3), Natal, Nigeria, Pakistan, Tanzania (3).

Total: 9 jurisdictions, 19 requests.

ANNEX 2

CONTRIBUTIONS TO CLAS 1985-1994

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Antigua and Barbuda		200		400 (x2)		200	400	400	400	400
Australia	5,484	6,032	6,639	7,299	7,268	6,917	7,500	6,248	7,191	4,500
The Bahamas					500	1,267 (x3)	500	500	500	
Bangladesh				255		255	255	1,005		750
Barbados	200								500	
Belize								400		
Botswana	251	200	251	300			375		750	1,000
Brunei Darussalam				300	300	750	750	750	750	1,000
Canada	6,717	4,974	4,566	4,216	4,567	4,588	4,174	4,645	5,263	4,119
Cyprus	128	250	250	250	500	500	500	500	500	1,000
Dominica									400	
The Gambia										
Ghana										
Grenada						200				
Guyana							1,667 (x2)		500	1,000
India					11,109 (x7)					
Jamaica	300		60		500	420	450	111		
Kenya	142				275	760				

	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
Kiribati							400	400		
Sri Lanka	400	400		400		400	400	1,150 (x3)		400
Swaziland										
Tanzania										
Tonga	300		300	300	300	388	400	400	400	400
Trinidad and Tobago	255	765 (x3)		1,200 (x4)				1,527 (x2)		
Tuvalu					46	38			150	150
Uganda										
Vanuatu										
Western Samoa										
Zambia				400		700		750		1,000
Zimbabwe		350						750		
Cayman Islands								500		
Gibraltar								150		150
Hong Kong			3,000		3,000	3,000	3,000	3,000	3,500	3,500
Isle of Man							500	500	500	500
Jersey							500	1,000	1,000	1,000
Montserrat							150	150	150	150
Turks and Caicos Islands										150
Total	15,725	15,647	17,109	18,869	29,465	23,375	26,346	30,649	29,297	(25,019)