

1980 Meeting of Commonwealth Law Ministers

Barbados, April-May 1980

Memoranda



Commonwealth Secretariat

MEETING OF COMMONWEALTH LAW MINISTERS

BARBADOS, 28 APRIL – 2 May, 1980

MEMORANDA

Commonwealth Secretariat,
Marlborough House,
London, S.W.1.

© Copyright 1980

Published by
The Commonwealth Secretariat

May be purchased from
Commonwealth Secretariat Publications
Marlborough House
London SW1Y 5HX

ISBN 0 85092 187 2

Printed for the Commonwealth Secretariat by
Hobbs the Printers of Southampton

PREFACE

Commonwealth Law Ministers from 41 jurisdictions met in Barbados from 28 April to 2 May 1980. This volume contains a number of the Memoranda prepared for and during that Meeting. Also included are the Meeting's Agenda and Communiqué. The Minutes of the Meeting, and classified Memoranda, are published separately and are only available to Member Governments.

Commonwealth Law Ministers meet regularly, at approximately three-yearly intervals. They are next to meet in Sri Lanka, in 1983.

CONTENTS

Preface	(i)
Communiqué	(v)
Agenda	(ix)
Memoranda	
The Promotion and Development of International Co-operation to combat Commercial and Economic Crime [LMM(80)2] [Memorandum by the Commonwealth Secretariat and a paper by Dr. Barry A. K. Rider] ..	1
Review of the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth [LMM(80)3] [Memorandum by the Commonwealth Secretariat and a paper by Professor I. A. Shearer] ..	63
Crown Privilege in The 1980's: A Decade of Change [LMM(80)4] [Memorandum by the Commonwealth Secretariat and a paper by Dr. Dennis Pearce] ..	77
The Transfer of Convicted Offenders from and to Commonwealth Jurisdictions [LMM(80)5] [Memorandum by the Commonwealth Secretariat and a paper by Mr. A. M. F. Webb] ..	91
Review of the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth [LMM(80)6] [Memorandum by the Government of Sri Lanka]	113
Review of the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth [LMM(80)7] [Memorandum by the Government of Jamaica]	115
The Transfer of Convicted Offenders from and to Commonwealth Jurisdictions [LMM(80)8] [Memorandum by the Government of Jamaica]	119
Confiscating the Proceeds of Crime [LMM(80)9] [Memorandum by the Commonwealth Secretariat and a paper by Mr. William Clifford] ..	121
Human Tissue Transplants [LMM(80)10] [Memorandum by the Commonwealth Secretariat]	133
Appeals Against Acquittals and Sentences [LMM(80)11] [Memorandum by the Commonwealth Secretariat]	183
Review of the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth [LMM(80)12] [Memorandum by the Government of Nauru]	185
Review of the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth [LMM(80)13] [Memorandum by the Government of Australia]	187
The Transfer of Convicted Offenders from and to Commonwealth Jurisdictions [LMM(80)14] [Memorandum by the Government of Australia]	189
Computerization of Legal Materials [LMM(80)15] [Memorandum by the Government of Canada]	191
The International Abduction of Children by a Parent or Guardian [LMM(80)16] [Memorandum by the Commonwealth Secretariat and a paper by Mr. J. M. Eekelaar] ..	195
The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Progress Report [LMM(80)17] [Memorandum by the Commonwealth Secretariat]	233
Contempt of Court [LMM(80)18] [Memorandum by the Commonwealth Secretariat]	277
Review of Legal Activities of the Commonwealth Secretariat [LMM(80)20] [Memorandum by the Commonwealth Secretariat]	301
Freedom of Information Legislation [LMM(80)23] [Memorandum by the Commonwealth Secretariat and a paper by Mr. John McMillan] ..	311
Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth—Multiple Damages Judgments [LMM(80)24] [Memorandum by the Government of Australia]	323
The Zambian Legal Aid System: Hope for Justice [LMM(80)25] [Memorandum by The Hon. Frederick M. Chomba, SC, MP]	327

*Computerization of Legal Material [LMM(80)28]	
[Introduction by the Government of Barbados]	333
*Review of the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth [LMM(80)29]	
[Comments by the Barbados Delegation on Agenda Item 3]	339
*Review of the 1966 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders [LMM(80)30]	
[Memorandum by the Government of Uganda]	343
*The Transfer of Convicted Offenders from and to Commonwealth Jurisdictions [LMM(80)31]	
[Memorandum by the Government of Uganda]	345
*Appeals against Acquittals and Sentences [LMM(80)32]	
[Memorandum by the Government of Uganda]	347
*Crown Privileges in the 1980's: A Decade of change [LMM(80)33]	
[Memorandum by the Government of Lesotho containing preliminary views on Dr. Pearce's paper]	349
*The Promotion and Development of International Co-operation to combat Commercial and Economic Crime [LMM(80)34]	
[Memorandum by the Government of Lesotho containing preliminary views on Dr. Rider's paper]	351
*Confiscating the Proceeds of Crime [LMM(80)35]	
[Memorandum by the Government of Lesotho containing preliminary views on Mr. Clifford's Paper]	353
*Appeals Against Acquittals and Sentences [LMM(80)36]	
[Memorandum by the Government of Lesotho containing preliminary views on Commonwealth Secretariat's Paper]	355
*Review of the 1966 Commonwealth Scheme Relating to the Rendition of Fugitive Offenders [LMM(80)37]	
[Memorandum by the Government of Lesotho containing Preliminary views on Professor Shearer's Paper]	357
*Appeals by the Prosecution Against Acquittals and Sentences [LMM(80)38]	
[Memorandum by the Government of Sri Lanka containing preliminary views on Commonwealth Secretariat's Paper]	359
*Contempt of Court [LMM(80)39]	
[Memorandum by the Government of Sri Lanka containing preliminary views on Commonwealth Secretariat's Paper]	361
*Contempt of Court [LMM(80)40]	
[Memorandum by the Government of Bangladesh containing preliminary views of Commonwealth Secretariat's Paper].. .. .	363
The Uganda Law Development Centre: Some Information [LMM(80)41]	
[Memorandum by the Government of Uganda]	367
*Contempt of Court [LMM(80)44]	
[Memorandum by the Government of Mauritius containing preliminary views on Commonwealth Secretariat's Paper].. .. .	371
*The Promotion and Development of International Co-operation to combat Commercial and Economic Crime [LM(80)45]	
[Memorandum by the Government of Singapore containing preliminary views on Dr. Rider's Paper]	373
*The Transfer of Convicted Offenders from and to Commonwealth Jurisdictions [LMM(80)46]	
[Written addendum to intervention by the Government of Guyana]	375

COMMUNIQUE

1. The Meeting of Law Ministers of the Commonwealth opened at Sam Lord's Castle, Barbados, on 29 April 1980 with an inaugural address by the Chief Justice of Barbados, the Rt. Hon. Sir William Douglas, and concluded on 2 May 1980.

2. The Meeting was attended by Law Ministers, Attorneys-General, other Law Officers and officials from 41 countries, and elected as its Chairman, the Hon. Henry de B Forde, S.C., Attorney-General and Minister of External Affairs for Barbados. Those participating on the first occasion since attaining their independence included Dominica, Kiribati, St. Lucia, St. Vincent and the Grenadines, and Solomon Islands. All were congratulated on their achievement of nationhood, and these joined in the special welcome which was extended to Zimbabwe as it took its place at the Commonwealth table for the first time.

3. Ministers expressed their very great indebtedness for the scholarly, perceptive and helpful papers prepared for the Meeting.

4. They reaffirmed their conviction that the Commonwealth association, committed as it is to guaranteeing the rights of all and to upholding the Rule of Law, and with its shared legal heritages, provides a firm foundation for the highest level of co-operation and mutual assistance in the legal field. This did not circumscribe participation in other international fora, in which Commonwealth members have traditionally played a role, nor did it limit the extension of co-operative arrangements to jurisdictions beyond the Commonwealth.

5. In the course of their deliberations, Ministers reviewed a number of areas in which special intra-Commonwealth arrangements have functioned well to the mutual advantage of the peoples of the Commonwealth, and considered ways in which existing levels of co-operation might be even further enhanced.

Recognition and Enforcement of Judgments, etc.

6. The Meeting recognised that the ability to enforce judgments and certain other court orders, and to serve process, across jurisdictional boundaries was of the greatest importance, particularly in times of ever increasing mobility and in the wake of the shifts of population that have taken place over the past 40 or so years. For these reasons they welcomed the splendid further work undertaken in these areas of the law by Professor David McClean and Professor Keith Patchett. A series of regional workshops had been held, which had resulted in the development of broad strategies for the improvement of present arrangements, which were generally endorsed. In particular, a number of countries saw considerable benefit from accession to The Hague Convention on Service Abroad of Process, The Hague Convention on the Enforcement of Decisions Relating to Maintenance Obligations, and the United Nations Convention on the Recovery Abroad of Maintenance.

7. Ministers also expressed their gratitude to the Professors for the preparation of "accession kits",

which analysed particular Conventions and provided details of the procedures for accession and consequential implementation. These were seen by Ministers as being highly practical, and they hoped that more would be prepared on other relevant Conventions.

8. Of particular concern was the question of the recognition and enforcement of multiple damages awards, a feature of anti-trust judgments under United States law. General support was expressed for the principle that arrangements for the recognition and enforcement of foreign judgments should contain a clear exclusion of multiple damages awards. Provisions for the recovery back of moneys paid under such judgments were also supported.

9. Ministers invited the Commonwealth Secretariat to extend its work in this important area of the law, to include such matters as arbitral awards, bankruptcies and windings-up, and the recognition of divorces.

Commonwealth Extradition Arrangements

10. The Meeting fully reviewed the working of the 1966 Commonwealth Scheme for the Rendition of Fugitive Offenders, in the light of nearly 14 years' experience. Ministers recognised the matter as being of great importance, and were concerned to ensure that Commonwealth arrangements worked fairly and effectively.

11. Ministers concluded that the Scheme is, on the whole, working well. However, a number of matters were identified as calling for attention, and the Secretariat was invited to consult with governments and prepare proposals for amendments to the Scheme so that these might be agreed either before or at the next Law Ministers' Meeting. Ministers expressed the conviction that they had common reason to continue with the Scheme and not to await the outcome of deliberations in other fora.

Transfer of Convicted Offenders

12. Having reviewed aspects of various Commonwealth schemes presently in force, Ministers considered whether it might be appropriate to develop Commonwealth arrangements under which, in appropriate cases, a prisoner might be transferred from a country in which he had been convicted, so that he could serve his sentence in his home country. The Meeting saw a number of positive advantages in the concept, and felt that the rehabilitation of an offender who had been convicted of an offence while abroad might be promoted if he were to serve his sentence in a place where he was more likely to be subject to the influence of his family and friends.

13. Ministers endorsed in principle the suggestion that such a Scheme should be developed and have as its basis the consent of the countries involved and, in particular, that of the prisoner himself.

14. There were some amendments which would need to be made to the proposed arrangements, and

the Meeting agreed that the process of consultation should continue both through the Commonwealth Secretary-General and on a regional basis. It also welcomed the generous offer of Canada to contribute the benefit of her considerable experience in the matter.

International Abduction of Children by a Parent or Guardian

15. Ministers expressed profound concern that their legal systems were, in a growing number of instances, failing to safeguard adequately the welfare of children. Increasingly, parties to disputes over custody had been abducting their children and taking them to foreign jurisdictions, frequently in defiance of court orders. Ministers reaffirmed their view that in attempting to deal with this matter the best interests of the child must always be paramount. They saw the question of jurisdiction as lying at the heart of the matter, and of the matter, and in this context felt that the nationality of a child could not of itself be the deciding factor.

16. Prompt and concerted collective action was regarded as essential, and it was of great importance that any arrangements should include non-Commonwealth, as well as Commonwealth jurisdictions. The Meeting welcomed the fact that the matter is to be considered by The Hague Conference on Private International Law in October this year. A number of Governments were convinced that the present Draft Hague Convention on the topic, with jurisdiction based on the "habitual residence" of the child, was an appropriate response to the problem. The Meeting expressed the sincere hope that the deliberations at The Hague would be successful, and that a large number of countries would accede to any resulting Convention as a matter of priority.

17. The Meeting was anxious to ensure that The Hague Conference was made aware of views held in various Commonwealth countries. Ministers asked the Commonwealth Secretary-General to undertake the necessary consultations, and to arrange a meeting of the Commonwealth countries who will be represented at The Hague to explore the possibility of their adopting a common approach. They also expressed the hope that the Secretariat, in its capacity as an accredited "observer", would be able to be represented at the relevant sessions, so that the views of other Commonwealth Governments could be made known.

"White Collar" Crime

18. The expansion of sophisticated technology and modern business structures had greatly widened opportunities for the unscrupulous to perpetuate fraud on a massive scale, and Ministers expressed their grave concern at the rise of a phenomenon which many countries were inadequately equipped to combat.

19. Ministers expressed their determination to combat this evil with all the means at their disposal. They felt that developing Commonwealth countries were particularly vulnerable, and that a united and

co-operative effort by Commonwealth Governments was essential. Ministers strongly endorsed the suggestion that a Commonwealth Fraud Liaison service be established as a matter of the highest priority, as they saw in such a service, even if provided through a single expert, a tangible means for protecting their societies by enhancing co-operation and disseminating information in an increasingly technical field. They also saw value in a Commonwealth Panel of Experts forming part of this service, to assist governments on an ad hoc basis. They asked the Commonwealth Secretary-General to explore the idea in further consultation with governments. Co-operation on a police force-to-police force basis was felt not to be a complete answer, and in the experience of some Ministers existing agencies were not equipped to perform all the functions contemplated. They welcomed the possibilities of wider participation in existing commercial crime courses, and invited the Commonwealth Secretariat to explore such possibilities.

Computerization of Legal Materials

20. Ministers recognised that new technology holds the potential for bringing about a more effective and more efficient delivery of legal services in both developed and developing countries. They were, however, conscious that they were not all as well informed on the topic as they wished to be, and invited the Commonwealth Secretary-General to arrange the collection of relevant studies for circulation to Governments.

21. They also felt that the use of computers could significantly assist in such areas as the preparation of legislation and the handling of land and registry records, and might further enlarge the already significant use made of legal material from other Commonwealth jurisdictions. The Commonwealth Secretary-General was invited to establish a study group to examine the possibilities afforded by recent technological advances, with early attention being given to the feasibility of placing law reform material on an electronic data base.

Human Tissue Transplants

22. A number of Commonwealth jurisdictions have, in recent years, sought to regulate the removal and use of different types of human tissue from both living and dead donors. Ministers recognised that sensitive moral, ethical, religious and legal issues were involved, and a variety of approaches was canvassed in their discussions.

23. Ministers considered it important that unsatisfactory procedures should not be permitted to develop. While a humanitarian approach to the problem was being pursued, they were also anxious to prevent any commercial exploitation of donors. They agreed to keep each other informed, through the Commonwealth Secretariat, of future developments in their jurisdictions, and supported the suggestion that the Secretariat consider organising a combined medico-legal workshop to further discuss the matter.

Freedom of Information

24. Ministers expressed the view that public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information. At the same time they recognised that it was necessary to strike a balance between the individual's right to know against the government's need, in the wider public interest, to withhold certain information from disclosure. This issue had to be addressed in developing any "Freedom of Information" legislation. Whether legislation was necessary and, if so, the priority to be accorded to its passage, depended on the stage of development of the country concerned and, having regard to the significant level of cost involved, the need to ensure that available resources were used to the best advantage of the community. The questions of a proper degree of personal privacy and commercial confidentiality, too, were of importance and needed to be assured.

25. Although they appreciated that what might be appropriate for one system of government might not be appropriate for another, Ministers felt that their frank discussions had highlighted the issues, and were anxious to continue to be kept informed on Commonwealth developments in this as in other areas of the law. The Commonwealth Secretary-General was invited to consider arranging studies analysing the issues and administrative arrangements and other aspects of "Freedom of Information" schemes, bearing in mind the different circumstances of member countries.

Contempt of Court

26. Ministers had a useful and illuminating exchange of experience in the field of contempt of court. Difficulties had been experienced in a number of respects, and several jurisdictions acknowledged a need to define and clarify the law. These discussions would, they believed, contribute to that process.

Review of the Commonwealth Secretariat's Activities in the Legal Field

27. Ministers reviewed the legal activities undertaken by the Commonwealth Secretariat since last they met. They noted that their Meeting marked the completion of the first decade of the operations of the Legal Division, and expressed their gratitude to the Commonwealth Secretary-General both for his own devotion and that of his staff to Commonwealth legal need. Ministers were deeply impressed by the quality and breadth of the services they offered, with such small resources. The Legal Division they considered to be highly cost-effective.

28. The Meeting commended the Secretary-General for the regular production of the *Commonwealth Law Bulletin*, which was described as a unique, helpful and relevant source of information on Commonwealth legal developments, and which has come to be increasingly relied upon by Ministers and their officers.

29. A number of Ministers expressed their Governments' indebtedness to the Commonwealth Fund for Technical Co-operation (CFTC), for the outstanding services of the legal advisers provided to them, and for the legislative drafting courses it had arranged. The need for legal technical assistance would, they acknowledged, continue for some time to come. They were appreciative of the fact that the CFTC recognised the vital role played by legal systems, in promoting economic and social advancement. The need for help was all the greater in the period immediately following independence, particularly in smaller jurisdictions. Ministers urged the establishment with all possible despatch of small strategically-placed legal units to assist with these problems. Because the units hold the potential to rationalise the delivery of legal services to developing countries, international agencies and other donors should be approached.

30. Ministers warmly applauded the role played by the CFTC in providing to developing member countries all forms of assistance in the legal field, and the recognition the Fund displayed of the high priority that should properly be accorded this type of aid. They noted, however, that the level of technical and training assistance afforded by the CFTC was being affected by a lack of resources. Some Ministers were able to pledge additional support to CFTC-funded projects, and their gestures were deeply appreciated.

31. Ministers learned with a deep sense of loss of the imminent retirement of Mr. Kutlu Fuad from the post of Director of the Legal Division. They wished to record their indebtedness to him for his outstanding personal contribution to the cause of Commonwealth legal co-operation, the development of which to its present high level was due in great measure to his energy, enthusiasm and erudition.

Next Meeting

32. Ministers gladly accepted the generous invitation of the Government of Sri Lanka to hold their next Meeting in Colombo, which they hoped might take place during 1983.

Appreciation

33. Ministers had come to Barbados with the highest expectations, both for the Meeting itself and for the surroundings in which it would be taking place. The discussions were chaired with consummate skill and charm by the Attorney-General, the Hon. Henry de B Forde. The generosity of the hospitality and the warmth of the friendship of the people will linger long in the memories of all of the delegates. They asked the Attorney-General of Barbados to accept their most sincere appreciation and congratulations, and to convey these also to his Government.

Barbados
2 May 1980

COMMONWEALTH LAW MINISTERS' MEETING, BARBADOS, 1980

AGENDA

Meeting opens. Discuss Report of Meeting of Senior Officials

Item 1: Recognition and enforcement of judgments and orders etc. within the Commonwealth

Item 2: Computerization of legal material

Item 3: Review of Commonwealth Scheme for the rendition of fugitive offenders

Item 4: International abduction of children by a parent or guardian

Item 5: Contempt of court

Item 6: Transfer of convicted offenders

Item 7: Freedom of information

Item 8: Human tissue transplants

Item 9: Review of Commonwealth Secretariat's activities in the legal field

Item 10: Promotion and development of international co-operation to combat commercial and economic crime

Item 11: Appeals by prosecution against acquittals

Item 12: Future Activities

Consideration of Communiqué

Item 13: The next Meeting of Commonwealth Law Ministers and any other business

THE PROMOTION AND DEVELOPMENT OF INTERNATIONAL CO-OPERATION TO COMBAT COMMERCIAL AND ECONOMIC CRIME

Memorandum by the Commonwealth Secretariat and a paper prepared by
Dr. Barry A. K. Rider, Fellow of Jesus College Cambridge; President of the British Institute of Securities

It will be recalled that a considerable amount of attention was given to the question of economic and commercial crime by Law Ministers at their last Meeting in Winnipeg. Concern was expressed about the need to facilitate and develop international co-operation both in the investigation and prosecution of "white collar crime" within the Commonwealth. The importance that Ministers attached to this matter was reflected in the Communiqué which asked the Secretary-General to study and make recommendations for the facilitation of international co-operation and the provision of a greater degree of mutual assistance in this field.

2. The Commonwealth Secretariat commissioned Dr. Barry Rider, who has practical experience as both a lawyer and investigator in the field of corporate fraud, to prepare a paper on the promotion and development of international co-operation to combat commercial and economic crime. During the course of the preparation of this paper we made it possible for him to visit a number of Commonwealth jurisdictions. Dr. Rider also took the opportunity to raise this matter with several non-Commonwealth governments whose co-operation in any Commonwealth initiative could be of major assistance. Dr. Rider was also commissioned to prepare a supplementary paper on the International Criminal Police Organisation (ICPO-Interpol) and this forms Appendix VI to Dr. Rider's main paper.

3. Although the Communiqué spoke in terms of "white collar crime" we invited Dr. Rider to confine his attention primarily to illegal commercial activity—in other words economic and commercial crime. Nevertheless, it will be appreciated that the scope of this subject is such that attention has had to be focussed on certain aspects more than others. Furthermore, it has not been practicable for Dr. Rider to include in his paper other than a small proportion of the evidence and material he has had placed at his disposal whilst preparing it.

4. Dr. Rider is convinced that there is no panacea, and any practical improvement in international co-operation is likely to involve a series of small steps rather than any major leap forward. However, he has made a series of proposals which should work to minimise the more significant practical difficulties presently inhibiting effective international co-operation within the Commonwealth in regard to economic and commercial crime.

5. The recognition by Ministers at Winnipeg that commercial and economic crime is a serious international and national problem is underlined in Dr. Rider's paper. It is pointed out that the Common-

wealth is not alone in recognising the need for urgent and effective action. Such organisations as ICPO-Interpol, the Customs Co-operation Council and various agencies of the United Nations are just as aware of the problem. However, Dr. Rider feels that the common traditions and good-will within the Commonwealth places it in an almost unique position to act effectively against this category of criminal activity which is particularly perilous for developing economies. In discussing the consequences and implications of rampant commercial and economic crime he gives special attention to the laundering and legitimisation of funds obtained from criminal or abusive activity and also the importance of criminal financial intelligence in the fight against organised crime and trafficking operations.

6. Although a number of difficulties and inhibitions impeding effective law enforcement in relation to illegal commercial activity are identified in the paper, the author considers the primary weakness is in deficient co-ordination. Therefore, at the centre of his recommendations is the proposed establishment of a Commonwealth Fraud Liaison Officer (CFLO), a post which might conveniently be within the Commonwealth Secretariat. This officer would be responsible for developing and co-ordinating such matters as criminal financial intelligence and target operations, liaison with other agencies and in particular ICPO-Interpol, the dissemination of intelligence and relevant information, the provision of technical assistance and advice, training and co-operation in the conduct of international investigations. In addition to the CFLO Dr. Rider recommends the setting up of a Commonwealth Panel of Experts (CPE). Members of this Panel would be responsible for providing expert advice and assistance, the conduct of international inspections and discussion and dissemination of information.

7. In making these recommendations Dr. Rider has attempted to ensure that should Ministers wish to implement them this can be done practically and speedily. He does not contemplate a need for legislation in any Commonwealth jurisdiction, nor would there be any threat of intrusion into the national sovereignty or domestic competence of any Commonwealth country. Furthermore, the scheme may be implemented without great cost.

8. In the supplementary paper on ICPO-Interpol [Appendix VI] a general description of its organisation and operation is given, with a detailed examination of its capabilities in regard to economic and commercial crime. Dr. Rider recommends that co-operation should be developed in appropriate areas between the General Secretariat of ICPO-Interpol

and the Commonwealth Secretariat. He suggests that the proposed CFLO could play an important role here, and not only in regard to illegal commercial activity. It is suggested that the Commonwealth Secretariat should send observers to the various proceedings of ICPO-Interpol and Commonwealth countries should be more prepared to second police officers to the General Secretariat of ICPO-Interpol for short periods. Attention should also be given to the improvement and development of communications. Dr. Rider makes other proposals whereby the Commonwealth could assist ICPO-Interpol both in training and research.

9. It is appreciated that Ministers will not be in a position to arrive at final decisions with regard to

these proposals without an opportunity for adequate discussion with their respective Governments. Indeed, as Dr. Rider points out in many instances the appropriate agency is not necessarily a police or law enforcement agency, but a securities commission or corporate affairs commission. On the other hand it is anticipated that Ministers will not wish the Commonwealth's initiative in this area to lose momentum. Therefore, the Meeting might wish to consider inviting the Commonwealth Secretariat be responsible for securing the views of Ministers, after they have had time for consultation with their Governments and advisers, and finalising a set of recommendations. These recommendations could then be circulated among Commonwealth governments and appropriate action taken.

THE PROMOTION AND DEVELOPMENT OF INTERNATIONAL CO-OPERATION TO COMBAT COMMERCIAL AND ECONOMIC CRIME

By Dr. Barry A. K. Rider, Fellow of Jesus College, Cambridge;
President of the British Institute of Securities.

CONTENTS

Introduction	5	(v) Facilitating international investigations	
Summary of Recommendations	5	(vi) Training	
Terms of Reference	6	(vii) The role of the Metropolitan and City of London Company Fraud Department	
“White Collar” Crime	6		
A Worldwide Problem	8	The Commonwealth Panel of Experts (CPE)	38
The need to regulate economic and commercial crime	10	(i) Provision of expert advice	
(a) The effect on national economies		(ii) Inspection and special investigations	
(b) Political stability		(iii) Legislative drafting	
(c) Investor and market confidence		(iv) Counsel and amicus curiae	
(d) Effect on social structure		Conclusions	42
(e) The funding of other crimes		Appendix I: Resolution, 37th General Assembly Session, ICPO-Interpol, Tehran 1968	42
(f) The mushroom effect			
Practical difficulties impeding law enforcement and international co-operation	18	Appendix II: Resolution, 41st General Assembly Session, ICPO-Interpol, Frankfurt 1972	43
(a) The problem of definition and drafting			
(b) The international dimension		Appendix III: Resolution, 45th General Assembly Session, ICPO-Interpol, Accra 1976	43
(c) Detection			
(d) Investigation		Appendix IV: Extract from ICPO-Interpol General Secretariat Report No. 5, International Frauds and Commercial Crime	44
(e) Extradition			
(f) Prosecution		Appendix V: Memorandum of the U.S. Drug Enforcement Administration on “The Exchange of Financial Information with Foreign Countries”	46
(g) Trial and punishment			
Proposals for the promotion and facilitation of international co-operation within the Commonwealth	30	Appendix VI: Supplementary Report on the ICPO-Interpol by Dr. B. A. K. Rider	48
The Commonwealth Fraud Liaison Officer (CFLO)	31		
(i) Criminal financial intelligence			
(ii) Liaison with ICPO-Interpol			
(iii) Dissemination of information and targeting exercises			
(iv) Technical assistance			

THE PROMOTION AND DEVELOPMENT OF INTERNATIONAL CO-OPERATION TO COMBAT COMMERCIAL AND ECONOMIC CRIME

By Dr. Barry A. K. Rider, Fellow of Jesus College, Cambridge;
President of the British Institute of Securities.

Introduction

This report has been prepared in a relatively short time and whilst a good deal of thought has been given to the proposals there has not been time to prepare as much detailed factual analysis as one would have wished. However, the present report and the supplementary report of ICPO-Interpol and the Commonwealth contained in the Appendix have been prepared in time for submission to Law Ministers in advance of the next Commonwealth Law Ministers' Conference, in Barbados.

In preparing these submissions I have worked on the assumptions that economic and commercial crime is prevalent and that it is desirable that law enforcement and international co-operation should be made more effective in regard to this sort of criminal activity. Both assumptions are based on comments made by Commonwealth Law Ministers at their Winnipeg Meeting. It must also be emphasised that I have confined my attention almost exclusively to the problem of promoting international co-operation. This is not in any way to underestimate the importance of effective domestic law enforcement. The capability to deal with commercial and economic crime at a national level must be presupposed when one considers regulation at the international level. Of course, in practice this capability at national level is invariably severely limited.

Commonwealth Law Ministers at their last Meeting expressed the need for urgency in developing and facilitating international co-operation in regard to "white collar" crime. During the last six months I have had the privilege of discussing this matter with a number of Commonwealth Law Ministers, and it would seem that this sense of urgency is still present. Therefore, I have attempted to present proposals which can be implemented with speed and which should not require lengthy consideration by Commonwealth governments. The proposals do not involve great expense, either at national or Commonwealth level. Nor do they require amendment of any domestic law. Obviously, these necessary constraints have restricted the scope and nature of these proposals, for it would be wholly counterproductive to submit unrealistic schemes which stood no chance of implementation in the foreseeable future. If the proposals are accepted by Commonwealth Law Ministers and implemented by their respective governments, international co-operation in this field of law enforcement would be significantly enhanced. However, it is vital to realise that there is no readily available panacea, and although no effort should be spared in pursuing the goals that all hold dear, there is no way that every problem can be resolved.

Summary of Recommendations

1. For the facilitation and development of international co-operation and mutual assistance within the Commonwealth with regard to commercial and economic crime, the following scheme is proposed:

(a) The post of Commonwealth Fraud Liaison Officer (CFLO) be established, perhaps conveniently within the Commonwealth Secretariat. The CFLO would be a senior post calling as it does for considerable experience and ability.

The CFLO would be responsible for, inter alia,

- (i) the development of criminal financial intelligence,
- (ii) liaison with ICPO-Interpol and appropriate other international agencies,
- (iii) dissemination of information on such matters as modus operandi, and the co-ordination of targeting,
- (iv) technical assistance,
- (v) co-ordination of international investigations, and
- (vi) training.

(b) A Commonwealth Panel of Experts (CPE) would be established. Members of the CPE would be experts in relevant professions (e.g. lawyers, accountants, investigators) nominated by their Law Minister. Members of the CPE would only receive compensation for specific assignments undertaken for the Commonwealth or a Commonwealth country. Subcommittees and individual members of the CPE would be responsible for, inter alia,

- (i) provision of expert advice,
- (ii) inspections and special investigations,
- (iii) legislative drafting,
- (iv) counsel and *amicus curiae*, and
- (v) discussion and dissemination of relevant information.

(c) Implementation of the above scheme would not appear to require enactment or amendment of any law in any Commonwealth jurisdiction.

2. For the facilitation and development of co-operation with ICPO-Interpol and the strengthening of that organisation within the Commonwealth, the following proposals are made in the Supplementary Report ICPO-Interpol and the Commonwealth (see Appendix VI):

(a) co-operation between the Commonwealth Secretariat and the General Secretariat of ICPO-Interpol,

(b) Commonwealth countries should be encouraged to second police officers to the ICPO-Interpol General Secretariat and consideration should be given to

the provision of assistance at Commonwealth level to facilitate this,

(c) consideration should be given to the improvement of communications between certain Commonwealth jurisdictions and ICPO-Interpol,

(d) the Commonwealth Secretariat should assist the General Secretariat of ICPO-Interpol in developing an intelligence and liaison capability with regard to international commercial crime. This assistance should be primarily the responsibility of the proposed CFLO,

(e) consideration should be given to ways in which expert assistance and advice could be made available to ICPO-Interpol by the Commonwealth. The creation of the proposed CPE would greatly assist in this,

(f) the Legal Division of the Commonwealth Secretariat and other Commonwealth institutions should be equipped to assist and participate in studies and research projects initiated by ICPO-Interpol,

(g) Commonwealth assistance, both in expertise and finance, should be made available to ICPO-Interpol with regard to the organisation of seminars and conferences of particular interest to Commonwealth jurisdictions, and

(h) Commonwealth assistance, both in expertise and finance, should be made available to ICPO-Interpol and Commonwealth police forces for the training of officers in specialist matters.

Terms of Reference

In January 1979 I was commissioned by the Commonwealth Secretariat to prepare a report for submission to the 1980 Commonwealth Law Ministers' Conference in Barbados containing proposals for the facilitation of international co-operation within the Commonwealth in regard to the regulation of "white collar" crime. In their Communiqué, Commonwealth Law Ministers at their Meeting in Winnipeg in 1977 considered that this was a matter of serious concern and had asked the Secretary-General to examine the subject and make proposals for enlarged mutual assistance and co-operation between Commonwealth countries in combating this class of criminal activity.

Given the constraints of time, I have not been able to examine every aspect of "white collar" crime and I have given special attention to commercial crime which has an "international element". During the last six months I have visited a number of Commonwealth and non-Commonwealth countries and discussed the subject with Ministers, senior law and police officers and the various professions. I would record my gratitude and my indebtedness to them for their unstinted assistance. As a practising lawyer and investigator, too, I have had some considerable practical experience in a number of jurisdictions, including several developing countries.

I have also limited my attention to those economic crimes which are regarded as criminal offences in all

or most Commonwealth countries. This approach was also suggested by the desirability of creating a scheme which would complement the Commonwealth scheme for the Rendition of Fugitive Offenders.

Furthermore, if greater co-operation is to be developed at Commonwealth level with ICPO-Interpol, it is important that the proposed scheme should relate to ordinary criminal law offences.

It would of course be unrealistic for the Commonwealth to view the problems it now faces with regard to "white collar" crime in isolation from those of the rest of the world. The particular difficulties facing many countries are the same, whether or not they are members of the Commonwealth. Given the scope and dimension of international commercial crime it would be inadequate to propose a scheme which only had relevance to the Commonwealth and could not develop relationships with non-Commonwealth governments and other international organisations. Therefore it is desirable that any initiative within the Commonwealth be such as is capable of being extended, as necessary, beyond the Commonwealth. This consideration is of special significance in regard to developing a closer working relationship with ICPO-Interpol. This particular matter is discussed in the separate supplementary report contained in the Appendix.

Commonwealth Law Ministers do not stand alone in their recognition of the seriousness of the problems facing effective policing in the field of international commercial crime. Discussions with countries outside the Commonwealth reveal that a number of foreign governments, including the U.S.A., Thailand, the Philippines, France, Japan and the Netherlands, await with interest to see what developments take place as a result of Commonwealth initiatives. Of course, it is not suggested that the scheme I proposed in this report should be other than a Commonwealth scheme drawing heavily on the common legal heritage that binds Commonwealth legal systems together.

"White Collar" Crime

At their last Meeting the terms "economic crime", "white collar crime" and "illegal commercial activities" were used interchangeably. A good deal could be written on each term. However, like the traveller who knew what an elephant was when he saw one yet had difficulty in describing it in abstract terms, I am confident that the pertinent area of concern needs no exact definition. A discussion of the concepts associated with this particular category of criminal activity, is included in the Appendices. For the sake of clarity I have set out below a number of crimes which would or could in certain circumstances fall within the terms economic, commercial or "white collar" crime. Of course, this list is not intended to be exhaustive and certain crimes substantially overlap with others:

- (i) corporate fraud (managerial and employee),
- (ii) securities frauds (e.g. the issuance of worthless stock, bond washing and market manipulation, insider trading),

- (iii) market and trading abuses (e.g. illegal restrictive practices and monopolies),
- (iv) manipulation of markets (i.e. securities and commodity),
- (v) smuggling,
- (vi) exchange control violations and illegal currency smuggling,
- (vii) counterfeiting of currency and valuable negotiable documents,
- (viii) forgery,
- (ix) franchise frauds,
- (x) loan sharking and illegal moneylending,
- (xi) fraudulently obtaining government subsidies,
- (xii) social security and welfare frauds,
- (xiii) fraudulent insurance claims,
- (xiv) shipping frauds (e.g. cube-cutting, wrecking, sale of non-existent cargo),
- (xv) credit frauds (e.g. long firm frauds, carbon paper and stationery frauds),
- (xvi) credit card frauds,
- (xvii) economic and industrial espionage,
- (xviii) bribery and corruption,
- (xix) tax evasion,
- (xx) pirating of records, films, publications etc. (including copyright and trade mark violations),
- (xxi) advance fee frauds,
- (xxii) fraudulent factoring,
- (xxiii) criminal banking,
- (xxiv) frauds associated with bankruptcy and insolvency (including fraudulent trading, trading whilst an undischarged bankrupt, fraudulent preference etc.), and
- (xxv) false accounting.

A good many of these crimes overlap with each other. In practice the most usual charges would be those of theft, obtaining by deception or cheating, forgery and (where more than one individual is involved) conspiracy to defraud. Of course, many of these crimes would be covered by specific provisions, but not all. It is not uncommon to find that the commission of these crimes is associated with some form of other criminal activity. For example arson may well be involved in fraudulent insurance claims, and violence or threats of violence may well be associated with loan sharking operations. There are certain crimes, listed above, which would not usually have an international element. For instance, most company based frauds by employees would not have an international aspect. However, many are almost by definition international crimes. Shipping frauds, counterfeiting of currency and a good many factoring frauds are almost certainly likely to have an international element. It is also important to appreciate that there is a growing amount of evidence that organised criminals are increasingly moving into non-violent criminal activity and therefore a crime which might at first appear as wholly a matter for domestic concern could well have international implications. Another significant factor that is increasingly

coming into play in such crimes is the use of foreign nominees or front men to obscure the commission of the crime and thereby avoid detection or if perchance detected greatly hamper investigation. Nominees both of the domestic and international variety are in practice exceedingly difficult to detect and penetrate.

A number of the crimes listed above are not generally extraditable and would not necessarily be regarded as ordinary criminal law offences by ICPO-Interpol. Indeed, certain of them would not be regarded as criminal in all Commonwealth jurisdictions. An obvious example would be exchange control violation. Furthermore, a number of these crimes might well be regarded as political offences or at least as having political implications. This is a significant inhibition on international co-operation. For example, ICPO-Interpol is expressly forbidden by Article 3 of its Constitution to intervene or give any assistance whatsoever where the offence is political. As already pointed out, this report concentrates on ordinary criminal law offences that are widely regarded as criminal. Essentially, this confines the scope of discussion to cases of commercial and corporate fraud, and associated activities of a criminal nature.

Dr. William Clifford in his Paper on "white collar" crime which he submitted to the last Commonwealth Law Ministers' Meeting correctly pointed out that a common thread throughout this category of criminal activity is economic exploitation. He commented that a characteristic of the "white collar" criminal is his ability to "unscrupulously manipulate the system so as to amass wealth at the expense of the consumer, small shareholder or those persons without economic power". Therefore, we are concerned with parasitical crimes of an insidious nature.

It would be a serious mistake to consider that "white collar" crime is solely a problem for countries with a "free market" economy. It is not merely the "unacceptable face of capitalism" it has often been represented to be. While it is true that certain offences are dependent to a greater or lesser degree on the exploitation of certain capitalist models, in practice economic and commercial crime is not confined to capitalist countries. Managerial and market frauds are equally prevalent in socialist and even communist countries. Indeed, the Government of the Chinese People's Republic has recently indicated its determination to reduce the abuses that have been occurring in its timber and extraction industries.

There is very little empirical evidence available as to the extent of economic and commercial crime—even in the more developed countries. The statistics that are available are generally regarded as unreliable and likely to significantly underestimate the problem. This is particularly true with regard to managerial and employee frauds. Sadly, managerial malpractice only comes to light once the corporation has become insolvent and gone into liquidation. Employee frauds are rarely detected and the vast majority of those that are, are dealt with as wholly an internal matter. In other words there is wide agreement that the vast

bulk of such frauds are not publicised, and their perpetrators come nowhere near the criminal courts. In recent years a good deal of attention has been focused on computer-assisted and related frauds. It is appreciated that this is a matter of concern mainly to the more developed Commonwealth countries, however, this matter is illustrative of the increasing sophistication in international fraud, and has therefore wider relevance. Furthermore, at the Third International Symposium on Fraud organised by ICPO-Interpol in December 1979 the delegates from such countries as Malaysia and Nigeria expressed great interest in this aspect of commercial crime. The danger with computer-related and assisted crime is simply its potential. By and large the elements of the offence are the same as in non-computer assisted or related cases. The potential, however, is staggering. A computer need be instructed by only one criminal so as to have the capacity of many thousands of criminals. Furthermore, the opportunities for preventing discovery and subsequent investigation are so much greater. On the other hand, there would appear to be little empirical evidence of computer-assisted or related crimes taking place within the Commonwealth. The 30 or so cases that have come to light in the United Kingdom have surprisingly only involved £750,000. Nevertheless, both in the industry and, I understand, in the police it is widely acknowledged that the incidence of abuse is infinitely greater than these reported instances would suggest. Research in the U.S.A. and in some European countries supports this pessimistic view.

Apart from a disturbing inability to detect and locate crime of a commercial or economic nature, most countries seem to suffer from difficulties in getting cases before the criminal courts and attaining satisfactory results. In the absence of a judicial determination it is extremely difficult to discuss a particular instance of suspected fraud. The laws relating to defamation and confidentiality serve as a major brake on this kind of analysis. It would be dangerous and short-sighted for any government to reject or ignore the need for a major initiative in the area of economic and commercial crime on the assumption that the few cases that have come to light are anything but the tip of an iceberg. The statistics of criminal prosecutions in this category of criminal activity are fundamentally misleading.

There would also appear to be agreement that the sums of money involved in commercial and economic crime are vast. Dr. Clifford in his Paper observes that the amounts involved are "rarely below the astronomical". Certain examples will be found in the Appendix. The Attorney General for New South Wales has estimated that from 1966 to 1977 crime by corporate officials in the state of New South Wales alone cost creditors and investors in excess of \$430,000,000 (See *The Bulletin* 12 March 1977). An analysis of the commercial and economic cases held by the Metropolitan and City of London Police Company Fraud Department in July 1978 shows that the 473 cases involved some £196,227,000 cash at risk. This means that each case under investigation involved on average £414,855, (See Annex III, *Work-*

ing Party on the Investigation and Prosecution of Company Fraud, Director of Public Prosecutions, 1979). I mention these sensational amounts, not because they hold any relevance in themselves, but to emphasise the importance and the implications of the sort of crime we are discussing. Apart from cash or property at risk, the amounts that may well be involved in appropriations are invariably exceedingly large. It is clear that the Commonwealth Law Ministers considered that both the likely incidence and magnitude of "white collar" crime was a most serious and pressing problem, and therefore there is little point in attempting to chronicle the numerous *causes célèbres* already on Law Ministers' minds.

A Worldwide Problem

As observed, Commonwealth Law Ministers do not stand alone in recognising the need for urgent action in this field of criminal activity. A number of international and national agencies are concerned with the proliferation of economic and commercial crime. However, despite widespread concern, so far little has been achieved at the international or in most cases the national level.

ICPO-Interpol has recognised the importance of facilitating international co-operation with regard to commercial and economic crime for some time. The question was raised at the ICPO-Interpol General Assembly in Koto, Japan, in 1967. The Sri Lanka delegation called for increased co-operation and mutual assistance generally with regard to economic crime and specifically with regard to exchange control violations and currency smuggling. The then-Director of Criminal Investigations in Sri Lanka, in a joint seminar on the role of police in national development held in November 1976, commented that "it rather frightens me to think that we had the audacity to raise this subject which does not normally come within the scope of Interpol as its Constitution restricts its activities to the prevention and suppression of ordinary law crimes".

This underlines one of the greatest problems in advancing international co-operation with regard to economic and financial crime. The concern expressed in Koto about the implications of commercial and economic crime was followed up the next year at the ICPO-Interpol General Assembly in Tehran. The General Assembly adopted a resolution calling for voluntary co-operation between member countries in the investigation of economic crimes (See Appendix I). In 1972, at Frankfurt, the General Assembly adopted another resolution calling for greater co-operation in the supply of information relevant to economic and commercial crime and the ramifications and implications of such (See Appendix II). This resolution was a direct result of a report tabled by the Indian delegation. At the 43rd General Assembly, at Cannes in 1973, a number of delegations and in particular those of India and Sri Lanka, expressed dissatisfaction with the existing state of affairs and emphasised the plight of develop-

ing countries when faced with exchange control and currency offences.

In November 1974, the ICPO-Interpol General Secretariat circulated a memorandum to the National Central Bureaux (NCBs) drawing their attention to the relevant resolutions of the General Assembly and underlining the need for more co-operation and mutual assistance. The Secretary General recognised that "co-operation in economic crimes can occasionally be impeded by differences between laws in various countries since certain actions are punishable by law in some countries but not in others". However, the Secretary General added "very often... receiving information that is relatively easy to obtain (e.g. the price of certain merchandise, whether or not a form actually exists etc.) can be of great assistance to requesting countries". Therefore, the General Secretariat emphasised NCBs should do everything "in their power to supply such information on request". The Secretary General also pointed out that "it is often imperative for requesting authorities to know as quickly as possible whether or not their requests for information can be acted upon by the receivers of those requests".

It is not unknown for such requests to be buried at the bottom of a stack of documents and either completely forgotten or ignored as a non priority matter. It is perhaps worth setting out the procedure that the General Secretariat recommended should be followed by NCBs on receipt of such request:

(a) upon receipt of a request for information in connection with economic offences, each NCB will indicate to the requesting NCB whether or not the request can be acted upon,

(b) whenever the requested NCB is unable to provide information to the requesting NCB it will indicate the legal basis for such a decision and also, where appropriate, the government or administrative service which might be able to provide information and the channels (judicial or diplomatic) through which the information could be officially obtained.

Despite the efforts of the General Assembly and General Secretariat there was still a feeling within the ICPO-Interpol organisation, particularly among the developing countries, that co-operation in this field of law enforcement was deficient. Certain countries invariably refused to co-operate, either on the basis that they were inhibited or because of apathy. The matter was raised yet again at the General Assembly at Buenos Aires, in 1975. A resolution was adopted which set out both a short and a long term programme. In the short term the need for increased co-operation and understanding was reiterated and specific attention drawn to the serious implications of economic and commercial crime. In the longer term a committee of experts was set up to look at international commercial crime and make recommendations for promoting co-operation. The committee of experts had delegates from Canada, the Federal Republic of Germany, Guatemala, India, Israel, Pakistan, the U.S.A., the United Kingdom, Senegal, Sudan and Sri Lanka. The ICPO-Interpol

General Secretariat sent out comprehensive questionnaires to the NCBs and a report was prepared. The committee of experts studied this report and draft resolution which was adopted by the General Assembly in Ghana in 1976 (See Appendix III).

Apart from the now-numerous resolutions of the ICPO-Interpol General Assembly and various circulars sent out by the General Secretariat, three Symposia on International Fraud have been held at the ICPO-Interpol Headquarters in Paris, (i.e. April 1968, September 1974, and December 1979). It should be noted that the Commonwealth Secretariat was invited to send an Observer to the most recent symposium, which it did. How effective ICPO-Interpol's efforts have been in promoting more international co-operation with regard to economic and commercial crime is open to question. A more detailed account of ICPO-Interpol's role in this area of law enforcement is given in the supplementary report, in the Appendix, specifically dealing with this organisation. In my judgment, it would be the consensus of opinion that to date ICPO-Interpol has been able to make minimal headway, and its major achievement has been to draw attention to the need for more co-operation and mutual assistance without necessarily developing either significantly. Here it is sufficient to point out that ICPO-Interpol is well aware of the need for urgent action, and has repeatedly sought support from national governments and law enforcement agencies for a more effective programme of international co-operation. So far this has not been forthcoming.

Several organs of the United Nations have also addressed the problem of developing international co-operation in this field. For example, the United Nations Committee on Crime Prevention and Control, meeting in 1974 at Geneva, underlined the harm which could be caused by rampant economic crime and recommended that studies be undertaken to investigate "the possibility of arranging for the collection and dissemination of information at the national and international levels with a view to reducing the damage to economic, political and cultural development through such crimes". Unfortunately, very little has come of this of practical value. The United Nations Centre for the Study of Transnational Corporations has also examined certain aspects of the problem. The Economic and Social Council of the United Nations has concerned itself with certain regulatory problems connected with multinational enterprises and international trading abuses. The United Nations Drug Abuse Programme and the various Regional Sub-Committees on Illicit Drug Trafficking have increasingly become interested in the relationship between commercial and economic crime and the illicit narcotics industry. Very recently the United Nations maritime agency—the Inter-Governmental Maritime Consultative Organisation has set up a special committee to examine maritime fraud.

There is a host of other international organisations, both inter-governmental and private which to a greater or lesser extent are concerned with international co-operation in this area of criminal

activity. The important contribution of the OECD in regard to multinational corporations and such matters as bribery and corruption and international restrictive practices is widely known. The European Committee on Crime Problems of the Council of Europe, too, has undertaken a good deal of important research in this area. The Customs Co-operation Council is a particularly important agency with regard to customs offences. A number of non-governmental organisations such as the International Air Transport Association (IATA) have increasingly had to come to terms with international fraudulent operations in recent years. Indeed, during the last decade some of the most important advances in international co-operation have been industry based. This is particularly true in such areas as credit cards, travellers cheques and, of course, airline tickets. It is to be hoped that the insurance, computer and shipping industries will make similar efforts during the next decade.

Organisations such as the International Chamber of Commerce have also contributed to the setting of world-wide standards of probity through the drawing up and publication of international codes of conduct on such matters as bribery and commission payments. Whilst this concern throughout the international community to advance co-operation is commendable and to be supported, it has to be admitted that to date it has made little impact on the problems that still in practice substantially impede international co-operation.

The concern evident at the international level is equally visible at national level. Over the last decade more and more attention has been given to such regulatory matters as corporate securities abuses throughout the world. It would be quite impossible to survey the vast quantity of material that has been produced on matters relating to commercial and economic crime during the last decade, even just within the Commonwealth. A number of Commonwealth countries have various "expert committees" examining law enforcement with regard to commercial crime, sitting whilst this report is being drafted. For example, in 1978 such a committee was convened in the United Kingdom "to consider the arrangements for investigating the prosecuting fraud and particularly company fraud and to examine the role and co-ordination between each of the authorities with responsibilities in this field". The committee reported in 1979. Even more recently, the Attorney General is understood to have set up another expert committee to examine matters relevant to this area. The press, too, has carried a report that the United Kingdom Government is considering setting up a "flying squad" of experienced fraud squad detectives to help Commonwealth countries (*Daily Telegraph* 27 December 1979). This particular development is discussed later in this report. However, this illustrates a high degree of concern at national level. Beyond the Commonwealth, the Federal Republic of Germany has set up an expert panel to examine necessary legislative and administrative changes required to facilitate the prosecution of commercial crime, in 1978. The

Japanese Government has had a similar committee sitting since 1976. The Philippine Government, too, set up a special task force to make recommendations on dealing with organised commercial crime in September 1978. Judge William Webster, Director of the U.S. Federal Bureau of Investigation (FBI) has recently re-affirmed the decision of his predecessor to make commercial and economic crime a matter of top priority within the Bureau. In April 1979, Mr. Benjamin Civiletti, Deputy Attorney General of the U.S.A. announced a major new offensive against commercial crime involving the establishment of some 27 new officers staffed by 150 specialist prosecutors throughout the U.S.A.

Having regard specifically to corporate securities frauds, the establishment of some kind of securities and exchange commission would appear to have become almost a status symbol. Sadly, these authorities are often ill-equipped to perform a regulatory function, and in some cases their ability to provide enforcement is severely restricted by combining in its role too many responsibilities. Certainly, it is important for governments, and in particular for governments of developing countries, to realise that the setting up of a new authority to police a particular area of activity as complex and important as corporate securities trading is no universal panacea. It may, however, be a significant first step to catching criminals.

The need to regulate economic and commercial crime

(a) The effect on national economies

Reference has already been made to the vast sums of money that can be involved either directly through misappropriation or placed at risk by economic and commercial crime. The ICPO-Interpol General Assembly has repeatedly emphasised the harm that can be caused to the economies of countries by this type of criminal activity. This recognition is implicit in the resolutions passed at the General Assemblies meeting in Tehran, Frankfurt and Lagos. The Minister of Justice and Attorney General of Jamaica stated at the Winnipeg Law Ministers' Meeting that this type of crime was having "a devastating effect in Jamaica". The Minister of Justice of Sri Lanka also pointed out that "the developing world has been particularly vulnerable to crimes affecting the national economy such as smuggling, foreign exchange violations, the illegal outflow of capital, illicit trafficking in currency, narcotics offences and bribery and corruption". Other Ministers expressed similar views. It is not without significance that, in the main, it has been the developing countries that have brought to ICPO-Interpol's attention at the General Assembly the inadequate state of international co-operation in this field of criminal activity.

There is some evidence that the commission of commercial and economic crimes can directly and adversely affect the national economy of a state. Dr. William Clifford in his Paper referred to several

instances of this occurring. Some Law Ministers will no doubt know of others. In the present context it would be invidious to select a single country for the purpose of illustration. A number of countries, including several Commonwealth countries, have elevated law enforcement in this area to almost that of national security. Where the state's economy and currency are at stake this is understandable. The psychological identification of certain economic crimes with those directly affecting the nation's security and well-being is occasionally reflected in the law enforcement agency designated to deal with such cases. This is mentioned merely to illustrate the feeling, not confined wholly to the developing world, that certain economic crimes are little short of treason. Although, it is not necessary to labour this point, it does have an obvious bearing on the question of international co-operation, and in particular to the surrender of fugitive offenders. ICPO-Interpol have been confronted with this problem on a number of occasions. It should also be mentioned, that the designation of specialised agencies to police specific crimes inevitably creates problems of demarcation, communication and co-ordination at both the domestic and the international level. This particular problem is developed in the supplementary report in Appendix VI dealing with ICPO-Interpol.

To a very real extent the way in which a state will view attacks on its economy through economic and financial crime will be influenced by its dominant political philosophy. The relationship between certain economic crimes and their political, social and moral justification is often confused. The political connection may, however, be the most significant. A failure to appreciate that certain economic and financial crimes are merely reflections of a state's political and economic values has engendered a good deal of misunderstanding. Certain countries have long felt frustration with the international community, and in particular with the developed world, over the inability or reluctance of other countries to provide meaningful assistance in combatting certain economic crimes. A classic example of this is the controversy that still surrounds exchange control regulation. A number of developing countries understandably consider that a measure of exchange control regulation is vital to their national economy and security, but this view may perhaps occasionally be overstated.

ICPO-Interpol has long been confronted with this particular problem. Deputy Inspector General Tyrrell Goonatilleke, of Sri Lanka Police Force, spoke out against the reluctance of certain countries to co-operate in investigations relating to exchange control violations at the ICPO-Interpol General Assembly at Vienna, Austria in 1973. His impassioned speech referred to his country being "cheated, defrauded—virtually robbed of its national wealth that is so essential for any form of development". He stated that "staggering sums of astronomical proportions" were involved. The Indian, Pakistan and Philippine delegations strongly supported this call from the heart.

This concern among the developing world for more meaningful assistance was followed up at the ICPO-Interpol Asian Regional Conference in Manila, in 1975. The reluctance of some countries to co-operate in these investigations is often because they themselves do not have exchange control regulations.

As mentioned, the General Secretariat of ICPO-Interpol prepared a report on international fraud (Report No. 5, ICPO-Interpol General Secretariat) which was endorsed by the special committee of experts and by the General Assembly at Buenos Aires. This report gave considerable attention to the degree of international co-operation countries could expect in the investigation of exchange control and currency related offences. The General Secretariat was concerned to ascertain those countries which required double criminality or reciprocity, and or, a required minimum standard of seriousness before co-operation would be given in such investigations. Although the results obtained were less than impressive, and the report itself is now somewhat dated, the relevant table appears as Appendix IV.

Perhaps an even more sensitive area for international co-operation is that of "foreign payments", or in less euphemistic language, international bribery and corruption. That this is a serious international problem for both the developed and developing world cannot be denied. Bribery and corruption cannot be countenanced in the giving or the receiving country. The implications of bribery and corruption in developing countries where scarce resources must be employed to the best advantage are obvious. Whilst a number of international organisations have examined this issue, there may still be room for a Commonwealth initiative.

The diversion of scarce capital resources into the hands of criminals, or at best non-priority investment sectors, is of concern to the governments of all countries. However, for a developing country the consequence are potentially far more grave. The sums of money may be the same in both cases, but the implications for the national economy of a developing country are significantly more serious than those for a developed economy. Added to this is the fact that developing countries, on the whole, constitute far easier targets for organised and syndicated crime. In such states the law enforcement machinery for combatting criminal penetration of domestic business or foreign enterprises operating locally, where they exist, are almost certain to be inadequate. Furthermore, it is probable that given the lower level of capitalisation in such countries the capital that needs to be employed to capture or manipulate an enterprise or industrial sector is far less than would be required in a more developed country. It should also be borne in mind that there is far more opportunity for the infiltration of the political and financial infrastructure in a smaller developing country. Whilst this could be disastrous for the country concerned there would be inevitable wider consequences for the international community.

(b) Political stability

It would seem that a very high proportion of commercial and economic crime is organised crime. The statistics available indicate that increasingly criminals are moving into "white collar" crime. For example, in the United Kingdom a growing number of "white collar" criminals coming before the courts are not first-time offenders and have records involving the commission of non-commercial and economic crime. It would seem that the ordinary criminal is becoming more aware of the advantages of this sort of crime. Given the potential rewards, the far lower rate of detection, the miniscule proportion of successful prosecutions, the absence of personal physical danger, and the social esteem that can surround a "white collar" criminal, the attractions are obvious and compelling. Furthermore, it is a mistake to regard all commercial and economic crime as necessarily complex or sophisticated, and as requiring a degree of training and intelligence unlikely to exist within the traditional criminal fraternity. Even those commercial crimes which do require a degree of specialist knowledge can be perpetrated either by purchasing or in some other way acquiring the necessary expertise. Blackmail and threats of violence can be useful tools here, along with the traditional motivation of greed.

Many economic crimes require a degree of syndication either in the setting up or the execution. Known criminals and criminal groups have been identified in such operations. Some Law Ministers may be aware of instances in their own jurisdictions. Here it suffices to point out the significant involvement of organised crime in a number of recent international credit and cheque frauds, counterfeiting operations, and the manipulation of world commodity prices.

In the United Kingdom and to a lesser extent in countries such as Singapore, Malaysia and Australia, there is evidence that organised crime is involved in "long firm frauds". The recognition that organised crime was already heavily involved in this category of criminal activity was implicit in the observations of certain Commonwealth Law Ministers at Winnipeg. Perhaps a word of warning should be added for those who are not at present aware of this dimension to economic and commercial crime. The Intelligence Manual prepared by the U.S. Department of Justice for use by law enforcement agencies concerned with the fight against organised crime states (at p. 9), "there can be little comfort for the law enforcement agency head who has felt himself fortunate over the years that no 'family members' have been located in his jurisdiction. The presence of industrial or commercial wealth may be as sure an indication that organised crime is at least viewing his city with interest as the visit of a notorious 'capo'. 'White collar' crime is on the rise. On the other hand, large concentrations of disadvantaged poor in a defined and compact sector of the city may attract those always ready to exploit the defenceless and uneducated". Whilst this was prepared with *La Cosa Nostra* in mind, its warning is of general application. I would also add that it is the view of virtually every

law enforcement officer consulted during this project that organised crime on the international level as well as the domestic level is heavily involved in commercial and economic crime.

Once organised criminal cells become established in a country, particularly a developing country, there is a strong incentive for them to seek to infiltrate the political structure. Indeed, in the long term for organised crime to survive and prosper it must do so. Apart from protecting its investment it will enable greater opportunities for the economic exploitation to be realised. The "political" activities of organised crime especially in the U.S.A., but also in certain Commonwealth countries, are well known and constitute a most insidious domestic and international peril. Once a degree of infiltration has taken place it is extremely difficult for a government to remove the cancer. Corruption breeds corruption. Increasingly, it is becoming obvious that this is not wholly a problem for developing countries. There have been examples recently where organised crime has infiltrated and operated in highly respected institutions and law enforcement agencies in developed Commonwealth countries. The problems that Scotland Yard has had to face during the last decade amply testify to this. It is both extremely difficult and costly both in manpower and money to adequately stamp out this kind of cancer once it has been allowed to establish itself.

Another matter for grave concern should be the criminal's desire to "legitimise" his operation. In the present context this desire is very strong. The social, moral and cultural pressures which underlie this desire are of no immediate interest here. However, it is important to note that by going legitimate the criminal places the product of his years of crime almost invariably beyond the practical reach of the law. This wealth can be used to generate more wealth, either legally or illegally. Through the exploitation of criminal and underworld contacts and relationships it is possible for this legitimisation to take place on grossly unfair terms to the disadvantage of the state, investors, creditors, consumers and employees. Examples are legion in the U.S.A., where the whole question has come increasingly to the attention of law enforcement agencies and law officers. In the recent past there have been indications that organised criminal cells have sought to make the transition into the world of legitimate business in the Commonwealth. Very little work has been done on this issue. The author is not aware of any academic or criminological research and detects a disturbing level of ignorance, and in one or two instances of unconcern, in relevant law enforcement agencies. Although this topic must await further investigation, several instances were found and it would be appropriate to give an example. In Hong Kong, the San Yee On Triad Society of the Chiu Chau have invested large sums of money obtained from various street offences, illicit gambling, and possibly loan sharking, in a hotel, two expensive and prestigious night clubs and three restaurants. It would appear that the businesses are now run as more or less legitimate operations, and despite

almost continuous police surveillance and even undercover infiltration there appears little likelihood of evidence being obtained such as would enable a criminal prosecution to be brought. The proprietors of the businesses are known and convicted criminals. This is not an isolated instance and other groups of organised criminals have become involved with similar operations in many Asian countries and to a lesser extent in Europe. Within the Commonwealth, this is understood to be a problem in Australia, Malaysia, Singapore and to a lesser extent Canada and the United Kingdom. Whilst it is true that most of these operations are relatively small, the danger is obvious.

The legitimisation of criminal activity has another important attraction—it allows criminals to “launder” the proceeds of the crimes with which they are still associated. It is probable that many of the clubs, massage parlours, gambling rooms and the like which are known to have criminal connections are used for this purpose in Commonwealth countries. There is a good deal of evidence of this taking place in the Far East, and to a lesser extent in Australia. Again an example may suffice. A criminal syndicate operating in the Philippines with connections in Indonesia and Malaysia, and probably also Thailand, regularly sends couriers to Hong Kong and Macao with large sums of money which have been obtained in the trafficking of both narcotics and arms, and a number of associated street offences. There it is “laundered” in a chain of night clubs, two firms of stockbrokers, an insurance company and a small private bank. Smaller scale operations are commonplace.

Infiltration of either the political or business infrastructure can easily lead to destabilisation within that country. Domestic and international confidence in the ability of that country to preserve a particular set of social, moral and economic values will be weakened leading ultimately to a serious undermining of national institutions.

(c) Investor and market confidence

Closely related with the earlier considerations is the risk of a significant loss in investor confidence, both domestically and internationally, should economic and commercial crime be allowed to continue and develop unchecked. Governments, and in particular Commonwealth governments, are mindful of the need to promote and foster investor confidence in the integrity of their financial and social institutions. For example, section 3 of the recent Off Shore Banking Act 1979 of Barbados specifically states that it is in the purpose of the Act to encourage the development of Barbados as a *responsible* off shore financial centre.

Numerous other examples could be cited but are unnecessary to support such an obvious assertion. The state has a right to protect and encourage the investor, and for that matter all consumers and participators, in its institutions and its economy. This is a matter of survival. Therefore, if it is established that a practice, such as, for example, insider trading,

significantly weakens investor confidence in the integrity of a state's capital markets, then it is beyond argument that the state has the right, perhaps even the duty, to act positively against that abuse. It matters not, according to this view, that criminologists and jurists might debate and doubt whether in fact any one individual is legally harmed by the abuse. Nor does it matter that a widespread feeling that a particular abuse is unfair may be judged by legal analysis to be illogical. Investor confidence can be injured just as much by an illogical reaction, and in the final analysis it matters little whether a loss of confidence is a logical reaction to the given facts or not. There is still a loss of vital confidence and respect. Therefore, governments should be prepared to act against such abuses giving, perhaps, more attention to cause and effect. The prophylactic argument is a strong one in regard to commercial and economic crime.

On this basis, even cosmetic regulation may be justified. Whilst some scepticism has been expressed about the growth of securities and exchange commission-type organisations, it is suggested that the exercise may well be valid if the result is to heighten investor confidence. It is reassuring to know that there is a policeman on the beat, even if very few burglars are successfully prosecuted in the courts. By the same token it must be appreciated that by creating a greater degree of awareness in the field of “white collar” crime and market frauds in particular there is a danger of a weakening in public confidence in the ability of the legal system to cope. This is not to say that frauds and malpractices should be concealed from the public and media. Awareness is a two-edged sword.

The presence of an authority charged officially and publicly with the responsibility of dealing with such cases is a step in the right direction.

(d) Effect on social structure

Traditionally, “white collar” crime has been largely confined to the more educated and monied sections of the community. “White collar” crime depends so much on opportunity. Whilst this is true, to a certain extent, of all crimes, it is especially true of this category of criminal activity. However, there is some evidence in more developed jurisdictions that the social barriers are beginning to break down, and increasingly there is little difference between the “white collar” criminal and any other criminal. It is true that a number of economic and commercial crimes require a degree of training and possibly intelligence that would not ordinarily be found in criminal groupings, but it is equally true that this factor has been over-emphasised. As already pointed out, economic and commercial crime, like general property offences, are essentially matters of opportunity balanced with temptation and/or pressure. It is perfectly true to say that only individuals having specific qualifications or a particular social position might be in a position to exploit such an opportunity.

Generalisation is dangerous, but it is a fact that in the vast majority of economic and commercial crimes

there is some element of exploitation of trust or confidence. Therefore, the criminal must either be in such a relationship or apparently in such. Having regard to those crimes involving a breach of trust in the legal and lay sense, it is arguable that the effect of the breach is to bring into question the system which enables that trust to be reposed in such an individual. This is merely an application of the "stewardship principle" which is so vital to many aspects of the commercial world today. Many "white collar" criminals blame the system they are "forced" to exploit. "White Collar" criminals seek to justify their actions by referring to the inherent unfairness or degree of mutual exploitation within the system, to a much greater degree than the ordinary criminal. Invariably a person accused of an employee fraud will point to real or supposed violations by his peers, or better still, by his superiors. The smaller "white collar" criminal will almost certainly assert he is "small fry", and the bigger offenders are allowed, by the system which has "forced" him into crime, to escape and prosper. The ability of more successful "white collar" criminals to legitimise their activities and acquire an aura of respectability no doubt accentuates this feeling.

The implications of all this will be obvious to Law Ministers. Widespread abuse of the system will undermine it, and this is equally true whether it be at the micro level in a particular company or with regard to a nation's institutions and economy. If exploitation is allowed to continue largely unchecked in any structure, the structure will become tainted and social and political alienation will follow. A state that is apathetic or is not prepared to be seen to be making a determined stand against such abuse must be prepared to accept the social, economic and political consequences. Again the danger for the developing world is so much greater.

(e) The funding of other crimes

ICPO-Interpol has long recognised that a connection often exists between the perpetration of economic and commercial crime and other forms of criminal activity. The Frankfurt General Assembly in 1972 stated in a resolution that "the profits made by those committing such offences may be used to finance illicit drug trafficking or other forms of organised crime". That a good deal of economic and commercial crime is associated with organised crime has already been pointed out. On a number of other occasions the ICPO-Interpol General Assembly, the General Secretariat and individual officers have stressed the relationship between economic crime and other types of organised crime. For example, Deputy Inspector General Tyrrell Goonatilleke of the Sri Lanka Police has raised this issue on several occasions. He chaired the committee of experts set up pursuant to the resolution of the ICPO-Interpol General Assembly at Buenos Aires. In presenting General Secretariat Report No. 5 on international fraud to the General Assembly at Accra in October 1976, Mr. Goonatilleke made the following comment:

"I have to emphasise that the secret accumulation of funds which are the proceeds of these offences (i.e. commercial and economic crimes) are used for criminal purposes such as the trafficking in narcotics, smuggling of firearms and political assassinations..."

Many senior police officers now accept that access to accountable funds is a very important element in a number of organised crimes, particularly where trafficking is involved. Funds derived from criminal operations or taken out of a country in violation of exchange control regulations are, to all intents and purposes, unaccountable. These funds may be laundered en route, but in most cases this is not essential. The important connection between the accumulation of unaccountable funds and exchange control violation was underlined by Deputy Inspector General Goonatilleke at the ICPO-Interpol General Assembly at Vienna in 1973. He stated:

"almost all developing countries have always looked at fiscal offences with great concern because it was found that unscrupulous groups of persons systematically syphoned the revenue out of the country either for their individual gain or for the purpose of accumulating unaccountable funds which are utilised to finance smuggling of drugs, arms etc., counterfeiting, the white slave trade and insurrection."

Mr. Goonatilleke then gave a number of examples where he had investigated such cases. In August 1979 I discussed this matter with him, and also with the Director of Criminal Investigations in Colombo. Both considered that the problems today were more serious than they were in 1976. Indeed, there is evidence that smuggling operations continue to a disturbing extent in Sri Lanka, despite the Government's recent relaxation of the regulations relating to the importation of foreign goods, and are being utilised to obtain unaccountable funds for other nefarious activities in Sri Lanka and its neighbours. Of course, an important element in this "pipeline" of unaccountable criminal funds in Sri Lanka is the smuggling of gems and precious stones. It is not without interest that the view of the Sri Lanka police is shared by many senior law enforcement officers in the Commonwealth.

The relationship between economic crime and illegal trafficking operations was highlighted in the symposia on international fraud that the ICPO-Interpol General Secretariat organised in September 1974 and December 1979. At the 1979 symposium, the French delegation stated that the French police and customs service were aware of this relationship and violations of exchange control regulations could provide a useful starting point for investigating other non-economic crimes. The Canadian delegation also accepted that this relationship existed in Canada, and referred to a recent initiative by the Canadian Solicitor General whereby a closer working relationship is to be developed between a special projects section of the Commercial Crime Division of the RCMP and the Department of Finance. It was thought that a closer relationship between the police and revenue services would be useful in tracking down large accumulations of untaxed income—possibly the product of organised crime—in the pos-

session of criminals and their associates. The Canadian delegation thought that these investigations would uncover a relationship with narcotics offences. The delegations from Spain, Italy and Australia also gave support to the "pipeline" theory.

There is certainly a desire within the ICPO-Interpol General Secretariat to expand the present facilities for intelligence analysis and money-flow targetting in regard to the illegal narcotics trade. The General Assembly at Nairobi in 1979 adopted a resolution calling upon member countries to pay greater attention to large capital movements and the facilities within their territory for "laundering" of money as important factors in combatting illegal trafficking in narcotics. The General Secretariat is about to send out a questionnaire to the NCBs asking what action can be taken at national level to monitor large capital movements and whether there are legal provision for the freezing of money and property associated with illegal narcotics trafficking.

The U.S. Drug Enforcement Administration is probably in the forefront of this kind of intelligence operation. The former U.S. Bureau of Narcotics and Dangerous Drugs (BNDD) was aware of the relationship between organised economic crime and the illegal drug market. In its submission to the ICPO-Interpol General Secretariat's study on international fraud in 1975, the connection between exchange control violations, market frauds and organised loan sharking and narcotics trafficking was pointed out. In early 1976 the Drug Enforcement Administration (DEA) set up Central Tactical Unit (CENTAC) 12 to investigate so called linked conspiracy cases. Attention to moneyflow between major criminal organisations has proved of vital importance in the development of targets and in the obtaining of documentary evidence establishing participation in the illegal trafficking of drugs. Of course, in the U.S.A. there are a number of special statutes creating offences particularly relevant to this type of enforcement programme: for example, the Continuing Criminal Enterprises Statute, the Racketeer Influenced and Corrupt Organisations Statute and the Foreign Corrupt Practices Act. The Financial Intelligence Programme of the DEA has now attained a significant interface with the enforcement programmes of other Federal law enforcement agencies, such as the Securities and Exchange Commission; the Department of Justice's Strike Force 18; the Department of Treasury's Office of Law Enforcement; the U.S. Customs Service; the Secret Service and perhaps most importantly the International Revenue Service (Narcotics Trafficker Tax Programme). For the information of Ministers I have attached a memorandum prepared by the DEA on the exchange of financial information relevant to narcotics trafficking to this submission, as Appendix V.

As has already been pointed out, a number of other countries are paying increasing attention to the relationship that might exist between economic crime and serious organised crimes such as narcotics and arms trafficking. One or two major successes with regard to narcotics enforcement have been in part the

result of this approach in the United Kingdom and Canada. The Commonwealth Police in Australia are also actively considering ways of improving their intelligence programme in this regard. Perhaps rather surprisingly a number of Commonwealth countries that do have problems with organised crime and in particular illicit trafficking have made little headway in developing viable intelligence. Only comparatively recently was the Commercial Crimes Bureau of the Royal Hong Kong Police Force asked to assist in a narcotics investigation, and this was evidently only because the officers investigating a narcotics case had seized a quantity of documents and accounts which they could not interpret.

Of course, in practice it is extremely difficult to operate an effective moneyflow intelligence programme if there is no exchange control regulation. This probably accounts for the little attention that this sort of programme has been given in Commonwealth jurisdictions such as Singapore and Hong Kong. In the U.S.A. the Financial Recordkeeping and Foreign Transactions Reporting Act 1970 which is intended by Congress "to require certain reports or records having a high degree of usefulness in criminal, tax or regulatory proceedings" plays a crucial role. For instance, the Act requires a Currency and Monetary Instrument Report—Form 47900—to be sent to the Customs where there is an international movement of currency or a monetary instrument in excess of \$5,000. A similar report has to be made to the Internal Revenue Service where a domestic transfer involves more than \$10,000. It is understood similar requirements operate in Canada. In practice criminals engaged in illicit trafficking operations tend to use cash rather than letters of credit because of the absence of records and thus a trail.

Even where there is no exchange control regime to assist the development of financial criminal intelligence, it is still possible to monitor other sources of relevant information. In recent years, ICPO-Interpol and in particular the U.S. law enforcement agencies have been concerned about the use international criminals have made of international financial havens. It would seem that on numerous occasions such havens have unwittingly provided economic criminals with shelter and allowed them to transfer their ill-gotten gains around the world with impunity so as to finance other serious criminal activity. It is disturbing to note that in a recent report prepared by a senior Financial Intelligence Program Officer in the DEA a number of Commonwealth countries were mentioned as affording off-shore financial services which had been exploited by known narcotics traffickers.

The views of policemen differ considerably as to the extent that syndicated and organised crime exists in various jurisdictions. It is, however, generally agreed that organised international crime is increasing both in its dimension and scope of operations. Within the Commonwealth there are few international criminal cells or "families" which operate in more than a couple of countries at the same time.

Perhaps the nearest Commonwealth equivalent to the mafia cells operating in North America and Europe are the so called secret societies in the Far East. "Secret Societies" are active in a number of Asian countries both within and outside the Commonwealth. The general consensus of opinion is that the Secret Societies are small, essentially domestic, cells almost exclusively concerned with street offences. Certainly it is true that the vast majority of ethnic criminal cells operating under the assumed banner of a Secret Society are of this order. However, there are those both inside and outside the relevant police forces who consider that there is a significant coming together of hitherto disparate criminal factions. For example, in October 1978 the notorious 14K Triad Society made a determined effort to regroup and consolidate the various 14K factions in Kowloon, the New Territories and Hong Kong Island. Fortunately, the selfish desires of the leaders of two cells operating on the Island and the reluctance of the senior officers of the "Headquarters Branch" in Taiwan to enter the Crown Colony without some guarantee as to the success of the initiative, frustrated this potentially ominous development. There is also a growing amount of evidence that certain gangs and individuals associated with particular societies are becoming more involved with international crime. This is not surprising given the availability of low cost air travel, efficient international telecommunications and the presence in most countries, particularly Commonwealth jurisdictions, of a sizeable ethnic group which could be either sympathetic or at least susceptible to persuasion. There is some evidence that these groups have expanded the scope of their criminal activities to include crimes such as shipping, insurance, travel and employment frauds as well as the traditional trafficking and street offences. I do not wish to create the impression that the numerous little gangs of petty thugs which operate at street level throughout the Far East and in certain other countries are moving into "white collar" crime. Such a notion would be absurd. However, it is true that certain groups and individuals associated with local societies have turned their attention to crimes of a more complex nature. It has long been known that particular individuals holding positions in secret societies also operate on an international level as individuals or in association with some other syndicate.

It is also clear that local gangs have been involved with laundering operations both on the national and international level. In Hong Kong there is a belief, even among senior officers in the Securities Commission, that major laundering operations take place in the financial infrastructure and in particular in the securities markets. During the last six months there have been several incidents where "couriers" carrying large amounts of money (Taiwan Dollars and Phillipine Pesos) were robbed in Hong Kong. It is clear that this money was being brought into the Colony for laundering. There is some evidence that a group of Singapore criminals, who used the name of one of the traditional secret societies, were engaged in illegal drug trafficking in three European countries and remitted the proceeds of their crime back to

Singapore for laundering. Local criminals evidently supported and facilitated this. This is almost certainly not an isolated instance and Singapore can not be alone in facing such problems. Securities frauds have been perpetrated to launder money obtained through some other form of criminal activity. The DEA have discovered several instances of this in the U.S.A. and the Philippine Securities and Exchange Commission with the assistance of the Department of Defence and National Security is currently investigating such a case in Manila. The syndicate there was operating, inter alia, from two Commonwealth jurisdictions.

At the Third Symposium on International Fraud organised by ICPO-Interpol in December 1979, the Nigerian delegation called for governments to pay more attention to the freezing and seizing of funds that are the product of illegal activities. In fact, this is a most effective weapon against international criminals. However, seizure creates a great number of legal problems which it is outside the terms of my brief to raise here. Suffice it to say that a number of countries, particularly developing countries, are not only concerned to develop international co-operation with regard to the prosecution of offenders, but are also concerned to see effective restitution.

Even if it is accepted that the few cases where such criminal groups as the Chinese secret societies have been positively identified as being involved in economic crime are wholly exceptional and do not indicate a disturbing new trend, it has to be admitted that such cells have co-operated and provided ancillary service to international commercial criminals. Throughout the Far East, and even in the United Kingdom, there is evidence that these local thugs have been retained by other organised groups of criminals, as enforcement agents for illegal and unenforceable loans and debts. Several triad gangs in Hong Kong hire themselves out to loan sharks and the proprietors of illegal gambling and vice dens for this purpose. Similarly, such cells have been used to put pressure on suppliers, creditors, employees etc. to facilitate a variety of commercial crimes. Long firm frauds and the theft of valuable paper are two areas where this has occurred to a disturbing level. Indeed, in one or two cases these criminal cells have actually infiltrated banks, securities houses, factories, and even law firms. There is also a good deal of fronting taking place either through the local gang or with its support.

Finally, it should perhaps be added that occasionally the commission of an economic crime will be the payment for some other criminal service. Extensive discussion has already taken place as to the utilisation of the product of a commercial or economic crime for some other criminal venture and the laundering of such. However, several cases have come to light where fraudulently obtained commodities, securities or the documents of entitlement to such have been given in payment. In the U.S.A. the DEA have uncovered two cases where the criminal payment was insider information and a deliberate manipulation of a national securities exchange.

(f) The mushroom effect

A good deal of what has already been said in regard to the use of funds obtained through the commission of economic and commercial crime is applicable to this consideration. The mushroom effect of economic and commercial crime, however, involves considerably more than the utilisation of such funds in the commission of other criminal activity. It concerns the tendency that has been widely recognised for "white collar" crime to lead the perpetrators into other areas of criminal activity. Reference has already been made above to the relationship that exists in many countries between organised crime and commercial and economic crime. "White collar" criminals in at least three Commonwealth countries—the United Kingdom, Australia and Canada would seem to be increasingly working with ordinary criminals. There are clear advantages for the "white collar" criminal in having the participation of ordinary criminals. Firstly, this gives him ready access to the criminal infrastructure and this could be important in a number of ways. For example, the recruitment of specialist criminals, the obtaining of false documents, special tools and information and in certain cases access to "fences". Secondly, a good many commercial and economic crimes require the commission of related ordinary criminal offences. For instance, theft of documents, breaking and entering, the use of "persuasion". In such cases of criminality the "white collar" criminal may well be inexpert. Therefore it would be wise for him to use the services of another criminal. Thirdly, expendable criminal services might be employed for the more visible elements of the crime. Thus, it is not unusual to find ordinary criminals involved in the transportation and collection of materials, possession of the stolen property etc. Fourthly, the statistics would seem to show, at least in the United Kingdom, that where a first time offender is involved in the commission of a "white collar" crime with a convicted criminal, the courts invariably focus their attention on the man with a record allowing the first time offender neatly to shift a good deal of the responsibility for the crime on to his shoulders. Therefore, it is not unusual for a "white collar" criminal to surround himself with one or two ex-convicts who can, should the need arise, be used as scapegoats. Obviously, these are not absolute factors and much will depend on the circumstances. It would be stupid for a first time offender with no support in the underworld to entrust valuable documents which can be easily negotiated to hardened criminals—for safe-keeping. By the same token a "white collar" criminal who openly mixes with convicted criminals obviously increases the chances of his being implicated in the criminal activity. Where organised crime is involved in the commission of "white collar" crime the financial commitment might be such as to make it prudent for expendable participants to be recruited who can be assigned specific functions in ignorance of the main perpetrators and primary objective. Given the access that such groups invariably have to relatively vast resources, it is feasible for complete outsiders to be recruited for the commission of a specific criminal act—such as the destruction of

incriminating evidence through arson of an office, or even the elimination of potential competitors. This may sound rather fanciful, but it should be stressed that there is already evidence of this having occurred within the Commonwealth. It is not an uncommon occurrence in the U.S.A., nor in several European countries. The author is also aware of the use of outside thugs to put competitors of a brewing company in the Far East out of business and even to eliminate an investigator appointed to examine the company's financial dealings. This did not directly involve a Commonwealth jurisdiction, although it is true to say that at least four thugs were hired in a Commonwealth territory and subsequently the company is now operating in two Commonwealth jurisdictions. There is also evidence that the use of criminals to frustrate investigation into certain international commercial crimes is not as uncommon as might be supposed. Of course, the destruction of documentary evidence is a very real problem in this type of criminal case. A number of potentially very important investigations have been frustrated in this way. The implications for prevention and detection that all this has should be obvious.

The preceding section on the funding of criminal operations has dealt, at some length, with the rather sensational issue of the triad societies. It is appreciated that in a report of this nature the raising of such an issue could cause doubt as to whether the recommendations made are appropriate for adoption by the Commonwealth. I would, however, emphasise that it is already established that ethnic criminal cells are providing criminal services certainly at the national level and possibly at the international level to "white collar" criminals. Reference has already been made to the use of certain quasi-triad gangs in Hong Kong as "enforcers" in loan sharking and illegal gambling operations. Thugs claiming, probably falsely, membership of the secret societies have acted in a similar capacity recently in London and three other major cities in the United Kingdom. This has also become a problem in certain Canadian cities and is an acknowledged problem in a number of Commonwealth jurisdictions in the Far East. I refer to the secret societies merely to illustrate the relationship that exists and can develop between criminals engaged in economic and commercial crime and those concerned traditionally with ordinary crimes of vice, violence and property. There are other criminal groupings, not of Chinese ethnic origin, which are also a serious threat. I have, however, concentrated here solely on the Chinese criminal groups because they are active in several Commonwealth jurisdictions and there is already a degree of awareness of their supportive activities in regard to the illegal narcotics trade.

Once a successful illicit operation has been set up in a country there is a strong incentive for the organisers to diversify and spread risk by moving into other forms of illegal and perhaps legal activity. Diversification is just as important in the world of crime as it is business. As has already been pointed out, there is some evidence that those engaged in the illicit trafficking of drugs do not put their money

through a financial institution or market solely for the purpose of laundering, but also to benefit through investment. Reference has already been made to the two cases of market manipulation and insider trading where the U.S. Securities and Exchange Commission alerted the DEA. It is most unlikely that this kind of activity is confined to North America.

Ministers and their advisers will no doubt be aware of a number of other grounds for regarding international economic and commercial crime as a serious matter requiring urgent and effective action. The above considerations are not in any way intended to provide an exhaustive analysis of all the reasons why action is needed. Instead, they are intended merely to justify the importance of the present project and indicate the areas of grave concern to which Ministers and their respective governments might like to direct their attention when considering the proposals and recommendations made in this submission.

Practical difficulties impeding law enforcement and international co-operation

It is not intended that this section should fully and exhaustively catalogue all the practical problems and difficulties confronting law enforcement agencies and the legal systems of the Commonwealth with regard to commercial and economic crime. The poor record that all Commonwealth jurisdictions have in the successful prosecution of certain types of economic and commercial crime amply testifies to these problems. Although, a great deal is said and written about the law and administration of specific offences intended to outlaw certain abusive activities in this area, only rarely do people sit back and look at the appalling lack of success, judged solely in terms of convictions, that these provisions have had. Certain Commonwealth models are almost slavishly adopted in other jurisdictions. However, in truth these countries even with their highly developed offences, and in some cases great expenditure of law enforcement resources in their administration, have only a minimal number of convictions. The point sought to be made, by way of introduction to this section, was aptly stated by P.D. Connolly, QC, in his report on Queensland Syndication Management Pty. Ltd. and Ors in 1974:

“It is fashionable in modern times when substantial amounts of public money are lost in questionable corporate affairs to produce a sheaf of amendments of the Companies Act. Doubtless the ingenuity of the confidence trickster does from time to time reveal deficiencies in the legislation. One cannot help feeling, however, that in most cases the Act and the general law are quite adequate and it is at the point of enforcement that the system breaks down.”

The learned inspector continues that it is necessary to make a fundamental reappraisal of our traditional approach to the criminal law in this area. With respect I wholly agree with this observation. I would submit that attention solely on the attainment of a

successful criminal prosecution in the case of a good many commercial and economic crimes is misplaced and wasteful of the scarce resources that are available for law enforcement, whether the country be a developed one or not. If a particular economic or commercial activity is considered sufficiently abusive so as to justify rendering it a criminal offence, then surely what is intended is to discourage and minimise the occurrence of this abuse. In my view, the criminal law standing alone and as traditionally administered cannot be an effective tool.

(a) The problem of definition and drafting

Inevitably problems of definition enter into the framing of all criminal offences. However, the problems likely to be encountered when defining economic and commercial crimes will be almost certainly greater. The concepts are both complex and involved. Initially, regulators and law enforcement agencies are faced with the serious problem of deciding at what point exploitation becomes unacceptable in the legal sense. Probably, to a much greater extent than in other areas of criminal activity, the determination of what should constitute an offence in the context of abusive economic and commercial activity calls for a series of “value judgments”. The determination of these “value judgments” will properly involve a host of extra-legal considerations. The issues involved in deciding whether indecent assault or rape should constitute criminal offences are more or less well defined and precise. This is not the case with regard to, say, insider dealing and the pirating of films, records and books. Occasionally the balance will be influenced wholly by *a priori* political or economic considerations. An excellent example is exchange control regulation. Lawyers and policemen are generally ill-equipped to make these value judgments. This is reflected in the reluctance of the Courts to intervene in certain areas of the law where business judgment is primarily a matter of informed expediency. Therefore, judges have been, on the whole, unwilling to involve themselves with such issues as shareholder oppression, the determination of consideration and dividends, insider dealing, capital maintenance and professional negligence. What is regarded as unfair by one section of the community might not necessarily be considered so by another. Take, for example, insider dealing. Many Commonwealth countries have enacted legislation outlawing insider dealing. However, others have not, and until recently insider trading was not considered particularly objectionable in the United Kingdom. The Solicitor to the United Kingdom Department of Trade stated in July 1974 that insider trading was not dishonest and therefore section 13 of the Prevention of Frauds (Investment) Act 1958 was of no application, (see Rider, “The Crime of Insider Trading” (1978) *Journal of Business Law* 19). Insider trading is now considered a serious abuse in the United Kingdom and a Bill is presently before Parliament which will, inter alia, render insider trading in certain circumstances a criminal offence. It should be noted, however, that even those Commonwealth jurisdictions which have outlawed insider trading have not always sought to impose criminal sanctions. Indeed, at least one jurisdiction

has attempted to inhibit insider trading through the setting up of an Insider Dealing Tribunal which is given wide ranging statutory powers of investigation. Consider also the "fairness" of market cornering, certain restrictive practices and executive fringe benefits. If it is criminal for a director to disclose inside information to his wife to enable her to deal on it, why should it not also be a crime for the director to run a luxury car at his company's expense and have an inflated expense account? Of course, everything is a matter of degree and in certain extreme cases milking a company could amount to theft or criminal breach of trust. However, suffice it here to point out the moral ambiguity of certain offences. Perhaps, it should also be noted that it is possible to justify almost any abusive dealing on the basis that it is merely the operation of ordinary market forces. For example, some have argued that insider trading is a legitimate executive "perk" and in fact assists the market by smoothing out market movements.

Given the moral ambivalence and technicality of many of these offences, it is hardly surprising that many do not evoke strong public support. In an attempt to justify the enactment of specific crimes it is not unusual to find governments resorting to constructed moral arguments which may or may not be convincing. For instance, it is difficult to base the regulation of insider trading on a moral distinction between the insider's abuse of information that comes to him because of his insider position and the abuse of that very position itself. It is, however, possible to justify the state's right to decide that insider trading in corporate securities is an abuse sufficient to warrant the imposition of criminal sanctions. Reference has already been made to the right that the state has to protect and foster investor confidence, whether the threat is a logical result of a given situation or not. In practice, it is common to find governments, when enacting this kind of law, emphasising the unfairness of the practice and the "fact" that it is immoral. As this issue has important implications for the regulation of commercial and economic crime perhaps one further illustration will be acceptable. In an understandable attempt to give a particular law some moral content and support, governments occasionally obscure the purpose of the enactment and thereby contribute to the problems of the authority entrusted with its administration. Again let me use the example of insider trading. What is at stake is the private exploitation of privileged information. Confidence in the integrity and efficiency of the market and securities industry might suffer if it is realised the system allows informational imbalances to be privately exploited by persons in a privileged position. In other words investors might consider that they have been unfairly treated. Therefore, it is submitted that the primary regulatory objective of anti-insider trading legislation should be to ensure that informational imbalances do not occur and, if in fact they do, to ensure that they are incapable of being exploited by insiders. The question of timely disclosure of material corporate information is thus of central significance. Although this is implicit in most statutory provisions it is rarely explicit. This is unfortunate as it would be preferable

merely to place an obligation on corporate issuers and their directors to disclose publicly material developments immediately, subject to some kind of protection against the untimely release of information which could damage a legitimate corporate interest. It would be far easier to enforce such a rule than the largely unenforceable provisions attempting to penalise insider trading. This matter is raised here solely to illustrate the confusion of purpose that can and does arise with regard to commercial and economic crime.

It has already been pointed out that few economic and commercial crimes involve strong moral issues, and most are of an excessively technical nature. It has also been said that persons convicted or accused of such crimes invariably attempt to shift moral responsibility for the violation on to the system, or claim that they have only acted as any other businessman would in the circumstances. Controversy has arisen where a widespread practice has suddenly been declared unlawful by a court or regulatory authority. For example, the decision of the English Courts in *R. v. Greenstein* [1976] 1 All E.R. 1, that staging securities issues might in certain circumstances amount to a criminal deception, caused a great deal of concern in the British securities industry. The technicality of the offences and invariably small penalties that are in fact imposed by the courts both tend to undermine enforcement. For instance, the Guildhall Magistrates' imposition of an exceedingly small fine on Mr. Jim Slater in October 1979 for offences under the 1948 Companies Act involving over £4,200,000 was described by Mr. Slater as amounting to little more than a traffic fine. Even where the offence does provide for strong penalties the courts, and in particular the lower courts, seem reluctant to exact adequate punishment in regard to economic and commercial crime. Of course, in many cases the legislation itself allows only ludicrously small penalties. This has been a serious problem with regard to copyright infringements and the general crime of pirating. In the circumstances, it is perhaps not surprising that law enforcement officers are less than enthusiastic about bringing offenders before the courts. There is a need for greater awareness throughout the legal system as to the dangers and serious implications of "white collar" crime.

The courts are traditionally cautious when called upon to evaluate a commercial practice. As has already been pointed out, they are hardly equipped to make such value judgments. Judges, perhaps with justification, are concerned not to impose too high a standard which would operate to the disadvantage of accepted business. This concern is legitimate, provided it is kept within reasonable bounds.

In certain areas of "white collar" crime it is very necessary for governments and business leaders to take a clear stand against an abusive practice. Education and explanation is in the long term the most potent tool. Invariably, there is misunderstanding both among the regulators and the regulated about what a particular law is supposed to be aimed at. This has already been mentioned in the context of anti-insider trading regulation. It is in the interests of all

that there should be a proper appreciation why a particular course of conduct is undesirable and why it should be prevented. In certain situations it may be counter-productive to seek to prevent the conduct taking place through resort to criminal sanctions and civil or administrative sanctions may be preferable. In not a few instances effective self-regulation by the profession, trade or market is likely to be more effective. However, in this context it is important to realise that foreign systems are not always exportable.

Because self-regulation works reasonably well in the City of London (and even there it has its critics) it does not mean that this should be the model for other countries, or for that matter for other markets even within the United Kingdom.

Once a Government has decided that a specific activity or course of conduct should be unlawful, the problem of drafting a statutory provision will arise. Drafting of laws in this area is notoriously difficult and requires a degree of understanding which is not generally required in the preparation of legislation. It is not enough merely to be a good draftsman. Many economic and commercial crimes involve a series of acts, perhaps all save one of which are perfectly lawful. Without thorough research and competent drafting the provision can very easily prove worse than useless. Ministers will be aware of a number of examples from their own jurisdictions. Given the possibly large sums of money involved and the moral ambiguity of many of the offences, there is a very real danger that an evasion industry might develop. Professional advisers in the field of tax avoidance are accepted, but what about a similar service for directors who wish to avoid corporate securities regulations and similar anti-fraud provisions? The implications of this are obviously undesirable. The perpetrators of these "crimes" will be able to buy the best advice, hire the best defence lawyers and provide the most expert defence witnesses. The prosecution services of some countries are not likely to stand much of a chance. The balance is significantly weighted in favour of the professional "white collar" criminal.

As has been suggested certain countries have been far too prepared to adopt, with few modifications, the laws of other countries. Law is a product of its society and to borrow provisions from other countries with entirely different social, political and economic characteristics is asking for trouble. For example, in the field of corporate securities regulation it is meaningless to have regard solely to the few statutory provisions that exist in the United Kingdom. What is of critical importance in Britain is the role played by self-regulation. This system is a historic and social phenomenon and certainly not always exportable. There are numerous examples where Commonwealth countries have adopted provisions borrowed from other jurisdictions. In the main, in the field of commercial and economic crime, the result has rarely been happy, and in one or two instances disastrous. This is not to say that specific provisions might not be used as models or at least as indications of the matters for consideration. Associated with this is the

undue reliance sometimes placed on external advisers. The obvious danger is that a foreign expert will merely advise adoption of the laws from his own country, for this is often his only source of expertise. Indeed, even more unsatisfactory has been the experience of one or two countries where novel legal provisions have been drafted as a test for some other jurisdiction. This has occurred in at least three Commonwealth jurisdictions in the area of commercial crime. Governments should be far more prepared to consult their own experts. Local problems may well be unique and if ignored or not properly appreciated frustrate the entire exercise. Of course, it is recognised that certain smaller countries may well lack relevant expertise and the necessary resources for developing their own law in this field. Outside assistance is not objectionable provided it is placed in its proper perspective.

(b) The international dimension

Today many criminals, particularly those associated with organised crime, operate at an international level. Developments in communication allow almost instantaneous direct communication with anywhere in the world. International travel is now, in most cases, as available as is domestic travel. Furthermore, the relaxation of trade and currency barriers, and the creation of free trade or preferential trade zones, all work in favour of the international operator, whether legitimate or illegitimate. Certain countries, even within the Commonwealth, depend on unrestricted international trade for their national survival. It also has to be accepted that certain organised criminal groups have an international capability and infrastructure which allows them to function with ease in a number of countries at the same time. The regulatory problems associated with legitimate international operators, and in particular transnational corporations, must also be emphasised. Today, law enforcement in the area of commercial and economic crime must have an international capability if it is to make any real impact on this form of criminal activity.

Perhaps it would be useful to illustrate at the outset the practical and legal problems faced by Commonwealth law enforcement agencies when required or asked by another policing agency for assistance in an investigation of a criminal offence. The case of *A.G. for Hong Kong v. Ocean Timber Transportation Ltd.* (1978) No. 86 is of particular significance and warrants discussion here. The Commercial Crimes Bureau (CCB) of the Royal Hong Kong Police received information from the Royal Fiji Police on 12th June 1978. As a direct consequence the CCB suspected that the directors of the respondent corporation had committed several criminal offences: namely (a) conspiracy to defraud the respondent corporation of payments made to the respondent's account at a bank in Hong Kong by Flour Mills of Fiji Ltd., and (b) dishonest appropriation of such payments with intention to permanently deprive the respondent of them. The crimes involved, were therefore theft and conspiracy—ordinary law crimes. An inspector from the CCB swore out a search warrant from the Central Magistracy, which was expressed to

be issued under section 50(7) of the Police Force Ordinance. On the same day the inspector seized a number of private and confidential documents belonging to the respondent company. Additional confidential documents were seized at a later date under the warrant. The Royal Fiji Police Force asked to be supplied with copies of the documents to assist in their investigation of possible crimes of dishonesty under the laws of Fiji. These offences were also ordinary criminal law offences. The CCB did not in fact accede to this request, but they did feel that they might wish to do so in due course, or at least allow inspection of the originals. The corporation sought two declarations; that the documents or copies of such, should not be permitted to be sent out of the Colony without the express consent of the corporation, and it should not be permitted for the documents to be examined by or delivered to any person other than a person directly concerned with the investigation of the crime set out in the information leading to the issue of the relevant search warrant.

Before the court of first instance the Attorney General claimed that the Crown was entitled to retain the documents pending completion of the investigations into the offences alleged to have been committed within the Colony. This was not disputed. However, the Attorney General also claimed that the police could disclose the documents either directly or by way of photocopies to any person that they thought fit, or if they could not go that far, they could at least disclose them to the police force of a friendly state within the Commonwealth for the purpose of assisting in a criminal investigation of a matter properly within the jurisdiction of that state. The Judge considered that the proposition that the police could disclose the documents to anyone they considered fit was far too wide:

“The power to enter, search and take possession is given to the police to assist them in their duty to investigate crime or suspected crime. In the course of that duty it may well be proper to show documents seized to others who are not in the police force, for example witnesses or persons who may be particularly expert in some scientific or specialist field. It may well be that the police would be justified in making one or several copies of the documents seized for purposes of that kind or even merely to make the investigation within themselves more efficient... There could be no complaint against dealings of that nature for they are all proper to the object for which the legislature granted the power. It is that object which marks out the boundaries of the power.”

The Court rightly pointed out that the fact that the search warrant had been issued by a Magistrate did not effect this, and could not authorise the misuse of a privileged power to obtain evidence. The Court expressed doubt as to whether the Attorney General's argument that there could not be a conversion in the photocopying of documents was correct, but thought that the question was irrelevant where an injunction or declaration was sought in relation to a future unlawful act; “the precise juridical nature of the wrong contemplated is immaterial. The court will, if satisfied that it is a wrong of some kind, prevent the commission of that wrong so far as it is able”. With regard to the more restricted argument of the Crown,

that there was power to show the documents to the law enforcement agency of a friendly Commonwealth jurisdiction, the Judge stated: “it is said that the condition in which the world finds itself today the public interest justifies the co-operation of the various police forces throughout the world for the purpose of reducing crime internationally and within the jurisdiction of other states as well as within their own”. Whilst the Judge considered this an attractive notion he rejected it on two grounds. Firstly, he considered that jurisdiction in criminal matters was generally territorial and any Ordinance of the legislature of Hong Kong could apply only to transactions within the Colony. Secondly, “once documents or copies thereof leave the jurisdiction, this Court is deprived of effective control”. Whilst there was no suggestion that the Royal Fiji Police Force would abuse any confidence reposed in it, the Court thought that this was a matter of principle and “a balance must be struck between competing aspects of public interest. For it seems to me as much in the public interest that the courts should uphold the rights of the individual if these rights are threatened or assailed outside the Colony”. Finally, it is interesting that the Judge did not give any weight to the respondents argument that the documents were protected by a duty of confidentiality as such a duty could not justify “the non-disclosure of material which would indicate that the directors of a limited company were defrauding its shareholders”. The Court of Appeal unanimously affirmed the decision of the trial Judge. It is important to note that Huggins J. A. emphasised:

“that nothing I am about to say should be construed as discouraging the police from extending to their counterparts in other states, directly or through Interpol, every assistance they can, provided only that they do not thereby put themselves outside the law of Hong Kong... As criminals seek to take more advantage of international boundaries so the need for international co-operation in fighting crime increases. Nevertheless, the proviso that the police should not put themselves outside the law of Hong Kong is important, for law enforcement authorities must never regard themselves as above the law which they seek to enforce. There lies chaos. The Court of Appeal agreed with the trial Court that both submissions of the Attorney General must fail on the ground that where a statute authorises an official to do an act which necessarily interferes with the general rights of one of the Queen's subjects such interference must not exceed what is reasonably necessary to attain the object of the act authorised. The present statutory provision allowing the issue and enforcement of search warrants was to enable the police to obtain evidence which may assist in the conviction of a person for an offence with which he is charged or of which he is reasonably suspected to be guilty. This must, however, be an offence triable in Hong Kong, it is untenable to contend that the police of Hong Kong have the power to apprehend persons for offences committed abroad—“no warrant could have been issued to search for documents which would merely throw light on the character or activities of a person liable to apprehension in Fiji but not in Hong Kong”. So far as the question of police policy was concerned Huggins J. A. stated “what matters is that an abuse of authority by the Royal Hong Kong Police threatens the respondents possessory right in the documents. The overwhelming public interest demands that

the courts should prevent it and not refuse the relief sought". The court accepted that time may have come "when it is desirable to extend the powers of the Royal Hong Kong Police so that they can lawfully give greater assistance to other police forces in investigating crimes suspected to have been committed outside Hong Kong. If so, it is a matter for the Legislature..."

This decision underlines the very real legal and practical problems facing police officers when requested by another country's police force to provide assistance and information. Of course, in practice a good deal of information is passed "under the table", and the persons to whom it relates never get to hear about it. Whether this is desirable remains to be seen. Furthermore, the "old boys" network is not necessarily efficient as too much depends upon the presence of a personal relationship between the relevant investigating officers. The Court of Appeal did point out that under sections 75 to 77B of the Evidence Ordinance evidence can be communicated once criminal proceedings have already been initiated in the foreign jurisdiction. It is understood that amendments to the Evidence Ordinance are planned which would allow the Hong Kong Police to pass on information where proceedings are merely contemplated. With respect this is desirable and should be emulated in other Commonwealth jurisdictions.

At this juncture it is pertinent to mention the existence of various international agreements for the communication of relevant information. It is, perhaps, true to say that few, if any, specifically bear upon economic and commercial crime. It should be noted, however, that the Single Convention on Narcotic Drugs 1961 in articles 35 and 36 does enable foreign governments to exchange financial information relevant to investigations into illegal drug trafficking. The importance of the Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, which came into force in 1977 should be underlined. This greatly facilitates co-operation between the two countries and allows the exchange of information on certain economic crimes such as anti-trust violations and tax evasion where such is relevant to an investigation involving organised crime.

In recent years increasing attention has been given to the freezing or seizing of assets or money that is the product of illegal activity, and in particular the illegal trafficking in narcotics. For example, in the Alberto-Sicilia-Falcon investigation in the U.S.A. the Swiss authorities froze assets in a Swiss bank account on the basis of a letter rogatory prepared by the U.S. Drug Enforcement Administration and Department of Justice (Criminal Division). Seizures have also taken place in several Central and Latin American countries, Thailand, the Philippines and South Africa. Of course, as a matter of domestic jurisdiction the U.S. authorities have a number of statutory powers allowing the seizure and confiscation of such sums. (Reference should be made to Appendix IV with regard to those provisions of special relevance to narcotics enforcement). The desire of some delegates to the Third Symposium on International Fraud organised by ICPO-Interpol in December 1979, to

extend this procedure and allow the seizure of property and funds in another country has already been noted above. Whilst this would be a useful weapon against organised crime it would require specific legislation in the relevant states. As I have confined my attention to areas where co-operation could be developed immediately without the need for the enactment of possibly controversial legislation, perhaps I may be permitted to raise the matter without necessarily elaborating on it further. I would, however, like to mention one or two instances where the question of seizure has arisen in neighbouring Commonwealth jurisdictions.

The Government of Sri Lanka has on several occasions felt that certain neighbouring jurisdictions have been less than co-operative in assisting in the enforcement of Sri Lanka laws—in particular those relating to the illegal trafficking in gems and precious stones and violations of exchange control regulation. In the case of *Gulam Hamid s/o Gulam Mohideed v. Government of Singapore* (Suit No. 1894 of 1973) this matter was brought before the courts of Singapore. A quantity of gem stones were found on board an Air France UTA aircraft by its cabin crew. The plane was flying from Colombo via Bangkok to Singapore. On arrival in Singapore the gem stones were handed to the Customs and Excise Department of Singapore for restitution of the gems or their value in damages. Subsequently, the Attorney General of Singapore was informed by the Government of Sri Lanka that it wished to claim the gems. The issue came before the High Court. The Sri Lanka Government claimed the Singapore courts lacked jurisdiction to determine the issue as an act of state was involved, in that the subject matter concerned the rights of a foreign sovereign Government. It was asserted that the Sri Lanka Government was not bound as a condition of establishing immunity to prove its title to the interest claimed, although it had to produce evidence that its claim was not merely illusory or founded on a manifestly defective ground. The Singapore High Court considered that there was no evidence upon which it could be established the Government of Sri Lanka had a possessory or proprietary interest in the gem stones and, on the authorities, when the sovereign is not a party to the action his possessory or proprietary interest in the subject matter of the litigation must be either admitted or proved to the satisfaction of the court before sovereign immunity will be recognised, and the action stayed. Here, the Government of Sri Lanka was attempting to intervene in an action between the Government of Singapore and the individual claimant and obtain a stay of action on the basis that it possessed an interest in the property. It was clear that the Sri Lanka Government nor any of its agents had never been in possession or control of the gems. Possession could not merely be asserted, it had to be proved. The certificate of deposit was not made out to the Government of Sri Lanka and would not in any case alone entitle the person named therein to delivery. The Sri Lanka Government contended that by virtue of section 44 of the Sri Lanka Customs Ordinance any person exporting or attempting to export or take out of Sri Lanka precious stones in

contravention of the prohibitions and regulations will by virtue of that provision forfeit the precious stones to the Government. The Singapore High Court considered that this statutory right of forfeiture "is limited—limited to the extent that the goods which are subject to forfeiture must be within the territorial jurisdiction of Sri Lanka". There was no evidence that the penal laws of Sri Lanka had extra-territorial effect, and therefore the Singapore High Court concluded that "the claimant's claim has all the ingredients of an illusory claim—in fact, the claim is misconceived..." The Court also rejected the claim of the individual plaintiff as it was not established that he had any right whatsoever to the gems. In the result the Court ordered that the gem stones should be disposed of as unclaimed goods. This decision was affirmed on appeal (Civil Appeal No. 34 of 1975). It is perhaps disturbing that many law enforcement officers seem unable to appreciate the clear legal position. No matter what a country's domestic laws might provide as to the seizure of goods and assets outside that state, save in wholly exceptional circumstances unless possession can be asserted within the jurisdiction, the provision is unenforceable. At the Third Symposium on International Fraud organised by ICPO-Interpol at least two delegations from developing Commonwealth countries trenchantly condemned other states for not assisting them in the enforcement of such provisions. Indeed, in one instance it is plain that the laws of the country in question do not even allow the confiscation of such assets within the jurisdiction.

One other example of the confusion that can result in this area of law enforcement may be given. Recently, officers from the Singapore Customs and Excise Department discovered several gold bars and wrist-watches hidden on the deck of a coaster bound for Sri Lanka. Evidently, when the Sri Lanka Government heard about this, it claimed that these articles were the product of illegal trafficking in gem stones. Therefore, it claimed restitution of the articles in question. It is understood that the Singapore Government have felt unable to hand over these articles on the basis that there is absolutely no evidence that they are the product of illegal smuggling and in any case it is almost certain that no offence has been committed in Singapore. I should perhaps emphasise that the above comments should in no way be construed as implying criticism of the Government concerned; I am sure that this type of problem is not confined to the countries mentioned. Indeed, I am aware of similar instances where other Commonwealth and, of course, non-Commonwealth jurisdictions have been involved.

Domestic legislation may be stretched by the courts to give it some degree of extraterritoriality. For example, considerable controversy has been caused by the extraterritorial enforcement by the U.S.A. of its anti-trust laws, securities regulations and more recently its commodity trading regulations. However, unless the law enforcement agencies can obtain evidence which is legally acceptable to the courts of that country, enforcement will be impossible. Where commercial and economic crime is con-

cerned it is probable that much of the relevant evidence will be out of the jurisdiction, and thus beyond the reach of the domestic legal system. There are, of course, ways of obtaining evidence from abroad legally, however, there is general agreement that on the whole they are expensive, time consuming and rarely effective. Thus, occasionally resort has been made to underhand methods of obtaining evidence. Various U.S. Federal agencies are known to have used "under-cover" agents and informants to penetrate foreign financial institutions both in Europe and in the Caribbean. It is almost certain that the relatively few cases which have come to light are but the tip of the ice-berg. While evidence obtained in this manner may not be suitable to adduce in Court, it may be used to obtain additional evidence which is more susceptible to production in Court. This underlines one of the main problems facing enforcement both at the national and international level. Apart from lacking resources, law enforcement agencies invariably feel inhibited through what they consider unnecessarily technical restrictions on the exercise of their powers. Whilst police powers must be subject to legal restraints if the rule of law is to have any real meaning, policemen rightly feel they are expected collectively and individually to adhere strictly to a set of rules which their adversaries deliberately exploit for their own criminal ends. Of course, there is no obvious solution to this problem, and all that can be hoped is that governments continually keep the balance under review.

At the Winnipeg Meeting there was broad agreement that co-operation in police matters was reasonably forthcoming within the Commonwealth. It is probably true that Commonwealth law enforcement agencies through personal contacts have managed to create a climate of good will and mutual co-operation which does not generally exist outside the Commonwealth. However, the degree of co-operation and awareness of problems between Commonwealth countries does in practice leave something to be desired. As so much depends upon personal contacts there is not a general principle of mutual co-operation and assistance within the Commonwealth. Certain Commonwealth law enforcement agencies have developed strong bonds of co-operation with the agencies of non-Commonwealth countries and have no real relationship with other Commonwealth policing agencies. Given the geographical and economic facts of life this is not surprising and perhaps not unwelcome. Suffice it here to say that there have been numerous instances where one Commonwealth country did not in fact give meaningful co-operation to another Commonwealth jurisdiction, and few of these instances involved questions of legal inhibitions. Certainly, many police officers and persons concerned with enforcement in the area of commercial and economic crime considered that there was considerable room for improvement and development. The Minister of Justice of Sri Lanka at the last Law Ministers' Meeting stated that many developed countries were reluctant to co-operate in the conduct of investigations relating to economic crimes on the basis that the acts complained of would not constitute criminal offences according to their

law. This has also been the experience of ICPO-Interpol. It would not perhaps be unfair to say that the connection between economic crime and the illegal trafficking of drugs has perhaps been over-emphasised on occasions as a means of obtaining greater co-operation from the developed world. It is certainly true that countries such as Switzerland, which have been traditionally most reluctant to provide financial information to other police forces, do co-operate fully where a drugs offence is suspected. International terrorism is also an area of successful international co-operation, and there is evidence of a drawing together on issues associated with organised crime generally.

Many of the most disturbing recent international frauds have involved a break down in international co-operation or an absence of co-operation altogether. It would be invidious to point to specific examples. However, it seems clear that the most serious cause of this break down was a fundamental misunderstanding as to the degree of co-operation that could properly be expected from the relevant law enforcement agencies and self-regulatory bodies. What is important to recognise here is that within the Commonwealth everything should be done to foster awareness and mutual respect of each state's limitations whether they be of competence in a regulatory field, or a matter of law.

It might be desirable to refer by way of example to a specific instance where there has been a serious break down in co-operation between a Commonwealth country and a non-Commonwealth country. A number of abuses associated with commodity trading have come to light in recent years in Hong Kong. The forms of abuse are manifold, but invariably involve the following features. Firstly, uneducated trading agents will be recruited by a trading house on the basis of highly misleading press advertisements. Trading agents will invariably be expected to pay for a short training course. After which they will be sent out on "cold call" to sign up customers. Customers will be required to enter into an exceedingly onerous contract which in effect deprives them of all their legal rights and expectations. Trading discretion will invariably be vested in the trading house. The customer may then be allowed to make a few small profits, after which he will be financially wiped-out by a course of dealing which has gone bad. Invariably the customer has traded on margin and now he can be required to pay exorbitant rates of interest on the outstanding loan. There is some evidence that certain of these operations are completely fraudulent, in that the transactions are wholly fictitious. Other operations involve the manipulation and washing of orders. Not a few of these commodity houses have Japanese connections and therefore before appropriate action can be taken by the Hong Kong authorities it is necessary to secure the co-operation of the Japanese Government. Although repeated requests for assistance were made by both the Hong Kong Securities (and Commodities) Commission and the Commercial Crimes Bureau to the Japanese Ministry of Finance no meaningful assistance had been given at the time this

report was being prepared. I might add that the Government of the Philippines has experienced similar problems with Japanese commodities dealers. On the other hand it is interesting that the Commercial and Companies Division of the Singapore Police was able to discourage a Japanese commodities and securities trading syndicate operating in Singapore on the basis of information supplied by the Japanese authorities.

In the past there have been instances where the more developed countries have seemingly countenanced abuses taking place in other parts of the world on condition that the fraudster did not operate within their own territory. For example, the settlement that the U.S. Government reached with the controllers of I.O.S. (Sec. Ex. Act Rel. No. 8083) typifies this attitude. The U.S. Government was not alone in taking this approach, however. In more recent years there have been several indications that the more powerful countries are becoming more aware of their international responsibilities in this regard.

(c) Detection

Without the ability to detect "white collar" crime any discussion of regulation and enforcement becomes academic. The question of detection has received far too little attention.

Many economic and commercial crimes are not readily identifiable in the sense that are crimes of violence or property offences. Determination that the actus reus of such a crime has occurred is far easier than the identification of fraudulent market manipulation or window dressed accounts. The police are trained and accustomed to deal with the more obvious crimes. Policemen have little or no experience of crimes such as manipulation, market cornering, currency smuggling and the like. As a general rule there will be no permanent machinery in being for the detection of such offences and thus the vast majority will escape, undetected, uninvestigated and unprosecuted. Perhaps the most disturbing feature of the cases involving more sophisticated modus operandi which do come to light is the length of time the fraud has continued unsuspected and the fact that almost invariably it is discovered by chance. Those cases which are not detected by chance in the main are only identified, if they are identified at all, once the abuse has reached such a stage as to bring the solvency of the victim into doubt. Discovering frauds during a liquidation or bankruptcy proceeding is of little use to anyone.

It is a matter of great concern to find apparently efficient mechanisms for investigation and prosecution founded on inadequate procedures for detection. Such resemble the house built on sand. Let me illustrate this point with reference to securities trading frauds. In recent years a great deal of attention has been given to insider trading regulation in Hong Kong. In 1978 the Securities (Amendment) Ordinance of that year set up an Insider Dealing Tribunal with powers to investigate and report on suspected instances of insider dealing. This is a most interesting albeit novel approach to this problem.

Since the setting up of this apparently efficient machinery for dealing with insider trading in Hong Kong, the two suspected cases which have come to light have not even reached the Tribunal for investigation. In the first place, the suspicious circumstances must be brought to the attention of the Securities Commission. When such a case is brought to the Commission the Senior Securities Officer in charge of investigations will make certain preliminary inquiries, and then if he considers there is a case worth pursuing pass it on to the Commissioner. Only if the Commission is satisfied that the matter warrants further action will the case be referred to the Financial Secretary who then has a discretion to forward it to the Insider Trading Tribunal. To date no case has gone further than consideration by the Commission. Whilst the ability and dedication of the officers concerned is impressive, the mechanism has proved itself deficient in operation and is in any case based on a false premise. It is understood that the Commission takes the view that it is for the stock exchange authorities to alert the Commission as to possible instances of market abuse. Given the absence of any system of insider trading disclosure in the Colony it is hard to see what other alternative the Commission has. However, unless the stock exchanges in Hong Kong perform their role with regard to insider trading and manipulation the mechanism that the 1978 Ordinance envisages is ineffective.

Another example might be in order. The Investigations Division of the New South Wales Corporate Affairs Commission is probably one of the best equipped and staffed regulatory agency of this nature in the Commonwealth. It certainly has access to more resources and professional services than any other authority of which the author is aware outside North America. Given this it is surprising to learn of the lack of success in regard to securities trading frauds, an area which is one of priority regulatory concern. It seems that most investigations into alleged instances of insider trading and manipulation fail to establish an insider relationship with the relevant corporate issuer. No attempt is apparently made to establish this relationship starting from the issuer. This simple expedient of sending a list of suspected insiders to the relevant company and asking for comments, has proved effective in the U.S.A., but more especially in Canada, where the procedure has been refined by the Stock Watch Section of the Toronto Stock Exchange.

I must emphasise that these instances of a possible break-down in effective regulation are but illustrations, and should in no way be considered as implying criticism of the governments concerned. It says a great deal for them that they have recognised the serious problem facing their markets and have been willing to invest so much legislative time, and scarce enforcement resources in attempting to deal with the problem. Unfortunately, this level of awareness and concern is rare.

It is not possible in a report of this nature to enter into a discussion as to how detective ability generally into economic and commercial crime might be

improved at the national level. I would, however, venture to make the following points. Firstly, it is important for those concerned with the official investigation and prosecution of such crimes to develop a close working relationship, and certainly gain the respect, of the various relevant professions. Auditors are a particularly important source of information. Possibly, governments should consider placing a specific obligation on auditing accountants to look for irregularities and possible crimes and report accordingly. At present, it is probable that the common law does not require auditors to actively pursue fraud in this way. Of course, there are arguments against placing such a burden on accountants, and in certain developing countries this profession will already be under considerable strain. However, suffice here to emphasise that police officers and official investigators must realise their own limitations and be prepared to actively enlist the support of various professional persons more directly concerned with the activity in question. Secondly, far greater attention should be given to intelligence. Few police forces have any real criminal intelligence capability in this area. Thirdly, once a viable intelligence capability has been developed it should be possible to target certain areas of activity or, indeed, particular individuals or groups. Fourthly, surveillance procedures can be developed in certain circumstances at relatively little cost. The classic illustration is the stock watch programmes developed to detect and highlight trading irregularities on securities markets. These programmes can be computer based or manual. Certain Commonwealth jurisdictions may consider that their markets are not susceptible to this kind of programme. However, having discussed the matter with specialists in the relevant fields I am convinced that a viable programme could be worked out for almost every Commonwealth jurisdiction. The use of computers greatly increases the surveillance abilities of regulatory agencies, but only if there is a proper appreciation as to the objective and capabilities of the particular programme. Merely installing a computer does not necessarily improve intelligence or provide a surveillance programme. I should perhaps add that some surveillance programmes developed for securities and commodity markets also have the advantage of providing governments with very valuable economic and financial data. Fifthly, official investigators must be trained to become more efficient in detecting abuses in the first place. I am sure it will not surprise Ministers that in a good many regulatory agencies there is a disturbing lack of knowledge and information as to what these crimes involve and how they should be dealt with. In other words there is a need for the police concerned to become far more professional.

(d) Investigation

Of course, a good deal of what has already been said with regard to detection applies equally to investigation. National police forces are generally understaffed and over-worked. There is invariably strong pressure on officers to clear up as a matter of priority the more sensational cases involving violence. Thus,

it is hardly surprising that many cases involving economic and commercial crimes are inadequately investigated. Apart from requiring different police procedures, many "white collar" crimes are far from sensational. Law enforcement agencies generally lack the trained personnel to adequately deal with such crimes. Indeed, in most cases the criminal will be a good deal more sophisticated and better connected than the average policeman. In drawing attention to this imbalance, I am not in any way seeking to denigrate the police service. However, I do feel that the time has come for a more forceful attempt to persuade police forces to overcome their traditional prejudice against the specially trained policemen. This is a matter dealt with at greater length in due course.

A very great problem with investigating commercial and economic crimes is the importance of documentary evidence and the difficulties of obtaining and possibly interpreting such. Furthermore, there is a much greater risk of destruction of evidence—and this is a very real problem in this area of investigation. The Companies Acts of most Commonwealth, and for that matter non-Commonwealth, countries recognise these problems and provide for the appointment of official inspectors or special investigators. These inspectors are entrusted with far-ranging inquisitorial powers. There are many problems associated with this particular approach and this is a matter which will be discussed again in regard to my proposals for greater international co-operation. Suffice it here to emphasise that virtually all governments have already recognised the need for special procedures and powers in regard to this kind of criminal activity.

Perhaps one of the most serious problems in practice facing a government wishing to institute a criminal or civil action against an individual where there has been some international element is the very great difficulties involved in obtaining evidence, particularly oral testimony from overseas. The cost of securing attendance in Court of a witness resident abroad is invariably high. Apart from expenses and travel costs it is not always possible to persuade the person concerned to spare the time and suffer the inconvenience. This is not only a problem for developing countries, although obviously the costs tend to hit them harder. The Director of Public Prosecutions of one of the smaller Commonwealth jurisdictions informs me that few prosecutions are brought for economic and commercial crimes where it is necessary to obtain evidence from abroad simply because of the cost involved. Of course, in such a country which happens to rely so much on the tourist industry a very high proportion of frauds and cheating offences will require the obtaining of testimony from persons normally resident outside the country. This is particularly the case where traveller's cheque frauds are concerned. It is important to appreciate even if a police officer is sent to another country to interview a potential witness any statement that he takes would not normally be admissible in subsequent court proceedings. This is a matter that Law Ministers might like to consider

further. Of course, most Commonwealth countries do have provisions similar to section 3 of the British Evidence by Commission Act 1885, (see also Order 38 Rule 1, R.S.C.) which provides:

"Where in any criminal proceedings a mandamus or order for the examination of any witness or person is addressed to any court or to any judge of a court in India or the Colonies, or elsewhere in Her Majesty's dominions, beyond the jurisdiction of the court ordering the examination, it shall be lawful for such court, or the chief judge thereof, or such judge, to nominate any judge of such court, or any judge of an inferior court, or magistrate within the jurisdiction of such first mentioned court, to take the examination so taken shall be admissible in evidence to the same extent as if it had been taken before the court or judge to whom the mandamus or order was addressed".

Finally, delay in the detection of frauds and other commercial and economic crimes severely hampers effective and successful investigation. As has already been pointed out in the discussion on the problems of detection, a disturbing feature of many of the more sophisticated frauds is that they are only discovered by chance after some considerable period of time during which the fraud might or might not have continued to operate. Similarly, the great majority of corporate and trading frauds are discovered only at insolvency. With the effluxion of time witnesses' memories become blurred, documents are lost or replaced, and evidence is destroyed. Furthermore, with the passing of time there is every chance that the "white collar" criminal will be able to legitimise his operation and acquire a semblance of respectability which in practical terms it might be difficult to impugn. An amount that appeared considerable in 1971 with inflation today might appear trivial—all this operates to the criminal's advantage. Courts are often prepared to look with some tolerance on a person who has had to bear the moral cross for a crime that he committed many years ago.

There is little that can be done in the short term to enable investigations to be initiated and concluded earlier. Detection must be improved and it is only then, when cases are discovered earlier, that the forces of law and order can move in. It is common, however, to find investigations dragging on for several years. It is not unusual to find police investigations into commercial and economic crimes lasting anything up to five years. The reasons for this are generally, pressure of work, concentration on other priority areas of law enforcement, incompetence and lack of direction. A degree of improvement could be attained by allowing police officers and the lawyers responsible for the prosecution to work closer together. The prosecuting lawyer should be involved in giving advice as to what matters are of importance for the subsequent prosecution at a much earlier stage than is presently the case in most Commonwealth jurisdictions. In practice it is not uncommon to find that the police pass the relevant file to the prosecutor at the completion of their investigations. The file then will be given attention by the lawyers who will generally instruct the police to make further inquiries. A good deal of the material found in police files passed to the prosecutor is wholly irrelevant for

the purpose of the intended criminal prosecution. This is not necessarily the fault of the police as they are not lawyers and therefore might be inclined to pursue aspects of the case which would not stand up in court. Without lawyers being involved throughout the investigatory process it stands to reason that a lot of police time is wasted. However, attempts are being made in several Commonwealth jurisdictions to involve prosecuting attorneys at a much earlier stage in the investigation. If resources permit this should become standard practice.

I have already referred to undue delays both in detection and investigation being in part due to police incompetence. Obviously, this is related to the training that police officers receive and their general ability. I would, however, point out that delay and perhaps incompetence in the conduct of such investigations is not necessarily the preserve of the police. Inspections and special investigations under various companies laws have in the past taken an inordinate amount of time and in not a few cases produced almost worthless reports.

(e) Extradition

It is beyond the scope of this report to discuss the Commonwealth Scheme of Extradition and I understand that Professor Shearer of the University of New South Wales has prepared a review of the Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth for Law Ministers. I have had the advantage of seeing Professor Shearer's review in draft and I would respectfully concur with his observations in so far as they relate to commercial and economic crime. I would, however, like to make the following points.

Returnable Offences: The 1966 Scheme provides that a fugitive will only be returned for a "returnable offence", and these offences are set out in annex 1 to the Scheme. Whilst a number of ordinary criminal law commercial and economic offences, such as theft and cheating are comprehended within this schedule many are omitted. Over the years a number of Commonwealth countries have unilaterally added additional offences to their legislation adopting the Scheme. This has been largely the result of various international Conventions. As Professor Shearer points out, although this is contrary to the wording of clause 2 of the Scheme, it is certainly within its spirit and it is unlikely that any objection could be raised.

There is a widespread feeling in the Commonwealth, particularly among law enforcement officers, that a number of offences that are presently not found in annex 1 should be added to the Scheme, or, at least, it should be possible for a given country unilaterally to extend its list of scheduled offences. It is not without interest that the Canadian Fugitive Offenders Bill of 1978 (which has now lapsed) would have, inter alia, added the following offences to the Canadian list of returnable offences:

"Obstruction of judicial proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by

influencing, bribing, threatening or injuring by any means any officer of the court, juror, witness or duly authorised criminal investigator,

and

Income tax evasion"

Income tax evasion is usually regarded as falling outside the traditional operation of extradition agreements and is not an ordinary law crime. Fiscal offences and certain economic crimes were left for future decision by the European Convention on Extradition in 1957. Article 5 of the Convention provides that "extradition shall be granted...for offences in connection with taxes, duties, customs and exchange only if the contracting parties (i.e. states) have so decided in respect of any such offence or category of offences". Professor Shearer has suggested that a possible solution to the problem is to leave the matter to be resolved on the basis of reciprocity. He advocates the addition of the following clause to annex 1 of the Scheme:

"Offences not described in paragraphs A, B and C but which are returnable under the laws of both the requesting and requested parts of the Commonwealth".

This approach would allow a significant degree of flexibility and would solve the fundamental problem that in regard to many economic and fiscal offences it is unlikely there could be Commonwealth-wide agreement. I respectfully recommend this approach to Ministers. It is hoped that countries would as a matter of reciprocal agreement add such offences as securities trading frauds, manipulation and insider dealing to their schedules of returnable offences. Of course, this proposal would not necessarily satisfy those developing countries which attach a great deal of importance to offences such as exchange control violation, as the countries which would probably agree to including such a crime as a returnable offence would not normally be the countries to which "hot" money or the culprit went.

An even more controversial proposal should also be made here. It has been suggested by at least two Department of Trade inspectors in the United Kingdom that a failure to comply with a demand for information or evidence during an inspection into the affairs of a company or into beneficial ownership of securities should constitute an extraditable offence. Many inspections have been frustrated by persons who could have contributed much to the investigation leaving the jurisdiction and often taking important documentary evidence with them. There would appear to be some support for the proposal that such an offence should be extraditable in other Commonwealth jurisdictions.

Double Criminality: The strict requirement for double criminality underlined in *R. v. Brixton Prison ex parte Gardner* [1968] 2 Q.B. 399 is a major hurdle in cases of commercial crime. Indeed the facts of this case illustrate the problem aptly. The New Zealand Government asked for the surrender of a fugitive to face charges of obtaining property by false pretences. However, the misrepresentations related to future

events and did not constitute an offence under the similar provision in force at that time in Britain. As Professor Shearer points out, "the circumstances that the evidence tendered in support of the application contained facts which, if they had occurred in England would enable other extraditable offences to be charged in England was irrelevant; regard must be had only to the acts or omissions constituting the offences actually charged in the requesting state". Lord Wilberforce, made a similar point in *Tarling v. Government of Singapore* (House of Lords, 19 April 1978, Unreported). He also stated:

"the accepted view, and I do not dispute it on this occasion, is that for the purpose of becoming satisfied that the evidence would be sufficient to warrant trial it is necessary to translate the actual charge laid into terms of English law and to consider whether the evidence would be sufficient to warrant trial on that equivalent offence ... this means that the courts have to attempt the task of fitting a most elaborate complex of facts, not into the legal framework which has been set up by the applicant government to deal with such facts, but into English legislation which may be, and in the case of the Theft Act 1968, is, largely inappropriate to deal with them".

In *Tarling's* case their Lordships considered this approach gave rise to considerable difficulty. Whilst the House of Lords could not consider the dismissal of the Singapore Government's case against Mr. Jim Slater it is not without interest that certain of their Lordships found it hard to reconcile with the Magistrate's decision to commit Mr. Tarling. Lord Salmon, observed that "I am wholly unable to understand how he (i.e. the Magistrate) could have come to such a curious decision... The evidence against each of them was virtually the same in respect of the conspiracy charges, yet one was committed and the other went free". Given the importance that the Magistrate erroneously attached to the fact that Mr. Slater was not a director of the relevant company it has been suggested he misdirected himself. This mistake was in part due to a misunderstanding of the relevant provision, and the confusion of two separate charges. I raise this point here not to imply criticism of the learned Magistrate but to underline the practical problems associated with double criminality in regard to commercial and economic crime. The comment of Professor Shearer that "the surprising result emerges that the double criminality rule is more exacting, under the United Kingdom law, in relation to Commonwealth extradition than it is in relation to extradition with foreign states" under section 26 of the 1870 Extradition Act has recently been borne out by the decision of the Divisional Court in *Re Budlong and Re Kember* (Times Law Report 6 December 1979). It was there decided that where the facts disclose a prima facie case of a crime according to the English law and the crime is substantially similar in concept in England and the country requesting extradition from England for the crime, the request cannot be refused on the ground that the definitions of the crime in both countries are not identical. Ministers might wish to consider the implications of this apparent anomaly.

Finally, I would like to underline Professor Shearer's comments with regard to the cost of extra-

dition proceedings. This can be, and I am sure is, a major factor in discouraging smaller countries from seeking the return of criminals for prosecution on charges relating to commercial and economic crime.

(f) Prosecution

Only a very small proportion of commercial and economic crimes that are detected finally come to the stage of prosecution. In this area of criminal activity the odds against a prosecution being brought except in a serious case are almost as high as the sums involved in commercial crime.

The prosecution services in many countries which are required to deal with these cases, are not adequately equipped. Traditionally the prosecution of commercial and economic crime has not been accorded a very high priority. Indeed, in the United Kingdom, until relatively recently, the Fraud and Criminal Bankruptcy Section of the Director of Public Prosecutions' Office numbered four lawyers. I understand that this figure is now seven. Given the complexity of the issues and the time that such cases take to satisfactorily prepare, it cannot be that many Commonwealth jurisdictions have the resources adequately to deal with more than the relatively small number of cases that do come before the Courts. Of course, in some Commonwealth jurisdictions a certain amount of reliance is rightly placed on the Bar, and counsel are briefed to bring prosecutions on behalf of the Crown. This may not be the best approach in the long term. Few will have either the experience or the time needed. It is also very costly. I am informed that it costs on average some £50,000 to bring a prosecution for long-firm fraud before the Central Criminal Court. Obviously, in certain instances it is wholly necessary to brief outside counsel where the prosecution service cannot be expected to possess the calibre of advocate with the requisite expertise. As has already been pointed out, defendants in criminal trials particularly in cases involving major commercial and economic crimes are likely to be represented by some of the best counsel available.

The main reason why it is suggested that an almost exclusive reliance on the private Bar is not the best approach in the long term is because great importance must be attached to the development of a special expertise within the prosecution service. I have already mentioned the problems that can and certainly do arise where police officers are inadequately supervised and directed by prosecutors during the conduct of their investigations. It is only in the most exceptional cases, like for example the Poulson case in the United Kingdom, that members of the private Bar will be actively involved in a case before the investigations are completed. Indeed, it might not be ethical for a practising member of the Bar to develop, as a matter of practice, a close working relationship with the investigatory services during these preliminary stages. Of course, specific opinions on the admissibility of evidence etc. are an entirely different matter. If the prosecution service is able to develop the relevant expertise in this particular field then its officers can provide a most important service

during the early stages of investigation. As I have already mentioned above when discussing this question in relation to police investigations, several Commonwealth jurisdictions have adopted such an approach. Indeed, I understand that the Attorney-General of Hong Kong has set up a special unit of public prosecutors within his chambers who will work closely with officers from the Commercial Crimes Bureau of the Royal Hong Kong Police. It should be emphasised that the police officer in charge of the CCB welcomes this move and considers it will greatly increase the efficiency of his officers. Of course, this approach has been standard practice in the U.S.A. and several European countries for some considerable time. Where the investigating authority actually has legal advisers working in it or attached to it, then this kind of relationship with the prosecution service is not so important. The in-house lawyers should be able to give the investigators the appropriate degree of direction. Again, in the U.S.A. many of the regulatory agencies have staff lawyers who provide this function. Within the Commonwealth it is exceptional to find lawyers not in the prosecution service fulfilling this role.

(g) Trial and punishment

Much has been written on both these questions with regard to "white collar" crime, and perhaps I will be excused from giving these important matters other than passing reference. Although they are important in the national context there are few if any international considerations involved. During the last two decades more and more people have come to the realisation that the traditional criminal process is unsuited to the more involved and complex commercial and economic crimes. In *R. v. James Edwards Jeffs et al*, (Court of Appeal, New Zealand, 28 April 1978, Unreported) the New Zealand Court of Appeal underlined the difficulties facing first instance, and in particular appellate courts, in complex financial fraud cases. Indeed, Richmond P. described the trial judge's task as "almost impossible". It is worth reproducing here the New Zealand Court of Appeal's comment on this sort of case:

"This brings us to the end of a task which has demanded our exclusive attention for a period of three months. As a Court of three judges we have enjoyed many advantages which were not shared by the members of the jury who tried the case in the Supreme Court. Unlike the jury we have had constant access to the transcript of the evidence . . . which comprises nearly 1,800 pages. On hearing the appeals, in order to follow counsels' arguments we had constantly to compare passages in the notes of evidence with material in the exhibits and to study these and ask for clarifying questions. These exhibits actually copied for the purpose of the appeal were contained in some eleven volumes each of about 500 pages. Even with the advantages of being able to peruse the notes of evidence and ask counsel questions and with easier access to the exhibits that was enjoyed by the jury, we found this process as difficult as it was time consuming. The jury's problems would have been immeasurably greater and we are very conscious of that fact. We add that one of the matters currently under study by the Royal Commission on the Courts is whether trial by jury is an effective machinery for trying the sort of issues that arose in the

present case. Our own difficulties have left us in no doubt that this is a question deserving of full consideration. It may be that some way can be found of permitting trial by judge alone, either at the election of an accused person or by special order of the Court" (Transcript at page 100)

This is a matter which is not only receiving consideration in New Zealand. In the United Kingdom proposals are being examined by the Lord Chancellor's Office which would allow defendants to opt for trial by a judge sitting with two lay magistrates. It is not yet clear how far these proposals extend and it is likely they would only apply to the less serious criminal offences. In Australia, and in particular New South Wales, serious consideration is being given to similar proposals and the introduction of a pre-trial procedure which would eliminate the vast quantities of documents that now have to be ploughed through at trial, [Reference should be made to the excellent discussion of this and other suggestions in "Regulating Corporate Misfeasance and Maintaining Honest Markets" 51 *Australian Law Journal* (1977) 541].

What is certain is that the traditional procedure for criminal trials is unsuited to the prosecution of many economic and commercial crimes. Of course, this is not to deny that some cases are disposed of quickly and efficiently, but before the superior courts this is the exception rather than the rule. The main problem is the complexity of the issues involved, which leads inevitably to the trial taking much longer than it should, thereby involving a great deal of cost and possible waste of valuable judicial time. Therefore, if law enforcement is to be made more effective and a greater number of prosecutions brought before the courts, attention will have to be given to reducing the complexity of the issues that have to be determined at trial. It is submitted that attention should be given to the development of pre-trial procedures which would allow non-controversial evidential matters to be agreed upon, and the identification of those matters in issue for trial. Greater attention should be given to the preparation of evidentiary abstracts and notes of evidence. An effective pre-trial procedure could be expected to reduce significantly the length of trial, and thereby the cost and demands on judicial resources. At trial, attention should be given to the optional replacement of the lay jury by assessors, either sitting as a "blue-ribbon" jury or with the judge to assist the court in the determination of facts, but, of course, not law. With the greatest respect, attention should also be given to the inadequacies of summary trial. With few exceptions Magistrates are not properly equipped to deal with complex frauds. Certainly, difficulties have arisen in those Commonwealth jurisdictions which have sought to bring criminal prosecutions for securities trading frauds before ordinary Magistrates. Nor may it be satisfactory to allow trial by a single judge without the benefit of assistance in the determination of facts. Few judges have had experience of the practical issues and in particular of matters of accountancy which are likely to arise in such cases. Whilst it is perfectly true that the judge should primarily determine the issues on the evidence presented to him, and

thus the burden of explaining these matters is properly on counsel, this can be wasteful both in terms of money and time. By way of example the recent prosecution of Mr. Tarling in Singapore for offences under the Singapore Companies Act relating to accounting irregularities was significantly prolonged by the presentation of complicated evidence relating to accounting principles and techniques which had to be explained at length, in several instances several times, to the court. Certainly, the experience of those countries which have sought to bring complex fraud prosecutions before ordinary magistrates has been less than satisfactory. The inability of certain magistrates to grasp the basic issues must significantly inhibit the bringing of criminal prosecutions before the courts. The concern voiced recently in the House of Lords during the Tarling extradition case, about the apparently erroneous dismissal of the charge brought by the Singapore Government based on conspiracy to defraud, against Mr. Jim Slater, on the basis that at no time had he been a director of the relevant company, has already been noted.

It is suggested that the more complicated commercial frauds should not be brought for trial before an ordinary Magistrate or Judge who has not had recent experience of commercial cases.

Proposals for the promotion and facilitation of international co-operation within the Commonwealth

It is clear from the record of the Winnipeg Meeting that there is a need for urgent action against international commercial and economic crime. The Commonwealth Secretary-General was asked to explore the question of mutual assistance and make proposals to the next Commonwealth Law Ministers' Conference as to how international co-operation might be increased in regard to commercial and economic crime. This concern for effective and urgent action is still apparent in the many Commonwealth jurisdictions visited during the preparation of this report. Likewise it is a concern shared with ICPO-Interpol and a number of non-Commonwealth countries. Whilst there is obviously a need for caution and informed discussion, the present situation calls for prompt and positive action by Commonwealth governments.

In formulating the following proposals, recognition has been accorded to the limitations of the practicable, both in political and economic terms. It is important, however, to appreciate that these proposals are essentially only a first step, albeit a most important step, along the road to enhanced mutual co-operation and assistance in law enforcement within the Commonwealth.

Prompt adoption of these proposals would not seem to require amendment to or enactment of any law in any Commonwealth jurisdiction, so there is no

legal impediment. Implementation of the proposals, too, would not involve significant expense. Furthermore, the proposed scheme would seem to fit into the present structure and operations of the Commonwealth Secretariat's Legal Division, were it the view of Law Ministers that it might most appropriately be placed there.

The political, legal and territorial sovereignty and integrity of Commonwealth countries would in no way be impugned or affected by the proposed scheme, and it could be extended, should Commonwealth governments be so minded, to non-Commonwealth jurisdictions.

From the earlier sections of this submission, the following problem areas are identified as being of concern when considering the development of mutual assistance and co-operation in this field of law enforcement, and the adoption of the proposals contained in this report should significantly assist in obviating and reducing most of the following inhibitions:

- (i) failure to appreciate the size of the regulatory problem,
- (ii) lack of awareness as to the implications of rampant commercial and economic crime,
- (iii) inability to detect abuse, partly through a failure to appreciate what to look for,
- (iv) the complexity and sophistication in the nature and perpetration of these crimes and the limitations within law enforcement agencies both in regard to competence and resources,
- (v) unsuitable and outdated investigatory techniques,
- (vi) too little attention to technological developments, which facilitate commercial and economic crime, and in particular lack of expertise within law enforcement agencies in regard to computer crime,
- (vii) the commission of crimes involving an international element leading to problems relating to jurisdiction,
- (viii) lack of co-ordination between law enforcement agencies, domestically and internationally,
- (ix) too little attention to the development of criminal financial intelligence,
- (x) reluctance to exchange intelligence,
- (xi) destruction of evidence and depreciation of evidence due to inordinate delays in investigation and prosecution,
- (xii) difficulties in obtaining documentary and oral evidence from overseas,
- (xiii) restrictive and possibly defective extradition procedures,
- (xiv) inadequate resources for the prosecution of offenders,
- (xv) unsatisfactory nature of criminal trial procedure and lay jury,
- (xvi) political bias in certain economic crimes
- (xvii) Cost of detection, investigation and prosecution,
- (xviii) competing enforcement priorities,

(xix) technical nature of offences and moral ambiguity, and

(xx) lack of effective deterrent

This list is, of course, not intended to be exhaustive, and some factors may be more relevant in one country than in another.

Central to the proposals which are made in this report is the creation of a facility for liaison and co-ordination, perhaps within the Legal Division of the Commonwealth Secretariat. The facility would be responsible for developing and promoting mutual assistance and co-operation with regard to "white collar" crime and associated criminal activity within the Commonwealth and liaising with such international agencies as ICPO-Interpol. At present no such facility exists within the Commonwealth.

The Commonwealth Fraud Liaison Officer (CFLO)

At this stage the precise designation is not really important, but the title of the post should underline its liaison role. There can of course be no question of the officer becoming a one man fraud squad.

Having regard to the field of responsibility that this officer will have it is important that he should be a lawyer preferably with a police background, and if possible have some expertise in accountancy. The post will require secretarial support. It should be at a level which will reflect his high standing and which will command the respect and support of those with whom he must liaise.

(i) Criminal financial intelligence

This is one of the most important functions that the CFLO should be called upon to undertake. At present there is a dearth of relevant intelligence information on economic and commercial crime in the Commonwealth. The Commercial Crime Intelligence Bureau of the Metropolitan and City of London Company Fraud Department is probably the most important source of information in the Commonwealth, but this in practice is defective in a number of areas, especially in regard to economic crime. While the CFLO should not go out looking for this kind of intelligence information, he should be able to function as a repository of criminal intelligence within the Commonwealth in regard to certain types of activity, criminal and otherwise, of particular operators. He should also be able to develop a close working relationship with Sub-Division II of the Police Co-ordination Division of ICPO-Interpol, the Customs Co-operation Council, the Commercial Crime Intelligence Bureau of the Metropolitan and City of London Company Fraud Department, the Commercial Intelligence Section of the U.S. Federal Bureau of Investigation, and a number of other bodies. In specific areas the CFLO should take the responsibility of co-ordinating criminal intelligence between the relevant international agencies and the national authorities. This would allow a degree of centralisation and avoid a great deal of the present duplication of effort. It would also provide, in particular, the smaller Commonwealth jurisdictions with access to criminal intelligence sources which in prac-

tice today they do not have, or of which they are not aware.

Certain individual police officers enjoy excellent relationships with counterparts in different forces and authorities. This personal relationship enables them to exchange relevant information either openly or informally. However, it would be erroneous to suppose that this applies generally throughout the Commonwealth. Many Commonwealth police officers do not have this kind of relationship with officers outside their territory: they may never have been on an international training programme, or visited either Scotland Yard or the F.B.I. in Washington. There is an obvious danger that a small developing Commonwealth country will in practice, even if not in theory, be excluded from these critical sources of information.

Furthermore, the present "old boy network" is hardly adequate to combat the international criminal of today. Even ICPO-Interpol with its vast communications network has not been able to make any real impact in the field of economic and commercial crime. The very real practical difficulties which exist in obtaining information will not be underestimated by Law Ministers. This point was emphasised at the Third Symposium on International Fraud at the ICPO-Interpol Headquarters in Paris in December 1979, and has been repeatedly underlined in General Assembly resolutions since the Koto General Assembly in 1967. Indeed, the ICPO-Interpol General Secretariat has recently agreed to prepare a list of relevant authorities in its member countries which might be able to assist in the provision of criminal intelligence in regard to economic and commercial crime. This is likely to take sometime to prepare as much will depend upon the competence of NCBs to remit to Paris full lists of relevant sources in their jurisdiction. Furthermore, whilst a list of addresses will be very useful it remains no more than a list, and there is no express or implied undertaking that co-operation will in fact be given.

As has already been pointed out certain police forces are notoriously slow in acceding to a request from another state for information concerning this sort of criminal activity. It is accepted that certain countries simply ignore such requests. Another, serious practical problem is that law enforcement officers are understandably reluctant to disclose sensitive information to persons who might be less than careful in dealing with it. The police forces of some states are not generally entrusted with certain categories of information. Most law enforcement officers would be hesitant to disclose information to another officer, even within his own country, if he thought that particular officer or agency lacked sufficient discretion adequately to handle it. This lack of trust, has obvious implications for international co-operation in regard to commercial and economic crime. Hopefully, the CFLO could facilitate communication of such intelligence.

Another important feature of CFLO's criminal intelligence role would be to have a catalytic role in engendering an enhanced flow of information to

Commonwealth law enforcement agencies from unofficial sources, e.g. private institutions and non-official regulatory bodies. With regard to what transpires in the City of London, such bodies as the Bank of England, City Panel on Take-overs and Mergers, the Stock Exchange, and the financial press, are likely to be far more in the know than are the police or the Department of Trade. This is all the more important when one is concerned with abusive activity which does not actually amount to a crime. Police intelligence services, and this includes ICPO-Interpol, are only concerned with criminal offences, and intelligence is inevitably and rightly orientated to this. Of course, other activities which effect the economic and commercial wellbeing of states are likely to be of equal concern to Commonwealth governments.

As has already been pointed out, international co-operation even between police forces with regard to economic and commercial crime can leave a lot to be desired. Even more so is this the case when the authority requesting co-operation is not a conventional policing agency. For example, it is open to question how much co-operation a body such as the Ontario Securities Commission could expect from a national police force. Officers of the New South Wales Corporate Affairs Commission have said that co-operation is a very real problem, but has been made easier by having a small section of police officers attached to the Commission. Other Commissions, and in particular those such as the Hong Kong Securities Commission which do not in practice adopt the role of enforcement agency, encounter considerable difficulty. Indeed, even the U.S. Securities and Exchange Commission has not always received the degree of co-operation it might expect. A senior police officer in the commercial crimes bureau of one of the countries I visited informed me that his bureau has refused to provide the independent Anti-Corruption Commissions of at least two jurisdictions with information on the basis that the Commissions are not police agents. The degree of co-operation that is given to authorities which are not even constituted under statute and thus lack specific legal authority is, as one might expect, minimal. Whilst co-operation has on occasions been given to the City Panel on Take-overs and Mergers by Commonwealth governments this has been the exception rather than the rule.

The author's own experience as an investigator shows that there have been instances in which private regulatory bodies have not gone out of their way to explain to a foreign government that they are not an official body with legal powers. This is an area where the CFLO could perform a most valuable function.

There is another area in which reliable intelligence is essential to governments, namely when an off-shore financial facility is developed. Once an off-shore financial institution has been set up and allowed to operate it is notoriously difficult to exercise close supervision over its activities. Perhaps the main attraction of such an off-shore facility is the absence of close regulatory scrutiny and the preservation of confidentiality. Obviously, a balance has to

be struck between ensuring responsible behaviour and imposing a degree of supervision which would be counterproductive. Several governments subject applicants for off-shore banking licences to careful scrutiny at the time of application. This is both sensible and commendable. However, at present it is hard to see how this can be as effective as it should be. Local officers may lack the capacity or expertise adequately to process applications. Furthermore, it is exceedingly difficult for the officers charged with the processing of applications to obtain relevant information on the applicants and their associates from foreign authorities. Officers in several diplomatic missions have informed the author that it would be extremely unlikely that any information relating to an applicant would or could be provided to, e.g. a Central Bank, although one officer suggested that he might be able to indicate whether an applicant had been convicted of a criminal offence in his home jurisdiction. Time is also a factor, as often the Minister responsible must make his decision whether to grant a licence or not within perhaps three months of an application—and there may be no power to extend this period.

At present, too, ICPO-Interpol lacks a viable financial criminal intelligence programme and its records would only cover persons wanted or convicted of a specific crime. It is possible that the police forces of specific countries could be consulted, but here again it remains to be seen whether they will possess the sort of information that is required. The sort of information that supervising department will need is most likely to be obtained from the private institutions and self-regulatory authorities.

The CFLO will be in an almost unique position to identify trends and put together pieces of general information. ICPO-Interpol has not yet attained this capability with regard to international economic and commercial crime. It should be noted that the ICPO-Interpol narcotics intelligence programme is co-ordinated by a single officer, and there is no reason why the CFLO could not perform a similar function within the Commonwealth in regard to international commercial crime.

It is, of course, important and desirable that close co-operation should be maintained with the General Secretariat of ICPO-Interpol. In the supplementary report on ICPO-Interpol (Appendix VI) it is pointed out that the General Secretariat can only operate through the various National Central Bureaux (NCBs). Thus, even if ICPO-Interpol is able to develop a capability in financial criminal intelligence it will depend largely on the input of NCBs. The resources and calibre of NCBs differ considerably and it is likely that some will prove inadequate conduits for the receipt and communication of this kind of information. In particular, it is unlikely that information generated through this programme will pass beyond the police to other regulatory agencies such as Securities Commissions and Registrars of Companies. Therefore, the CFLO could play an important role in directing intelligence to agencies and authorities practically outside the ICPO-Interpol network within the Commonwealth.

The CFLO might also be able to give some attention to the relationship that financial criminal intelligence has to other areas of criminal activity. Of course, reference has already been made to the use of financial intelligence in combatting narcotics trafficking and certain other forms of organised criminal activity.

(ii) Liaison with ICPO-Interpol

In the near future ICPO-Interpol intends to develop a programme similar to that successfully employed with regard to narcotics for economic and commercial crime. The programme will combine both an intelligence and liaison function. Specific details of the proposed programme are given in Appendix VI. It suffices here to point out that the intelligence function will involve targeting exercises, and the liaison scheme will provide a facility for the co-ordination of international investigations. There are several ways in which the Commonwealth and ICPO-Interpol could be of mutual assistance to each other in the operation of these intelligence and liaison programmes. In addition to the more general recommendations made in Appendix VI, it is suggested that the CFLO should work closely with the relevant ICPO-Interpol liaison officers concerned with international commercial and economic crime. The Executive Committee of ICPO-Interpol has already invited the Commonwealth Secretariat to send an observer to its Third Symposium on International Fraud, this should enure to the mutual benefit of both organisations. It is vitally important that the CFLO as an individual develops close ties with the officers working within ICPO-Interpol. It is only on a basis of mutual trust and confidence that the full potential of this initiative can be realised.

The CFLO should also explore the possibilities of developing similar links, both formal and informal, with other international organisations such as the Customs Co-operation Council and the Crime Prevention Office of IATA. Having spoken to representatives of both organisations I am confident that there would be support for such a proposal.

The CFLO could also develop useful relationships with agencies in non-Commonwealth jurisdictions. It is now an established feature of Commonwealth activity to allow, wherever possible, non-Commonwealth participation. International fraud knows no boundaries, so the CFLO should be able to provide co-ordination and liaison in appropriate instances, and to be able to do so he must have a working relationship with relevant non-Commonwealth agencies. ICPO-Interpol can provide a measure of assistance here, but in practice it would probably be best for the CFLO to establish a co-operative bond with relevant agencies as a representative of Commonwealth law enforcement in this area of criminal activity. This matter has been discussed with senior law officers in several non-Commonwealth jurisdictions and has received an enthusiastic response.

(iii) Dissemination of information and targeting exercises

Targeting exercises on the basis of criminal intelligence could be of considerable assistance in the pro-

motion of Commonwealth law enforcement in regard to international "white collar" crime. During the last two years the narcotics intelligence programme co-ordinator at ICPO-Interpol has given a good deal of attention to this sort of intelligence procedure and has achieved major successes. Of course, targeting has been considerably refined in the U.S.A. where the procedures now adopted by the DEA in regard to organised crime have perhaps become rather too theoretical.

Within the Commonwealth, this sort of exercise is most employed in the more developed countries, and in particular the United Kingdom, Canada and Australia. As in the U.S.A., it tends to be employed more in regard to narcotics offences and certain forms of organised crime than economic and commercial crime. In Britain, for example, attention is being given to the setting up of a regional crime intelligence network which would be able to identify patterns of criminality and monitor specific criminal groups. A similar programme is understood recently to have been initiated by the RCMP in Canada. In so far as targeting allows the concentration of law enforcement resources on specific areas of criminal activity it is perhaps surprising that it has not been more widely employed in developing countries. The author is aware of only a few instances in developing Commonwealth countries where any real attention has been given to this kind of exercise. However, in a few non-Commonwealth countries in the developing world this sort of procedure has been adopted and has resulted in a certain amount of success. For example, the National Bureau of Investigation in the Philippines has developed specific intelligence programme allowing a high degree of targeting in regard to illegal trafficking offences and gang crime.

Targeting can also take the form of focusing attention on specific individuals, corporations, operations or locations. The effectiveness and accuracy of the operation depends to a considerable extent on the accuracy and quantity of intelligence. However, it is possible to design intelligence areas of criminality or individuals. The process has important preventive implications. It is possible to use these procedures to identify weaknesses in law enforcement and regulation. On the basis of these revelations corrective action may be taken, or a trap sprung.

The CFLO should pay attention to this application of criminal intelligence and should co-operate with Commonwealth law enforcement agencies in operating such procedures. Reference has already been made to the financial intelligence programme that ICPO-Interpol is hoping to develop and the possibilities for targeting this will give. As in the case of the liaison officer scheme, the CFLO should be prepared to co-operate fully with ICPO-Interpol. Co-ordination of applied intelligence programmes and targeting exercises within the Commonwealth (and outside the Commonwealth provided such has implications for the Commonwealth) should also be a matter for the CFLO.

Associated with the dissemination of criminal intelligence and targeting exercises is the responsi-

bility to supply relevant Commonwealth law enforcement agencies with information that comes to the attention of the CFLO, and of which he considers they should be aware. For instance, where a particular *modus operandi* comes to his notice he should inform the appropriate Commonwealth agencies.

The General Secretariat of ICPO-Interpol already circulates *modus operandi* notices to the NCBs. However, very few of these notices have been sent out on matters pertaining to economic and commercial crime. The General Secretariat finds that the information which is relayed to it is insufficiently detailed in most cases to prepare a meaningful notice. It is important that if a notice is to have any practical value it must be sufficiently detailed to show the special aspects of the particular *modus operandi*. It is possible that the poor information that has been supplied to the General Secretariat reflects the relatively low level of expertise in regard to these kind of crimes in NCBs. Given the dependence that ICPO-Interpol has on these bureaux it remains to be seen whether the financial intelligence programme it hopes to develop will be any where near as successful as that developed in regard to narcotics. The CFLO might, in certain instances, be far better placed than ICPO-Interpol and its NCBs to obtain the kind of detailed information that would justify disseminating a *modus operandi* notice. In particular, the CFLO would have access to the non-police regulatory authorities which are generally in the forefront of the fight against economic and commercial crime. Apart from *modus operandi* notices, the CFLO should be at liberty to disseminate any information he considers useful in the fight against this type of criminal activity. In the preparation of some of this material he might consider it helpful to consult members of the Commonwealth Panel of Experts.

Another important aspect of the CFLO's responsibility to disseminate relevant information is his ability to communicate directly with the agency most concerned with the matter in question. ICPO-Interpol can only operate through its NCBs. Furthermore, before ICPO-Interpol circularises its NCBs with a certain item of information the General Secretariat must be decided that it is of interest to more than one country. In practice, it is unlikely the General Secretariat would send out a notice or memorandum unless it considered the item will be of interest to a majority or a significant minority of member states. Of course, information is on request (but rarely without one), supplied directly to a member country. The CFLO could be far more selective in providing this sort of information. Rarely would it be necessary for him to disseminate information to all Commonwealth jurisdictions, and items of information could be directed to specific agencies to which the matter would be of relevance. Therefore, this procedure would be far more flexible and less wasteful than that necessarily operated by the General Secretariat of ICPO-Interpol. Furthermore, the CFLO would be expected to take initiatives in informing relevant agencies within the Commonwealth on matters of special interest or significance.

(iv) Technical assistance

This could prove to be one of the most important responsibilities of the CFLO. At the last Commonwealth Law Ministers' Meeting it was implicit in several interventions that some domestic law enforcement agencies lacked the expertise and sophistication adequately to combat certain commercial and economic criminals. This raises the significant but controversial question as to whether the traditional reluctance of police forces to recruit specialist officers is now an appropriate approach. It is true that in recent years certain Commonwealth forces have done a great deal to attract graduates into the service: for example the RCMP places considerable emphasis on recruiting graduates with a technology based degree, preferably in the computer sciences. Most Commonwealth police forces now provide some form of basic training, and some have developed advanced and specialist courses at police colleges.

The Metropolitan and City of London Company Fraud Department sends police officers joining the Department for the first time on a three week course. During this course some attention is given to commercial law, accountancy and banking practice, etc. Few Commonwealth forces provide courses longer than this, and apparently many regard the position in the United Kingdom with envy. The RCMP in association with some of the Provincial and Metropolitan forces in Canada has instituted a one year degree-level commercial crime course. This is exceptional in the Commonwealth. What the average policeman can glean from a three week course covering law, accountancy, banking and a host of other technical subjects must be open to question. Most officers I have spoken to consider that at best this very basic course can only make them aware of the relevant areas of concern and indicate the appropriate sources of information. Traditionally, in the British police almost exclusive reliance is placed on in job experience. Given the pressure that policemen are under today and their lack of resources, this may be a luxury that cannot be afforded in the modern era of commercial and economic crime. Of course, by the same token one is entitled to be equally sceptical about the practical value of some of the expensive and exceedingly theoretical training devised in the U.S.A. for specialist law enforcement officers.

In the main, Commonwealth police forces have been reluctant to allow specialists into their ranks. This is especially a matter for concern in regard to economic and commercial crime. Policemen tend to raise a number of arguments against the recruitment of specialist officers. It is said, for example, that an ordinary police officer should be responsible for carrying out a fraud investigation no matter how complex, as in the final analysis lay members of the jury must be able to appreciate the facts. This is wholly misconceived, for it is the job of a highly-skilled advocate to present the facts to the jury in such a way as they can understand them. It is also said that the recruitment of specialists would upset the present career structure and cause discontent within the force. This is obviously a serious matter, but one that should not necessarily be allowed to

impair the efficiency of the police in a given area of responsibility. Of course, at present it would be extremely unlikely that many accountants of standing would be willing to join the police, given present career structures and rates of pay. The standard practice in most Commonwealth countries, where specialist assistance is required in an investigation is for the police force to retain an outside consultant. This practice has a number of disadvantages. It is usually very expensive and time consuming, and problems sometimes arise as to the confidentiality of information under investigation. Furthermore, once outside consultants have been brought in there may well be a lack of co-ordination in the investigation. Even if these factors are ignored, the present approach does not allow the police to exercise an efficient detective role. Once a case for investigation has come to the attention of the police, then it may be that resort to outside professional consultants is reasonably efficient and efficacious. However, this ignores the equally important responsibilities the police have in regard to detection and prevention. Without a specialist facility within the police, the ability of police officers to carry out these responsibilities must be doubted. Unless there are experts looking through accounts or operating computers the irregularity that might reveal a major abuse will not be detected. Of course it is not feasible or, for that matter proper, for police officers to be sent out at random to examine accounts or run computer programmes merely to see if everything is in order. However, certain likely areas for abuse can be selected through efficient targeting exercises. Following up and investigating "risk areas" is an entirely legitimate police function, and one which is largely ignored today in the field of commercial and economic crime.

Perhaps the most important problem that is likely to confront police officers investigating commercial crime during the 1980s, is their present absence of expertise in the computer sciences. Computer assisted and computer related fraud is a vast uncharted sea in the Commonwealth. Even the law enforcement agencies in the U.S.A. have not been able to make significant inroads into this area of criminal activity. Indeed, although several major computer frauds have come to light in the U.S.A. it is disturbing to find a lack of priority in coming to terms with the problems facing investigators. For example, although there is an expensive computer facility for training at the FBI's college, the FBI's budget has not allowed a programmer and operator to be employed to run it.

Within the Commonwealth, the Canadian police forces are at the forefront in recognising the need for the development within the police of the technological skills vitally necessary to deal with this new dimension to criminal activity. Reference has already been made to the bias that the RCMP has in favour of graduates with a technology based degree. Furthermore, the RCMP is prepared to sponsor individuals to attend university and acquire a computer science qualification. In Britain there is no capability to tackle even the most simplistic computer

fraud within the police. The Commander of the Metropolitan and City of London Company Fraud Department has informed the author that if a case came to light it would be necessary for the Department to retain an outside consultant. He felt concern about the inability of the police to operate in this field. Indeed, problems have arisen in at least two Commonwealth jurisdictions where a warrant has been issued for the seizure of computer records. Police officers executing warrants have arrived at premises where records are kept and been totally unable to determine what records are the relevant ones. In fact, in two recent instances in the United Kingdom the police and investigators from the Inland Revenue seized every record they could find.

The time has perhaps come for policemen to accept that there are certain areas of criminal activity where they cannot operate efficiently without expert guidance, preferably from within the service. Certain law enforcement agencies have long recognised this fact. The FBI, for example, has 1,000 qualified accountants in a staff of 8,000 investigators, and the Philippine National Investigation Bureau has a very high proportion of lawyers and accountants among its 1,500 investigators. Surprisingly, it is some of the less developed countries which have made most headway in this regard. What is of critical importance is that expert advice should be freely and immediately available during all the stages of police detection and investigation. As one American lawyer said, "experts should be kept on tap, but not on top". It might be said, for example in the United Kingdom, that in practice this expertise is available from the relevant sections of the Department of Trade. It is perfectly true that a good many accountants and lawyers are employed in the Investigations Branch, Insolvency Service and Solicitors office. However, in practice the sort of expertise that is required during all stages of police work is not readily available.

Some smaller developing countries might experience difficulty in recruiting the kind of expertise that is required. This has been a serious problem in several Caribbean jurisdictions. There is no immediate answer, but if governments accord this area of law enforcement the priority it should have, this difficulty would be reduced. For instance expatriates with the required skills may well be willing to return to their country of origin. In the short term, non-citizens might be recruited. Nonetheless, as already pointed out, to date it is the smaller jurisdictions which have made the greater progress in recognising the need for expertise within the police. The example of the Singapore Police Force is particularly in point.

The CFLO might in appropriate circumstances be able to arrange for technical assistance to be given to a Commonwealth agency. Possibly the Commonwealth Fund for Technical Co-operation could assist in the funding of these services, in appropriate instances. Certainly, the CFLO should be in a position to identify particular expertise and be able to recommend individual experts. It should also be possible for him to arrange and co-ordinate exchange programmes and short-term secondments for law

enforcement officers from Commonwealth jurisdictions, to agencies within the Commonwealth and possibly outside the Commonwealth.

Within the Commonwealth Secretariat's Legal Division the CFLO should build up a small and highly-specialised reference library of relevant legislation and regulations throughout the world. This would be available to Commonwealth governments and agencies.

(v) Facilitating international investigations

This responsibility has obvious connections with the proposed liaison scheme that ICPO-Interpol hopes to introduce in the near future in regard to economic and commercial crime. A number of investigations in recent years have been frustrated or substantially impeded by a failure on the part of a government or agency to take a wider perspective. This is not to imply criticism, as it must be acknowledged it is the first responsibility of a government to have regard to its own national interest. Commonwealth co-ordination in such international investigations could provide a most useful mechanism. The CFLO would be able to liaise between Commonwealth, and possibly non-Commonwealth, countries at inter-governmental level. He would operate at a higher, and in this context more effective level, than a police officer from ICPO-Interpol could expect to.

As has already been pointed out, certain matters which are of concern to the Commonwealth are not necessarily given high priority within ICPO-Interpol. Indeed, in certain circumstances the activity in question might not even be regarded as an ordinary criminal law offence and would thus be outside ICPO-Interpol's jurisdiction. In such cases the CFLO could obviously play a most important role. Again, he would not be restricted to dealing with exclusively policing agencies and the NCBs as an ICPO-Interpol officer would. The great advantage that the CFLO would have is flexibility. He would be able to liaise with any appropriate agency within the Commonwealth that would contribute to the degree of co-operation and mutual assistance that Law Ministers seek to achieve.

Effective co-ordination of international investigations would also save countries money and resources. Inevitably, where there is no co-ordination, duplication of effort will occur that is obviously wasteful. Thus, apart from being more effective and efficient, an international investigation co-ordinated by the CFLO would in general be cheaper.

(vi) Training

The importance of training has already been stressed. It is not without interest that at the last Commonwealth Law Ministers' Meeting the Minister of Justice of Western Samoa stated that the problem of dealing adequately with "white collar" crime was affecting his small country and he wondered if the Secretary-General's office could organise some kind of training scheme whereby selected police officers from small developing countries could receive training designed to assist them in combatting this form of criminal activity. It is important to appreciate that

training in this context should not simply be a matter for police officers, but also for customs officers, prosecutors and other individuals concerned with the regulation of specific economic activities. This is recognised in the U.S.A., with the FBI and the Department of Justice running special courses on economic and commercial crime for both agents and prosecuting attorneys. Similar integrated courses are being introduced in the Philippines, Thailand and Mexico. Certain Commonwealth jurisdictions have also recognised the need for similar, albeit less ambitious, programmes.

ICPO-Interpol is active in the field of police training, as shown in Appendix VI. In the context of commercial and economic crime, the short courses on counterfeiting organised by the General Secretariat have been most helpful. However, in other areas the General Secretariat does not always possess the expertise required for organising such programmes. Occasionally, outside consultants are allowed to participate in such proceedings, and the CFLO could provide a degree of assistance here. Assistance might also be given to police officers from small developing countries to enable them to attend these proceedings. Specific proposals are made in Appendix VI as to how the Commonwealth could assist ICPO-Interpol training.

The CFLO could arrange symposia and courses for officers from Commonwealth law enforcement agencies. This could be done either alone or in association with ICPO-Interpol and other international organisations. Attention should also be given to regional courses in certain parts of the Commonwealth. Apart from reducing expense, it would allow specific regional problems to be examined in greater depth. The CFLO should also be prepared to participate in and support the training programmes in Commonwealth jurisdictions.

Officers from Commonwealth jurisdictions are permitted to spend short periods with the Metropolitan and City of London Company Fraud Department. Officers from such agencies as the New South Wales Corporate Affairs Commission have also been able to spend short periods of secondment with the British Department of Trade and Director of Public Prosecutions. Similarly, officers from other Commonwealth jurisdictions are occasionally seconded for short periods to the various agencies in such countries as Canada, Australia and New Zealand. This is most useful, as it broadens an officer's perspective and allows the development of useful personal contacts. Speaking to a good many officers who have served short periods on secondments of this kind, it emerges that some at least did not acquire much in the way of new police knowledge. Given the concentration on in-job experience this is predictable, as these officers would not always have been exposed to the kind of experiences that would have given them additional relevant knowledge. There is also the problem that officers, usually in the middle ranks, who have been seconded to overseas police forces are often promoted on their return, and thus any experience they might have acquired becomes of little practical relevance.

It must also be noted that in most Commonwealth countries the commercial crime section of a police force does not have its own career structure. Thus officers are posted to this section for relatively short tours of duty. In the United Kingdom these tours would average three years. Should an officer seek promotion there is no guarantee that he will remain in the commercial crime section. Indeed, there is a widespread feeling in Commonwealth countries that senior police officers should have served in as many police roles as possible. This inevitably tends to weaken specialist sections as the better officers are constantly being creamed off. One or two Commonwealth jurisdictions have managed to create a separate career structure within certain specialist services, but these are the exceptions rather than the rule.

Thus, whilst a period of secondment with another Commonwealth policing agency does have some mutual benefits, the advantages are more in the nature of developing closer personal links than with heightening the officer's expertise. Hopefully the CFLO could co-ordinate and facilitate these arrangements, and possibly inject into them a greater opportunity for training.

None of the above functions of the CFLO are exclusive, and there would in practice be a good deal of overlap. No doubt, a number of other responsibilities and functions would be given to the CFLO once the scheme was put into operation. Law Ministers might, at the inception of the scheme or at a later date, sanction the extension of the CFLO's responsibilities to other related areas of criminal activity, or specific unrelated international crimes.

(vii) The role of the Metropolitan and City of London Company Fraud Department

As this report was being finalised it was announced that the United Kingdom Government is considering setting up a special section of experienced fraud squad officers, in London, which would be able to go to the assistance of any other Commonwealth jurisdiction where a major fraud was under investigation, and the local force was unable to cope. ("New 'Flying Squad' plan to fight overseas frauds" *Daily Telegraph* 27 December 1979). The press report states that in certain cases detectives from other jurisdictions (the article mentions Hong Kong and America) might be asked to participate in these investigations. If the press report is correct, the United Kingdom delegation to the Commonwealth Law Ministers' Conference would no doubt wish to describe the plan in detail. It might, however, be desirable that brief mention be made here of the implications that this British plan might have for the proposals contained in this report.

To the extent that the proposal would involve the provision of assistance to small developing countries it is to be warmly welcomed. However, it is not clear how far it is intended the scheme should extend. Already in certain instances the British Government has arranged for British police officers to spend a short period of time assisting Commonwealth forces with a particular project or investigation. It would seem that the present proposal seeks to expand and

formalise this facility. There is no doubt that officers from the Metropolitan and City of London Company Fraud Department could give very real assistance to the forces of some Commonwealth jurisdictions in certain fields of criminal activity. However, it must be said that the degree to which expertise would be available for sharing with the Commonwealth in such areas as securities trading frauds, complex company frauds and computer assisted and related crime seems likely to be limited. The Metropolitan and City of London Company Fraud Department has a staff of 210 officers, and all have a very large and pressing case load. This establishment is small when compared with a number of other Commonwealth forces. For example, the Commonwealth Police in Australia have in excess of 600 investigating officers, a third of whom are engaged in fraud work. This is, of course, in addition to the fraud squads of the states and the various special regulatory commissions, such as the New South Wales Corporate Affairs Commission. In Canada, the RCMP is believed to have in excess of 525 officers involved in fraud investigations, and again this is in addition to the Provincial and Municipal forces. In Hong Kong, the Commercial Crime Bureau has 70 serving police officers, and in Singapore, the Commercial and Companies Division has 40 officers. Admittedly some other Commonwealth countries do have extremely small fraud squads. Of course, apart from the Metropolitan and City of London Company Fraud Department, there are a number of fraud squads in the other police forces. Some, such as the Manchester and Birmingham squads are both well staffed and efficient. Others, however, seem less well equipped. There is thus some obvious limitations to the degree to which the British police will be able to offer this form of assistance.

Were such a squad to come into existence, and one very much hopes it will, it would be concerned with actually investigating cases or providing active advice in the conduct of such. Therefore, the CFLO would still have an important role in facilitating international investigations. Furthermore, as has already been pointed out with regard to the ICPO-Interpol liaison scheme, the police will only be concerned with ordinary law crimes and not other disruptive economic and commercial activity which would also be of legitimate concern to Commonwealth governments. The CFLO could assist here, where the police could not. The CFLO would operate at an inter-governmental level, whereas it seems that the proposed international police squad would operate at a lower police level. Much of what has already been said in regard to the ICPO-Interpol liaison scheme on this point would apply here.

Furthermore, there is still the question of liaison between non-police Commonwealth agencies. This is a particularly important point. There has been instances of a lack of communication and understanding even just within the City of London. The degree of co-operation and co-ordination that exists between the police and self-regulatory authorities is in practice not as great as it should be. Some bodies

are anxious about the legal implications of handing over confidential information or of making statements which might prove to be defamatory.

Certainly, there would be great advantage in the CFLO developing a close working relationship with such an international police squad. This co-operation should work to the advantage of both services. It has already been pointed out, the CFLO should in any case develop a close relationship with the Commercial Crime Intelligence Bureau of the Metropolitan and City of London Company Fraud Department. This Bureau already plays an important role in Commonwealth enforcement and receives a great number of requests for information from certain Commonwealth jurisdictions.

Finally, the setting up of an international police squad such as that proposed would not effect the various intelligence, informational, reference, advisory and training functions that the CFLO would be expected to perform.

The Commonwealth Panel of Experts (CPE)

The Commonwealth Panel of Experts would be a standing committee of persons nominated by Commonwealth governments, and appointed by the Commonwealth Secretary-General. Members of the Panel would be persons with acknowledged expertise in one or more of the following areas:

- (i) law (International, Criminal, Commercial and/or Corporate),
- (ii) accountancy,
- (iii) commerce,
- (iv) any other discipline which has a direct bearing on the subject of international economic and commercial crime.

It is important that members of the Panel have practical experience, although this should not necessarily rule out academics. It is also assumed that nominees will be persons of standing in their respective profession, and should enjoy the full confidence of his government regarding personal integrity and ability.

It is important to appreciate that membership of the CPE would not of itself impose any great burdens on the time of any member. He would be entitled and expected to continue full time in his profession or business. However, as a member of the CPE, he might be asked to undertake a particular assignment within his competence for the Commonwealth. This might involve sitting on a special sub-committee of the CPE, or giving his view on a matter as an expert in that area, or possibly acting as an inspector. There would be no obligation on him to accept any such commission although it would be understood by his nomination that he had indicated a desire to serve the Commonwealth and place himself and his expertise at its disposal. Should a particular member accept a commission or assignment, where appropriate, fees and expenses might be paid.

The CFLO should be a member of the CPE and act as its Secretary. Secretarial assistance might

appropriately be provided by the Legal Division of the Commonwealth Secretariat.

It might not be necessary for the CPE to meet as a single committee, although it might be desirable for special sub-committees to be formed to carry out specific functions. Organisational considerations could be worked out in the light of developments.

(i) Provision of expert advice

Special sub-committees and, indeed, individual members of the CPE could be asked to prepare reports on matters of general interest to the Commonwealth or matters of a more specific and limited interest. Studies could be commissioned from members of the CPE with or without participation from persons and bodies outside the CPE. It may not be necessary to make payment to the persons concerned in most of these cases. For people of this standing the honour of being able to serve the Commonwealth would in my experience be enough. Of course, there will be situations where some kind of fee will have to be offered. The CFLO would be responsible for co-ordinating these studies and reports and should be able to commission a project without a specific request from a Commonwealth government. Of course, it is contemplated there would be close consultation with the Legal Division.

Members of the CPE would be available to provide any Commonwealth government or agency with expert advice or assistance. Of course, some Commonwealth countries have no need for outside assistance. However, others do, and it is the smaller developing countries which would probably have most to gain from this facility. At present a certain amount of expert advice and assistance is provided through the Commonwealth Fund for Technical Co-operation. However, attention should be given to the development of other sources of finance. Certain Commonwealth countries are prepared to fund technical assistance as part of their aid and development programme. The CFLO should be responsible for collecting and co-ordinating data as to possible sources of funds.

Whilst the calibre of experts and advisers provided under these various governmental schemes and the Commonwealth Fund for Technical Co-operation is usually very high, the CPE could help assess the ability and experience of a candidate before a recommendation is made to a requesting government or its agencies.

The CPE would also be available to give expert advice and guidance to the CFLO and the Legal Division of the Commonwealth Secretariat. This could be extremely valuable, as it is unlikely the CFLO will have expertise in all the matters he will be required to deal with. Possibly, a special sub-committee of the CPE could be established specifically to provide the CFLO with prompt advice and assistance.

(ii) Inspections and special investigations

As far as I have been able to ascertain every Commonwealth country has some kind of legislation which empowers the government to appoint or seek

the appointment of special investigators or inspectors to enquire, *inter alia*, into a matter of corporate fraud. Commonly these provisions are found in the Companies Act and or the Securities Act. Usually the power to appoint inspectors is vested in a minister or senior officer, such as the Commissioner of Securities or Registrar of Companies. Occasionally, the power of appointment is vested in the courts, but application is to be made by the appropriate minister or senior officer. These special investigators or inspectors are generally as a matter of practice, but in one or two instances as a matter of law, persons of some eminence in the legal and accountancy professions. In most countries there is no provision forbidding the appointment of a civil servant, but in practice this is rarely done. In addition to the power to appoint inspectors, most jurisdictions also have powers enabling the minister or some other appropriate regulatory authority to conduct an investigation into the records of a company without appointment of an inspector. Special inspections and investigations in most countries are confined to an examination into the affairs of a specific company or group of companies and or the beneficial ownership of certain securities. Certain Commonwealth countries have legislative provisions which enable the appointment of special investigators to inquire into a wider range of matters, but this is unusual and need not detain us here. Suffice it to say that most Commonwealth jurisdictions have provisions which enable them to appoint inspectors to investigate the affairs of one or more companies where it appears a commercial crime has been committed in relation to or by that company or companies or the controllers thereof. Under the relevant legislation special investigators and inspectors enjoy far-reaching powers to obtain evidence and demand testimony on oath. They are not fettered by procedural requirements and have a privileged position under the relevant law. In short they function more or less as an inquisition. In most cases they can apply to the minister or court for an order freezing assets and shares under investigation and a failure to comply with their demands for evidence and testimony generally constitute contempt. It is not necessary here to enter into an extended discussion of the relevant laws relating to inspection and the criticisms that have been made of the procedure in various states. What is important here, is that there is already a common provision in the laws of Commonwealth countries providing for this form of investigation into the affairs of companies, individuals connected with such and the beneficial ownership of securities.

In appropriate cases where two or more Commonwealth jurisdictions are involved with a common or closely related investigation into corporate fraud or abuse, it would be a simple expedient to simultaneously appoint the same individual or individuals as inspectors in both those countries. Appointments could be made from members of the CPE or after seeking their advice. Perhaps it would assist Law Ministers if I was to give an example:

Suppose a holding company in Singapore has subsidiaries in Malaysia, Sri Lanka and Hong Kong. It

has an associated group of companies in New Zealand. There is evidence that the holding company and its subsidiaries have engaged in a number of illegal activities involving commodity speculation, misappropriation of corporate assets, fraudulent issue of securities to the public and insider trading. These matters might well be of concern to the governments of Singapore, Malaysia, Sri Lanka, Hong Kong and New Zealand. Individual governments might well consider launching an investigation under their special statutory provisions leading to the appointment of inspectors. Given the likelihood that in each case material evidence will be outside their own jurisdiction it will be a brave government which goes ahead and appoints inspectors. Under this proposal after due consultation, possibly through the offices of the CFLO, all five countries might resolve to appoint the same individual from the CPE as inspector under their own national legislation.

Of course, in practice it is unlikely so many countries would be involved, and even today a certain amount of informal consultation would take place between the respective governments. However, at present each state's investigation is legally and practically insulated from that in a neighbouring territory. It is probable in the above example that no state would risk the cost of initiating an inspection which would almost certainly end in frustration. Even if two or more states did appoint inspectors there would be no co-ordination and legally each investigation would be insulated from the other. This kind of situation can have serious implications for international co-operation.

The present proposal is not as radical as it might at first appear. On several occasions two or more state governments in Australia have appointed an individual as an inspector to conduct an investigation into a matter of common interest. In one case, although initially separate, inspectors had been appointed by the Commonwealth and New South Wales Governments. During the conduct of the investigation it was found expedient to appoint each others inspector in addition to their own. Furthermore, it is understood that officers from the Australian Attorney-General's Department have been appointed inspectors to such territories as Norfolk Island. In Canada, there have also been several inter-provincial investigations. Of course, there have been instances in the Commonwealth where a senior lawyer from one country, usually the United Kingdom, has been appointed to conduct an investigation or inquiry in another jurisdiction. Perhaps I should enumerate some of the advantages I contemplate this proposal would have if adopted by Ministers:

(a) Facilitating international co-operation and minimising misunderstanding and mistrust between Commonwealth nations: There have been several cases in the recent past where a degree of dissatisfaction has been caused by the failure on the part of one Commonwealth country to live up to the expectations so far as international co-operation is concerned of another Commonwealth state. A good deal of this is due to a lack of appreciation on the part of

many Commonwealth governments as to the legal and practical fetters which restrict the quantity and quality of co-operation that another state may be able to give. As has been pointed out in a circular sent out by the General Secretary of ICPO-Interpol, this misunderstanding and feeling of frustration is in many cases the fault of the country concerned by failing to explain to other governments the legal and practical constraints within which it is forced to operate. There have been instances where a government has refused point blank to give any assistance in the investigation of an admitted crime without giving any explanation as to its reasons. This must be disruptive of international co-operation and leads to mistrust and suspicion. It is intolerable that the goodwill that exists within the Commonwealth should be undermined in this way. The CFLO would help ensure that such misunderstandings did not arise, or if they did, were quickly rectified. The appointment of a common inspector in the relevant countries would go a long way to ensuring that such misunderstandings did not occur.

(b) Evidence: The proposed appointment of common inspectors would minimise the problems that now exist with regard to the obtaining of evidence, both documentary and oral, in a foreign jurisdiction. A common inspector would have complete access to all relevant evidence within any jurisdiction to which his appointment applies. It is possible that difficulties could arise in practice as to which government is to be allowed to retain within its jurisdiction original documents which might be required for the purpose of tending evidence in court. This has been a problem in Australia in at least two cases where common inspectors were appointed. However, it would not be beyond the ability of the governments concerned to come to some agreement as to this, and the CFLO should seek as a matter of priority to develop a common understanding within the Commonwealth, as to this and such other practical problems that might arise. Evidence taken by a common inspector under oath would probably be admissible in evidence in another jurisdiction, of which he has also been appointed an inspector, under the equivalent provisions to section 3 of the British Evidence by Commission Act 1885, which has already been discussed.

That Commonwealth countries can work together in an investigation of a matter of common concern to them, and by agreement resolve the various practical issues, is demonstrated by the co-operation that Singapore, Malaysia, Australia and Hong Kong have recently given to each other in dealing with the collapse of a group of companies operating within their territories. The governments of Singapore, Malaysia and Australia have agreed that the Official Receiver in Hong Kong should take the lead in dealing with this matter, and to provide him with all necessary assistance. This is an admirable solution and should be a model for further co-operation. It should not matter in which Commonwealth jurisdiction an international fraudster is eventually brought to justice, provided justice is in fact seen to be done and his schemes are terminated. Indeed, the

cost of prosecution, and in particular extradition, can be a very great burden for a developing country. Perhaps, Commonwealth countries should be more prepared to allow another jurisdiction to deal with a common criminal and thereby save itself a great deal of expense. Of course, it is appreciated that a number of significant political issues are involved in such a determination, and it might well be the case that economic factors are of secondary importance.

(c) Impartiality: The appointment of a member of the CPE as an inspector would have the advantage that there could be no allegations of partiality or bias. This would apply to common appointments or where a single Commonwealth government decided to appoint an inspector from outside the country. The obvious impartiality of an inspector appointed from among the members of the CPE, or appointed on the recommendation of the CFLO, could be particularly attractive to the governments of certain smaller developing countries. The inspector's impartiality could also have a bearing on extradition as the evidence provided by such a person would in practice be far more difficult to impugn on the basis of bias—political or otherwise. Where a matter of great national or international significance is involved and controversy is likely to surround any investigation of the facts the appointment of an impartial inspector from the CPE could be very attractive. Ministers will be aware of instances within their own jurisdictions where it would have been expedient politically and otherwise to appoint a person of standing outside the country to conduct the investigation who is obviously impartial and not bound up with local affairs or interests.

(d) Expertise: The present proposal would provide Commonwealth countries with an almost inexhaustible supply of expert investigators. In many developing countries governments are faced with a very serious problem in finding a person of suitable stature and expertise to appoint as an inspector who is wholly independent of the matters it is likely he will be inquiring into. Apart from requiring ability and professional competence it is of critical significance that the inspector is wholly independent. In some Commonwealth countries the number of persons who would have the requisite degree of competence and training, and also have the confidence and respect of the government, is likely to be very small. In such societies persons with ability and professional skills are at a premium and will almost inevitably be deeply involved with the local business community. Therefore, it is extremely difficult to find a person of the required ability who is independent. This is not only a problem for the smaller developing countries. For example, the Government of Singapore had a great deal of difficulty in finding a suitable independent person to conduct the inspection into the affairs of *Haw Par*. Australian states and Canadian provinces have experienced similar problems. Therefore, in appropriate cases a Commonwealth government might wish to appoint a member of the CPE as an inspector under their relevant legislation. Of course, where several smaller developing countries are involved and wish to make a common

appointment then the problems associated with finding a suitable independent appointee from within their own territories would be so much greater, and resort to the CPE would be a most practical solution. The main advantage with appointing an inspector from the CPE is the "guarantee" that the appointing state or states have in his ability and integrity. Instances are not unknown where local or overseas practitioners of some standing have been appointed inspectors in Commonwealth countries usually at some considerable cost to the government or governments concerned, and the result of the exercise has been the preparation of a document that is of no practical value to anyone, let alone a prosecutor.

(e) Cost: Inspections and special investigations can be exceedingly expensive. Furthermore, as has been pointed out, not all inspections produce satisfactory results. It would be misguided in evaluating the cost to ignore the admittedly few inspections that have been conducted ineptly and inexpertly. The consequence of such is a serious waste of public money. The present proposal for the appointment of common inspectors where two or more countries wish to investigate a common matter would reduce the overall cost of investigation. Countries would be able to share the cost of inspection and hopefully the more developed countries would agree to bear a greater financial responsibility where they are involved in such an appointment. Duplication of expensive effort in each country would be eliminated and it would not be necessary to expend large sums of money on trying to recover evidence from another territory or interview witnesses out of jurisdiction. Furthermore, appropriate fee scales and expenses for inspectors who are members of the CPE could be determined by the CFLO in consultation with interested parties. This would have the advantage that less attractive jurisdictions would not have to pay over the odds to get the kind of expertise they require to conduct an investigation. There would be obvious advantages in the appointment of an inspector, whether it be a single or common appointment, from the members of the CPE. Obviously those members of the CPE who are practitioners of standing in the legal or accountancy profession would be the most likely appointees. However, much of what has been said above would equally apply to the appointment of a person who is not a member of the CPE, yet is from outside the relevant jurisdiction. If the inspection involves a matter of interest to more than one Commonwealth country it is likely the CFLO would be involved at an initial stage with co-ordination. If this is the case he should be able to advise the relevant government as to appointments.

I should point out that the appointment of inspectors is not a panacea. The procedure is essentially a fact finding exercise and is not necessarily well suited in all cases to producing evidence that would be useful in a criminal prosecution. However, having said this, in many instances of international commercial and economic crime it would be of major importance to have such a facility for finding out the relevant facts. Evidence such as would be required in a specific criminal prosecution can then be obtained

in a much more efficient and effective way. It should also be noted that once governments are in a position to know the relevant facts then corrective action can be taken and this may or may not involve criminal prosecution. As I have said elsewhere, in the context of economic and commercial crime it is not always productive to think only in terms of a criminal prosecution. What is important is putting international criminals out of business—putting them behind bars is an expensive secondary consideration.

(iii) Legislative drafting

The CPE could give valuable assistance to Commonwealth governments in regard both to the formulation of legislative policy and in drafting legislation. Perhaps it would be possible to arrive at an informal arrangement whereby relevant legislation would be submitted to the CFLO who could then pass it on to the relevant members of the CPE for comment. All countries would benefit by this facility and through it a common approach to certain problems might be developed.

(iv) Counsel and amicus curiae

It is not uncommon for smaller Commonwealth countries to instruct counsel from outside their local Bar in cases involving important or complex issues. This has occurred in a number of recent prosecutions involving commercial and economic crime. Although this might at first appear unduly lavish, in practice it is sometimes cheaper to instruct foreign counsel than brief an eminent member of the local Bar. For example, in Hong Kong and to a certain extent Singapore it is cheaper in most cases to brief a member of the English Bar than instruct local counsel of the equivalent calibre. Furthermore, it is possible that the accused might be represented by a foreign counsel and this is particularly likely where the accused is an expatriate. Unfortunately, a good many expatriates have been involved in economic and commercial crime. Where the defence is represented by a foreign counsel there is strong pressure on the prosecution to do no less. Whether this is always wise remains to be seen. Obviously, an eminent lawyer from another jurisdiction is able to bring a new perspective to the case and possibly a certain amount of expertise which might not be locally available. He is also seen to be obviously impartial, which can in certain prosecutions be particularly important. Commonwealth jurisdictions wishing to instruct foreign counsel might wish to consult the CFLO and resort to the CPE. As in the case of inspectors, the competence and integrity of members of the CPE would be beyond question. Although the amicus curiae is unusual in the Commonwealth, particularly in the present context, there might well be instances where such a brief would be of value. Again the CPE could provide invaluable assistance.

(v) Discussion and dissemination of relevant information

Sub-committees and working parties of the CPE, perhaps with additional members from outside the CPE, should be asked to examine and report on matters of common interest to Commonwealth

countries. In certain circumstances studies might be undertaken which are of relevance to specific countries only. Priority here should be given to the developing world. Where appropriate the study or report should be published by the Commonwealth Secretariat. The CFLO in consultation with the Director of the Legal Division should be responsible for co-ordinating the dissemination of such material.

There would be value in the establishment of permanent sub-committees to keep particular issues under continuous review. Academics could become involved in the work of these sub-committees, either as member of the Committee or consultants. There is a vast source of expertise and research capability within the academic world which could be usefully tapped for such a programme.

Reference has already been made to the desirability of facilitating training in regard to certain aspects of commercial and economic crime. The CFLO would have an important role here, both in the organisation and implementation of such schemes at the Commonwealth, regional and national level. The CPE should be able to give assistance to the CFLO in this regard, and members of the CPE could participate in these programmes. It might be possible to develop some kind of interface with the training schemes and courses organised by ICPO-Interpol.

As in the case of the CFLO it is probable that a number of other functions will develop in regard to the CPE once it has been set up and the scheme put into operation. Suffice it here to emphasise that it will provide an important source of relevant practical expertise for Commonwealth governments and law

enforcement agencies and could develop through its sub-committees into a useful forum for the discussion and dissemination of information and knowledge germane to this area of law enforcement.

Conclusions

In preparing this report and the various proposals contained in it I have tried to devise a scheme which would in practice facilitate international co-operation with regard to commercial and economic crime. The scheme is simplistic, flexible, and cheap. As already pointed out the scheme would operate without convention or any further act of the Commonwealth.

It is important that the Commonwealth does not allow its initiative in regard to commercial and economic crime to lapse. The time is certainly right for the development of closer international co-operation in this area, both inside and outside the Commonwealth. It would be a sad defeat if the Commonwealth missed this opportunity to cement in this one area the good will and mutual expectations that presently exist within it. It would equally be a significant weapon against crime if Commonwealth Law Ministers followed up their earlier initiatives.

Finally, I would like to acknowledge the assistance that I have received in the preparation of this report from a number of Commonwealth and non-Commonwealth governments and agencies and international organisations, first among such, being ICPO-Interpol.

APPENDIX I

INTERNATIONAL CRIMINAL POLICE ORGANISATION

— INTERPOL —

**37th General Assembly Session
Tehran, 1st to 8th October 1968**

RESOLUTION

IN VIEW of the importance which exchange control can have for the economy of a country and, in particular for the economy of a developing country; and

IN VIEW of the fact that serious violations of national exchange laws are occurring and that these violations often also involve other offences such as theft, counterfeiting or forgery, fraud, perjury, etc; and

CONSIDERING that material evidence for proving a violation of exchange control regulations is often located outside the territorial limits of the country whose laws have been violated;

The ICPO-INTERPOL General Assembly, meeting in Tehran from 1st to 8th October 1968 for its 37th session;

REQUESTS the General Secretariat, and the National Central Bureaus in affiliated countries, as permitted by their laws and as decided by the courts, to do everything to help countries which have been victims of offences of this kind and assist them in their efforts to discover and obtain possession of evidence for convicting offenders.

Adopted with 61 votes in favour,
2 against and
7 abstentions.

APPENDIX II
INTERNATIONAL CRIMINAL POLICE ORGANISATION
— INTERPOL —

41st General Assembly Session
Frankfurt, 19th to 26th September 1972

HAVING TAKEN NOTE of Report No. 18 submitted by the Indian Delegation;

BEARING IN MIND the fact that economic offences constitute a form of crime which seriously affects the economy of a large number of countries;

CONSIDERING that the profits made by those committing such offences may be used to finance illicit drug traffic or other forms of organised crime;

THE ICPO-Interpol General Assembly, meeting in Frankfurt from 19th to 26th September 1972 at its 41st session:

RECOMMENDS that NCBs in affiliated countries should assist, to the extent possible, those countries which are the victims of economic offences, with international ramifications, notably by supplying them with maximum information.

APPENDIX III
INTERNATIONAL FRAUDS AND COMMERCIAL CRIME
(INCLUDING ECONOMIC OFFENCES)

HAVING STUDIED Report No. 5, entitled "International frauds and commercial crime", submitted by the General Secretariat,

HAVING HEARD the report given by the Chairman of the Committee of Experts set up by the ICPO-INTERPOL General Assembly at its 44th session to study Report No. 5,

REITERATING that international frauds and commercial crime (including economic offences), having regard to their grave consequences and wide repercussions, are of great concern to all member countries as brought out in Resolution No AGN/44/RES/4 unanimously adopted by the General Assembly at its 44th session in Buenos Aires (1975),

CONVINCED that international police co-operation is an absolute necessity in the fight against this type of crime,

RECOGNISING that international police co-operation in this area takes place within a context of much wider international co-operation in which police action requires judicial and diplomatic co-operation, if satisfactory results are to be achieved,

NOTING that international and national legal instruments are often contradictory and inadequate to promote international co-operation regarding international frauds and commercial crime (including economic offences),

BELIEVING that international co-operation in this domain is essential and should be expanded and facilitated:

The ICPO-INTERPOL General Assembly, meeting in Accra, from 14th to 20th October 1976 at its 45th session:

ADOPTS the recommendations appended to this Resolution:

ASKS the ICPO-INTERPOL National Central Bureaus:

- a) to submit these recommendations to the appropriate authorities in their countries;
- b) to make every possible effort to implement those of the recommendations they are empowered to apply;
- c) to draw their Governments' attention to the criminal enforcement advantages which would result from:
 - i) the negotiation of improved and expanded channels of co-operation in the area of international frauds and commercial crime (including economic offences);
 - ii) the harmonisation of laws and regulations in this field.

Adopted with 87 votes in favour,
0 against
1 abstention.

RECOMMENDATIONS

- a) Inclusion of economic and appropriate fiscal offences in international treaties and agreements and also in national laws governing extradition and judicial co-operation on criminal matters, taking account of the problems raised by the difficulty of getting information about funds obtained by means of such offences committed in one country and secreted in another country.
- b) Study of the possible ways of improving international co-operation, particularly with regard to economic and appropriate fiscal offences, with a view to drawing up bilateral agreements which may also take into account the problems raised by banking secrecy.
- c) Study of national legislation to identify omissions and deficiencies with a view to giving sufficient legal authority to the agencies responsible for dealing with economic and fiscal offences; the police would then be able to deal with economic and fiscal offences with powers equal to those they have in connection with other criminal offences.
- d) Granting the competent authorities of requested countries the possibility of obtaining from banks and other financial institutions, under legal authority, evidence in their possession, insofar as the evidence is needed for the investigation of an offence committed in the requesting country.
- e) General acceptance of the principle that, where law enforcement with regard to economic offences is concerned, the ICPO-INTERPOL and its NCBs make available also to responsible law enforcement agencies other than the police the facilities offered by Interpol.
- f) Encouraging the Interpol NCBs, at their discretion, to co-operate with each other, even in cases where the offence giving rise to the request for assistance would not be punishable in the requested country had it been committed there, at least in cases where the assistance requested does not imply the use of compulsive measures.
- g) Highlighting, in requests for international assistance, the facts and details likely to induce the requested country to interpret the act committed in a way likely to facilitate international co-operation.
- h) Recognition of the need for expertise in the investigation of international frauds, commercial crime and economic offences; specialised agencies may be established for this purpose in countries in which it may be necessary.
- i) Recognition of the necessity to review on a continuing basis, the working of the bodies responsible for implementing the laws and regulations with respect to national economic and fiscal controls, and of the need to initiate appropriate measures to improve procedures and the efficiency of personnel, in order to make it more difficult to commit international frauds and commercial and economic offences.

APPENDIX IV

APPLICATION OF THE PRINCIPLES OF DOUBLE CRIMINALITY AND OF RECIPROCITY AND A REQUIRED MINIMUM STANDARD OF SERIOUSNESS OF OFFENCES IN CASES WHERE CO-OPERATION IS REQUESTED:

(Extracted from Report No. 5 submitted by the General Secretariat of ICPO-Interpol to the 45th General Assembly Session, Accra ICPO-Interpol, 1976, on *International Frauds and Commercial Crime*.)

(The following definitions were used in the questionnaire addressed to NCBs:

Double criminality:

According to this principle, assistance is only given in cases where the act committed is an offence punishable by the courts in the requesting country and would also be punishable by the courts in the requested country had it been committed there.

Reciprocity:

According to this principle, assistance is only given if the requesting country would grant the same or similar assistance if the positions were reversed.

Minimum standard of seriousness of an offence:

For example; legal distinction such as "crime" or "indictable offence" etc., a requirement that offences must be liable to a specified minimum sentence.)

The following analysis relates to Part One of Report No. 5 and therefore only to Foreign Exchange and Currency Offences (and closely related economic crimes). None of the responding NCBs made any distinction between the type of assistance requested, with the exception of Finland with regard to the minimum seriousness of the offence.

It should also be noted that this analysis was prepared in 1976 and is thus not entirely accurate today.

N.B. The table is in French alphabetical order.

COUNTRY	Application of the principle of double criminality (cf. definition under 7.2)	Application of the principle of reciprocity (cf. definition under 7.2)	Required minimum standard of seriousness of offences (cf. 7.2)
Netherlands Antilles	Yes	No	Yes (the offence should be of sufficient seriousness in Netherlands Antilles legislation).
Bahrain	Yes. However, see Bahrain's reply on police powers (7.3.1); the question on possibilities for co-operation (cf. 7.3.2) was considered "not applicable".	Yes, but it is not applied strictly (cf. preceding column).	No (cf. remark in first column).
Bermuda	No	Yes, the Bermuda authorities would expect total co-operation in return.	No
Burundi	No explicit reply, but apparently not.	No explicit reply, but apparently not.	No explicit reply, but apparently not.
Canada	No	No	No
Chile	No	Yes	No
Finland	Yes, but no account is taken of the value limits which are part of the offence committed.	Yes, but it is not applied very strictly (the requesting country does not have to give exactly the same service in return).	No. However, exercising of coercive powers relies upon certain minimum standards in Finnish legislation.
France	Yes	Yes, depending on the requesting country.	"There must be a criminal offence punishable under French legislation." (It is not clear whether this reply is merely a repetition of the principle of double criminality, or if it has a more far-reaching significance.)
Hong Kong	Yes, provided that the offence has been partly committed in Hong Kong and exists under Hong Kong law.	Yes	No
India	Yes	No	No
Ireland	The service which drafted the reply thinks not.	The service which drafted the reply thinks not.	The service which drafted the reply thinks not.
Japan	No	Yes (applied strictly)	—
Malaysia	No. However, see Malaysia's reply concerning police powers (7.3.1).	Yes (cf. remark in preceding column).	Yes ("on reciprocal basis and to the most extent possible as permitted by the legislation of our country"). This is taken to mean that there are minimum requirements of seriousness in relation to Malaysian legislation) cf. remark in column 1.
Nigeria	Yes	Yes	—
Pakistan	Usually, yes (according to the NCB's reply; another service which assisted in replying to the questionnaire stated that this principle is not applied).	There is no strict rule (according to the NCB; another service stated that, in practice, this principle is not applied).	Usually, yes.

COUNTRY	Application of the principle of double criminality (cf. definition under 7.2)	Application of the principle of reciprocity (cf. definition under 7.2)	Required minimum standard of seriousness of offences (cf. 7.2)
Philippines	"The principle is applied only when the offence is likewise punishable by any of our penal laws."	Yes, but it is not strictly applied.	No
Portugal	Yes	No reply given.	No
Singapore	No. However, see Singapore's reply on police powers (7.3.1); the question on the possibilities of co-operation (cf. 7.3.2) was considered "not applicable".	No	—
Sri Lanka	No	No	No
Sweden	Yes	No	No
Venezuela	Yes	Yes (the requesting country must be prepared to render a more or less similar service in exchange wherever possible).	Yes (the offence must be a "delito" punishable by a prison sentence).

APPENDIX V

PREPARED BY THE U.S. DRUG ENFORCEMENT ADMINISTRATION

EXCHANGE OF FINANCIAL INFORMATION WITH FOREIGN COUNTRIES

The strengthening of laws and conclusion of treaties relating to the financial aspects of the narcotics traffic are long term objectives of our international narcotics control policy.

Essentially, there are several ways whereby the U.S. and foreign countries can exchange financial information relating to criminal matters, specifically narcotics activities.

1. SINGLE CONVENTION OF NARCOTIC DRUGS, 1961

The convention provides a mechanism for the international exchange of financial information. Articles 35 and 36 enable foreign governments to exchange the records of financial operations connected with illegal narcotics trafficking activity.

2. MUTUAL ASSISTANCE TREATIES

These treaties provide for broad co-operation between two countries in criminal matters and with respect to narcotics affairs provide an increased emphasis on the exchange of information authorised by the single convention. The treaties provide for assistance in obtaining banking and other records, locating and taking testimony from witnesses and the service of judicial and administrative documents.

The Judicial Assistance Treaty with Switzerland, effective January 1977, is a first, and can, with some modification, serve as a model for similar treaties to be concluded with other nations. One of the primary features of this type of treaty is that co-operation is to be provided at the investigative stages of a case, as well as during the judicial phases. Treaties have been proposed with the Bahamas and Mexico.

The Swiss Treaty does not create any new crimes in either country. It is limited to providing to each country additional evidence and information for use in investigating or prosecuting the crimes established by domestic law of that country. It is intended to allow each of the countries to overcome some of the problems presented in obtaining information or evidence concerning activities taking place outside of that country in furtherance of crimes committed in that country.

The exorbitant profits derived from the narcotics traffic are just as important targets of control for D.E.A. as the drugs themselves. History is not without precedents of economic instability and political turmoil due in large part to financial manipulations by individuals who have attained their position

through illegal activities. To place the financial rewards of the narcotics traffic in their proper perspective, one might compare the gross retail sales on an annual basis with highly visible and legitimate commercial enterprises and as IBM with D.E.A.'s conservative estimate of the retail narcotics and dangerous drug sales upwards of 20 billion. Narcotics is clearly a multi-billion dollar industry which explains the persistence with which traffickers can accept great losses of money, men, and material and still continue to function. This tremendous flow of currency within and among trafficking organisations, however, cannot be concealed as easily as the drugs themselves. At some time the illicit profits should be revealed in some aspect of the narcotic investigation.

The U.S. Government's approach to this problem, is currently directed toward:

1. Obtaining financial evidence of narcotics trafficking for enhanced prosecution, i.e. continuing criminal enterprises statute with life in prison penalty (New York trafficker Nicky Barnes was convicted on this charge) and other prosecutorial venues.
2. Seizing trafficker capital and operating funds; and
3. Assessing and collecting income tax on their undeclared assets and income.

The need for a specific attack against traffickers' financial resources stems from the realisation that conviction and incarceration do not necessarily disrupt trafficking organisations. The acquisition of vast capital permits regrouping and the incarcerated high-level trafficker can direct his organisation's resources toward the accumulation of further illegal narcotics profits. All too often, incarceration does not occur; large sums are easily posted for bail, and the trafficker flees, shrugging off the resources thus lost as an anticipated and acceptable cost of doing business.

Experience has clearly shown that trafficking organisations are not limited by any geographical boundaries or restricted to financial transactions within a specific country. The financiers behind the narcotics traffic have long been a primary target category, albeit difficult to pursue because of the layers of insulation between this class of trafficker and the actual commodity trafficked. Many of their financial transactions, however, can be more easily pursued through: (1) The careful scrutiny of financial reporting and record keeping; (2) The exchange of financial information among law enforcement agencies and foreign countries; and (3) The application of financial information for enhanced prosecutions.

The congress has passed a number of key legislative items in the last few days, including several initiatives proposed by the drug enforcement administration:

A. Forfeiture of proceeds of illegal drug transactions. Currently, section 511 of the controlled Substances Act (21 U.S.C. 881), provides for the forfeiture of certain types of property if such property is used or intended for use in the manufacture or distribution of illegal drugs, or used or intended to be used to facilitate certain violations of the Act. Property covered under the current law includes illicit abusable drugs, raw materials and equipment used in manufacturing such drugs, property used to contain or conceal such drugs, vehicles used to facilitate the transportation of such drugs, and any records, books or formulas used in violation of federal illicit drug laws. The new legislation expands section 511 to provide for the forfeiture of the following additional types of property:

1. All monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for illicit controlled substances.
2. All proceeds traceable to such an exchange for illicit controlled substances, and,
3. All monies, negotiable instruments and securities used or intended to be used to facilitate any controlled substance law violations.

This forfeiture bill is a key investigative and prosecutorial weapon that can, I believe, be used with great impact in our efforts to curb drug distribution.

B. Administrative forfeiture. This legislation increases from \$2,500.00 to \$10,000.00 the value of property which may be handled by administrative forfeiture procedures and became effective October 4, 1978. This legislation, which has been requested for the last 15 years, will enable vehicles and vessels in particular, to be processed for forfeiture in an administrative fashion rather than through a lengthy court procedure for a value of up to \$10,000.00. This will save the government time and money.

The Drug Enforcement Administration has established close working relations with other federal agencies responsible for financial investigations and audits. A separate section has been established in D.E.A.'s office of intelligence devoted solely to money flow financial intelligence. We look forward to working closely with the international law enforcement community on narcotic related financial investigations.

APPENDIX VI

SUPPLEMENTARY REPORT ON THE INTERNATIONAL CRIMINAL POLICE ORGANISATION (ICPO-INTERPOL)

INTRODUCTION

The role of the International Criminal Police Organisation (ICPO-Interpol) is of critical importance in any meaningful discussion of international co-operation in law enforcement. In addition to preparing a report on international co-operation in regard to economic crime for submission to the Commonwealth Law Ministers, the Director of the Legal Division of the Commonwealth Secretariat asked me to examine generally the role of ICPO-Interpol in international law enforcement and make proposals for the achievement of a greater degree of co-operation between the two organisations. I would like to acknowledge the assistance and co-operation that the Interpol General Secretariat has given me during the preparation of my submissions and during my visits to their Headquarters in Paris.

A good deal of mystique surrounds ICPO-Interpol and there is a surprising lack of knowledge as to its role and capabilities. Therefore, I have included in this part of my report a brief discussion of the structure, organisation and work of ICPO-Interpol. However, I have given special attention to those facilities concerned with commercial and economic crime, and an analysis of Groups E and F of the Police Co-ordination Division forms a separate section of this report. Finally, I have made a series of proposals which should if adopted by Commonwealth Law Ministers contribute greatly to international co-operation in law enforcement.

THE ORGANISATION AND OPERATION OF ICPO-INTERPOL

A. The basic principals of ICPO-Interpol

1. The purpose of the organisation

According to the terms of Article 2 of the Organisation's Constitution, the aims of the ICPO-Interpol are the following:

- "a) To ensure and promote the widest possible mutual assistance between all criminal police authorities, within the limits of the laws existing in the different countries and in the spirit of the Declaration of Human Rights.
- b) To establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes."

The limits of its action are laid down in Article 3: "It is strictly forbidden for the Organisation to undertake any intervention or activities of a political, military, religious or racial character".

2. Members—applications for membership

According to Article 4:

"Any country may delegate as a Member to the Organisation any official police body whose functions come within the framework of activities of the Organisation. The request for membership shall be submitted to the Secretary General by the appropriate governmental authority. Membership shall be subject to approval by a two-thirds majority of the General Assembly".

3. Co-operation principles

International police co-operation within the ICPO-Interpol has always been governed by certain guiding principles:

Respect for national sovereignty

Co-operation is based on the actions of Interpol-affiliated police forces, operating in their own countries in accordance with their own national laws.

Enforcement of general criminal law (Article 3 of the Constitution)

The Organisation's field of activity is limited to crime prevention and law enforcement in connection with offences against general criminal law. This is the only level at which there can be agreement between all member countries.

Universality

Any member country may co-operate with any other and co-operation should not be impeded by political, geographical or linguistic factors.

Equality of all member countries

All the Organisation's member countries receive the same services, irrespective of their financial contributions to the Organisation.

Co-operation with other agencies

Co-operation is extended through the NCBs, to any government agency concerned with combating offences against general criminal law.

Flexibility of working methods

Although governed by principles designed to ensure regularity and continuity, working methods are flexible enough to take account of the wide variety of structures and situations in different countries.

A study of these principles make it clear that Interpol does not consist of teams of international detectives who travel around investigating cases in different countries. International police co-operation is in fact co-ordinated action on the part of the member countries' police forces, all of which may supply or request information or services on different occasions.

B. Structure and administration of ICPO-Interpol

The Organisation is administered and operated by:

- a) The General Assembly and the Executive Committee, two bodies which represent member countries and which hold regular meetings.
- b) The General Secretariat and the National Central Bureaus (NCBs), permanent institutions of a more technical nature which deal with day-to-day co-operation and implement the decisions of the two administrative bodies.

1. The General Assembly

Delegates from the governments of affiliated countries constitute of General Assembly which meets once a year. The General Assembly makes all the major decisions on the ICPO-Interpol's general policy, finances, working methods, instruments of co-operation, programme of activities, and elected officers—in fact on all the important aspects of the Organisation's life. When decisions—in the form of resolutions or recommendations—are voted on by the Assembly, each member country has one vote.

2. The Executive Committee

The Executive Committee is composed of thirteen members—elected by the General Assembly from among the member countries' delegates—as follows:

- a) The President of the Organisation, who is elected for a four-year term of office. He chairs General Assembly sessions and Executive Committee meetings, makes sure that the Organisation's activities are conducted in accordance with the provisions of the Constitution, and maintains direct contact with the Secretary General.
- b) Three Vice-Presidents and nine ordinary members, all of whom are elected for three-year terms of office.

The seats on the Executive Committee are proportionally assigned to the various continents.

The Executive Committee meets twice a year to ensure that the General Assembly decisions are implemented, to prepare the agenda for the General Assembly sessions, to approve the programme of activities and draft budget before they are submitted to the Assembly, and to supervise the Secretary General's management of the Organisation.

3. The General Secretariat

The General Secretariat is the permanent administrative and technical institution through which the Organisation operates. It is responsible for implementing the decisions taken by the General Assembly and the Executive Committee, it supervises and co-ordinates the fight against international crime, it centralises information on crime and criminals and it keeps up contacts with national and international authorities. The Head of the Secretariat is the Secretary General who is elected by the General Assembly for a five-year term of office. He is responsible for running the Organisation's permanent departments and, in the performance of his duties

and the management of the Organisation's budget, he is answerable to the General Assembly and the Executive Committee. The General Secretariat has Three Divisions, each responsible for specific tasks:

Division I: General administration

This Division is in charge of:

- a) Finance, accounts and preparation of the budget;
- b) Management of staff, equipment and general services (telecommunications, translations, printing, etc.);
- c) Preparation of General Assembly sessions and other meetings organised by the ICPO-Interpol.

Division II: Police co-ordination

This division is responsible for centralising information and for handling criminal cases requiring international police co-operation. It collects and processes information on crime and criminals. It drafts international notices and reports on criminal cases. In addition to the criminal records groups, this Division also comprises three Sub-divisions, each of which deals with one major sector of international crime:

- a) General crime (offences against persons and property);
- b) Economic and financial crime (fraud and currency counterfeiting);
- c) Illicit drug traffic.

Division III: Research and studies

This Division is responsible for:

- a) Collecting and classifying general documentation, on criminology, crime prevention, criminal law and procedure, techniques used by the police, etc.;
- b) Collecting and publishing international crime statistics;
- c) Preparing international symposia;
- d) Writing reports and working papers;
- e) Publication of *The International Criminal Police Review*.

4. The National Central Bureaux (NCBs)

Experience has shown that the main stumbling-blocks for international co-operation were:

- a) the different structures of various police forces which often make it difficult for outsiders to know which specific service is empowered to deal with a case or to supply information;
- b) language difficulties;
- c) the different legal systems prevailing throughout the world.

These problems have been solved by the decision that the government of each member country should appoint one permanent police department to serve as the country's ICPO-Interpol National Central Bureau and the focal point for international co-operation. In most cases, the department chosen is a high-level one, with wide powers, likely to be able to reply to any request from the General Secretariat or from another NCB and capable of launching large-

scale police action by the various other national services if this should be necessary. The NCBs are staffed by their own countries' police or government officers who always operate within the limits set by their own laws.

The NCBs' activities can be summarised as follows:

- a) From sources in their own countries they collect documentation and information relating to international law enforcement, and pass this on to the other NCBs and the General Secretariat;
- b) They ensure that police operations and actions requested by another country's NCB are carried out in their own countries;
- c) They receive requests for information, checks, etc., from other NCBs and answer them;
- d) They send NCBs in other countries requests for co-operation from abroad made by their courts or police services;
- e) Finally, the Heads of NCBs attend the ICPO-Interpol General Assembly sessions in their countries' delegations and subsequently ensure that the Assembly's resolutions are implemented.

The NCBs communicate directly among themselves. However, they are expected to send copies of their correspondence to the General Secretariat so that the latter can perform its task of centralising information and co-ordinating co-operation.

5. ICPO-Interpol's finances

The ICPO-Interpol obtains its resources from the annual contributions paid by the governments of its member countries. These annual contributions are expressed in "budget units" and countries can pay from 1 to 80 units annually. When a country joins the ICPO-Interpol, it indicates the number of budget units it wishes to pay every year by asking to be placed in one of the twelve groups of countries on the scale of contributions. The Secretary General is responsible for implementing the budget every year and is answerable to the Executive Committee and the General Assembly. The accounts are checked by two Auditors elected by the General Assembly and an accountant.

C. Instruments of international co-operation

1. The Interpol telecommunications network

To combat international crime effectively, a reliable, discreet and rapid communications system is essential. In addition to normal communications channels, the ICPO-Interpol has various facilities of its own:

The radio network: About sixty National Central Bureaus have set up Interpol radio stations and the totally independent network allows them to contact each other and the General Secretariat. The national stations in a particular geographical area are grouped round a regional station, and the regional stations have direct links with the central station in France.

The system allows a message to be broadcast to several NCBs Interpol radio stations, to all the stations in a particular zone or to all the NCBs on the network. A priority scale has been drawn up to determine the order in which messages are transmitted.

Phototelegraphy (Transmission of pictures using the normal telephone network): The Central Station and several NCBs now have the equipment needed to exchange photographs and fingerprints by this method.

2. Criminal records

All the information received concerning offences and offenders is analysed and filed by the two criminal records groups in the Police Co-ordination Division at the General Secretariat. This makes it possible to identify offenders and discover links between different cases.

The General Records Group which works on the basis of:

- a) An index file of names, classified both phonetically and alphabetically; the cards bear details of the real identities and the aliases of people connected with international police investigations.
- b) Records of offences with index files containing details of offences, places where they were committed, and descriptions of particularly interesting *modus operandi*.
- c) Records of missing documents and objects.

The Special Records Group which frequently identifies people from their fingerprints. Its records include:

- a) A ten-print file of the prints of all ten fingers of various international offenders. The Galton-Henry classification system is used.
- b) A single-print file of isolated, single fingerprints, classified by the Muller system.
- c) A photograph file.

3. International Notices

The purpose of international notices is to circulate items of information, through the NCBs, to the police forces of the member countries. The notices are prepared by the groups within the Police Co-ordination Division at the Secretariat and often contain information collected from several countries.

There are several types of international notices:

Individual notices

These notices give particulars of the identity of the person concerned, as well as physical descriptions, photographs and fingerprints.

Since the reasons for publishing individual notices vary, four different types are used:

- a) "Wanted" notices about people whose arrest is requested with a view to extradition. These notices contain full particulars of the arrest warrant and details of the offence committed.
- b) "Enquiry" notices published to collect additional information about the person concerned. These

notices can be used in an attempt to locate a missing person.

- c) "Warning" notices, giving information about offenders who operate in several countries.
- d) Notices about unidentified bodies. These notices contain a description of the body that has been found, together with fingerprints if available.

Stolen property notices

These notices give descriptions of valuable items—most often works of art—which have been stolen or discovered in suspicious circumstances. When possible, the notices also include photographs.

Modus operandi sheets

Details of new or particularly interesting modus operandi used by offenders are circulated to the NCBs by means of these special M.O. sheets.

Circular letters, summary reports, technical brochures, etc.

The General Secretariat also circulates a large amount of information in circular letters and brochures which give a summary of the facts available at a specific moment, about various types of crime and certain categories of offenders (pickpockets, drug traffickers, swindlers, etc.).

4. Training of police personnel

The ICPO-Interpol helps in several ways with the training of police officers in its member countries. Several symposia have been held to enable Heads of Police Training Colleges to discuss training problems and methods.

Moreover, the General Secretariat organises training courses for police officers who specialise in combating currency counterfeiting and for National Central Bureau Officers.

5. Regional and continental meetings—international symposia

The ICPO-Interpol organises two types of meetings to give police officers from member countries opportunities to exchange views and information on different subjects and benefit from each others' experience:

- a) Continental Meetings and Regional Conferences which allow the Heads of NCBs and the heads of various police departments in a particular part of the world to discuss problems affecting their region.
- b) International Seminars and Symposia, which provide a platform for discussion of specific subjects by police officers and experts. Since 1959, four symposia have been held on police training, four on the scientific aspects of police work, three each on drugs, road traffic offences, and the use of EDP by the police, two on organised crime, and one on each of the following: crime prevention, international fraud, fingerprinting, hostage-taking and organised violence.

6. Technical co-operation

Every year, the Executive Committee awards a number of travel or maintenance grants to enable

representatives from member countries to attend international symposia or to spend a few weeks—individually or in groups—training at the General Secretariat. The purpose of such training is to help police officers become familiar with the procedures used in international police co-operation or acquire more information about a specific subject.

D. Research and studies

Co-operation between the police forces of INTERPOL-affiliated countries is not limited to an exchange of information about actual cases. Co-operation also has a role to play in the compiling of general information on all the phenomena and all the disciplines connected with the structure and duties of police forces, in the preparation of papers and reports to circulate such information and in the organisation of international symposia for thorough examination of subjects or problems which are of permanent or topical interest to the police forces of member countries. However, it must be remembered that all this information can only be collected with the assistance of the NCBs while, in return, the documentation stored at the Secretariat and the reports on studies and symposia benefit all member police forces. The department responsible for this important aspect of co-operation at the General Secretariat is Division III, the Research and Studies Division.

E. External relations

1. Relations with other International Institutions

United Nations

The ICPO-Interpol has always collaborated with the United Nations in certain specific areas and this collaboration, which has grown steadily closer and more wide-ranging, was formally recognised in 1971 when a "Special Co-operation Agreement" was signed between the two organisations.

Co-operation is closest with three United Nations Institutions, the Commission on Narcotic Drugs, the Division of Human Rights and the Social Defence Section.

United Nations specialised agencies

Of these specialised agencies, the ICPO-Interpol co-operates particularly closely with:

- a) the International Civil Aviation Organisation (ICAO), on air security and on preventing and combating unlawful interference with international civil aviation;
- b) the International Telecommunication Union (ITU), in connection with the Interpol telecommunications network;
- c) UNESCO, regarding the protection of national artistic and cultural property and the prevention of thefts of works of art.

Other intergovernmental organisations

The Customs Co-operation Council: The ICPO-Interpol keeps in close contact with the Customs Co-

operation Council in order to make sure that police and customs officers work together in spheres where such co-operation is essential, an example being illicit drug traffic.

The Council of Europe: An agreement on co-operation was signed by the two organisations in 1959 and the ICPO-Interpol works with the Council of Europe in studying crime problems and in preparing European conventions designed to combat crime. In fact, many of the European conventions concluded under the auspices of the Council of Europe contain provisions stating that the signatories may use Interpol channels to forward judicial documents.

2. Headquarters Agreement with the French Government

In 1972, a Headquarters Agreement was signed between the French Government and the ICPO-Interpol. The Agreement was approved by the French Parliament in the form of a law dated 23rd December 1972. The terms of the Agreement recognise the ICPO-Interpol as an international organisation located on French territory, and define the Organisation's legal status in France.

ICPO—INTERPOL AND COMMERCIAL AND ECONOMIC CRIME

It must be emphasised that ICPO-Interpol is primarily concerned with international commercial and economic crime. At the Third International Symposium on Fraud the General Secretariat defined this requisite international element in commercial and economic crimes as,

- i) When the actions involved in the commission of the offence(s) or in keeping the illegal advantage thus acquired have been perpetrated or have had effects in more than one country; or
- ii) When the modus operandi hinges on differences in the statutory provisions or regulations of various countries, or on loop-holes in international agreements.

Of course, there is no constitutional limitation on the ability of the General Secretariat to concern itself with criminal activity which lacks an international element.

Reference has already been made to the growing concern within ICPO-Interpol about the dimension and implications of international economic crime. Since the 1967 General Assembly meeting in Koto, Japan, almost every General Assembly has passed a resolution having some bearing on international co-operation in this field of criminal activity. The General Secretariat have prepared an extensive report on International Frauds and Commercial Crime, which was submitted to the General Assembly in Accra in 1976. Three International Symposia on Commercial Crime have been organised by the General Secretariat. The Research and Study

Division have produced a number of circulars and notices relevant to economic crime and is currently engaged on a project to ascertain the degree of co-operation that countries can give in regard to the provision of information without resorting to legal procedures. In the very near future a major programme will be initiated, modelled on that developed with regard to illicit drug trafficking, for economic crimes.

The Police Co-ordination Division (Division II) of the General Secretariat is divided into three Sub-Divisions and a number of specialist groups. Sub-Division II is concerned with commercial and economic crime. It is divided into Group E and Group F. Group E is concerned with economic and financial crime other than that involving counterfeiting of currency or valuable documents. Counterfeiting is the concern of Group F. Although it is likely the strength of Group E will be increased soon, as of the 1st April 1979 it had a staff of 7, and Group F a staff of 8. Inevitably there is a degree of overlap with other specialist groups and in particular Division III the Research and Study Division is responsible for the preparation of a number of notices and documents which have a bearing on the work of Groups E and F.

Police Co-ordination Division, Group E

Group E is concerned with crimes that involve trickery and fraud and do not involve violence to the person or property. Traditionally the General Secretariat has been reluctant to initiate requests for information from its NCBs let alone take the initiative in advising an NCB to commence a particular line of investigation. The most obvious reason for this disinclination to take a more offensive stance is the tremendous burden of work. However, it is likely that the traditional view of ICPO-Interpol as little more than a sophisticated police letterbox owes a great deal to its French domination. There is a certain amount of frustration in the General Secretariat and it is probable that the traditional approach will be significantly modified in the near future.

As with the other specialist groups in Division II Group E is concerned with the processing of all information relating to economic crime that is relayed to the General Secretariat in Paris from the NCBs. The processing of this information is almost entirely manual and is both time consuming and laborious. There is a feeling within the General Secretariat that a good deal of this work could be just as well handled by clerks under the supervision of police officers. Group E, like the Police Co-ordination Division as a whole, lacks secretarial and clerical support. The police officers in Group E have to type out the draft notices themselves. There is dissatisfaction in the General Secretariat about the time it takes to prepare a notice and then disseminate the information to the various NCBs. All circulars and wanted notices relating to commercial and economic crimes other than counterfeiting are prepared and sent out by Group E. After drafting and typing them out, they are checked by a superior, then sent for translation into the four official languages. The document is

then sent to the printers. This process can easily take more than a month. The circulars and notices are then generally sent out to the NCBs in the ordinary mail. To save postage costs there have been instances where documents have been accumulated for a couple of weeks and sent out in one parcel. Where speed of communication is essential resort can be made to the radio network, which does not extend to many Commonwealth countries, telex, or ordinary telegram. Given the speed at which many international frauds can be perpetrated the present machinery for communication is inadequate.

The officers in Group E are on the whole ordinary police officers without any special training in fraud work. There are, however, one or two notable exceptions. Given the traditional role of the General Secretariat there has been little opportunity for officers to show their initiative and specialist expertise. As has already been pointed out, this is likely to change in the near future.

The quality and quantity of information that is relayed to the General Secretariat from the NCBs varies enormously. Very much depends upon the resources and competence of the officers in the various NCBs and the kind of relationship they enjoy with their own national police force. Some NCBs are extremely well equipped and constitute a respected and integral part of the national police force. Others, unfortunately, exist only in name. Very few NCBs have officers trained to deal with commercial crime. NCBs do communicate directly missing out the General Secretariat. When this occurs they are expected to inform the General Secretariat and supply it with copies of the relevant correspondence. This is not always done. Indeed, some consider it is rarely done. Given this and the reluctance of some NCBs to provide the General Secretariat with adequate information the officers in Group E at best only see half the picture. It is because the information coming into the General Secretariat has been so deficient in detail that so few *modus operandi* notices have been compiled and sent out. It would seem that the poor quality of information that is relayed to the General Secretariat is not solely due to ignorance and apathy. There is an understandable desire in certain police forces not to reveal all their information at once. Whilst the General Secretariat is widely respected, once sensitive information has been passed to the Secretariat there is no absolute guarantee that it will not fall into the hands of a police officer who uses it otherwise than the first police force would have wished. There can be little doubt that some police officers are selfish and will only bother about co-operation where it is directly in their own immediate interests to do so. On the other hand it is not unknown for a country to request assistance with regard to one offence when in actual fact it contemplates bringing charges under a number of offences. However, these other offences might not constitute crimes in other countries and therefore international co-operation might be less than enthusiastic. In some instances these other offences might even be considered political. Many cases of commercial and economic crime could have political conota-

tions. For example, the General Secretariat have received several requests for assistance from Iran in regard to alleged exchange control offences by supporters of the Shah. Corruption cases also create problems for the General Secretariat. For ICPO-Interpol to allow itself to be used in cases having a political character would be against its constitution and could easily destroy the international goodwill the organisation has developed because of its manifest impartiality.

Having regard to the sort of information that Group E receives it is very difficult for the officers to develop any viable programme for criminal intelligence. The information is usually far too piecemeal and invariably stale. There is little opportunity to build up profiles or any overall picture of a particular operation or series of related offences. I am told by one officer that it is unlikely that even the I.O.S. affair would have shown up as a co-ordinated operation involving possible criminal offences. The snippets of information coming into the General Secretariat would not have been put together to present a clear overall picture disclosing the scale of the operation. This is obviously a matter for concern and underlines the importance that the Secretariat attaches to the development of a viable intelligence programme. Another problem in this respect is the reluctance of the General Secretariat and NCBs to disseminate information on persons suspected of criminal offences, without there being a firm commitment from a state to seek extradition. It is also extremely difficult for the General Secretariat to disseminate information relating to known associates of such persons. In the area of commercial and economic crime this kind of information is particularly important. Of course, this is not to ignore the question of civil liberties and the right of an individual to protect his name.

Over the last five or so years the General Secretariat has built up a great deal of experience with regard to the co-ordination of intelligence on illicit narcotics trafficking. The General Secretariat intends to utilise this experience with regard to economic crime. The main features of the narcotics programme are the centralisation of intelligence with specific attention to limited targeting and the creation of a scheme of liaison officers. Sub-Division III of the Police Co-ordination Division is responsible for drug enforcement. This Sub-Division has almost the same number of officers as do the other two Sub-Divisions. Furthermore, the drugs problem is a relatively well defined regulatory problem. There is also a great deal of international co-operation and widespread agreement that the illicit activity must be stamped out. In my view these factors make it questionable whether the experience with regard to narcotics can be employed with regard to economic crime with any where near the same level of expectation in the success of the programme. Whilst Group E will be strengthened it will certainly not be given the same kind of resources and international support that Sub-Division III has received. Nevertheless, the development of an intelligence capability with regard to economic and commercial crime in ICPO-Interpol is

to be welcomed and deserves the support of the Commonwealth. It remains to be seen whether resources will enable the narcotics liaison officer scheme to be implemented with regard to commercial crime even at a far more modest level. However, it is understood that funds will be made available for officers in Sub-Division II to travel. Apart from making their expertise available they would also be available for co-ordination and intelligence work. It is probable that these developments will enable Group E to play a far more active role in relation to international fraud. Targeting should become a real possibility and greater attention will be given to the dissemination of information on *modus operandi*. It is contemplated that a closer working relationship will develop with certain officers in the Research and Study Division and those officers concerned with the narcotics intelligence programme in Sub-Division III. It is important to appreciate, however, that there is no question of Group E becoming an operational unit.

At present Group E is predominantly concerned with European cases. An analysis prepared of Group E cases in 1978 showed that out of 1,740 files some 1,247 concerned Europe and 180 the United States of America. Most of the European cases concerned France and Germany. Therefore, Group E would seem to be rarely concerned with a case involving a Commonwealth jurisdiction. The preponderance of cases that have come to the Group from Africa, Australasia and the Far East concern cheque frauds and the use of forged documents. Thus, at present ICPO-Interpol provides a minimal degree of assistance to Commonwealth countries in this area of criminal activity. This is not the fault of ICPO-Interpol, but rather underlines the lack of awareness in many Commonwealth jurisdictions and the inability of national police forces to detect the abuse which everyone would seem to agree exists. The General Secretariat can only deal with a case if it is brought to its attention by the appropriate NCB. There is a widespread feeling that law enforcement in this area of criminal activity has not received an adequate amount of attention in many developing countries and has not therefore become a matter of priority. It should also be pointed out that another reason for the lack of ICPO-Interpol involvement in the Commonwealth with regard to this kind of crime relates to the role that many governments regard ICPO-Interpol as playing. It would seem that there is a widespread feeling in the Commonwealth that ICPO-Interpol should only be used for serious crimes. Whereas the greater proportion of the 1740 files referred to Group E concern relatively minor cases. Certain European countries are inclined to relay virtually every commercial crime case to ICPO-Interpol that has any international element. This has obvious drawbacks. Firstly, it results in Group E being greatly overburdened. Secondly, on any cost benefit analysis it is wasteful of scarce and exceedingly expensive police resources. The ICPO-Interpol procedures are basically the same whether \$10 or \$1,000,000 is involved. It is important that Group E be allowed to concern itself primarily with those international economic crimes of importance judged

so because of the amount involved, the persons involved, the circumstances of the case or some other special factor.

Police Co-ordination Division, Group F

In recent years it is probably in the areas of narcotics abuse and counterfeiting that ICPO-Interpol has achieved most success. Counterfeiting of currency is by definition an international crime. The International Convention for the Suppression of Currency Counterfeiting (Geneva 20th April 1929) contains a number of articles designed to foster international co-operation in dealing with this type of criminal activity. In particular articles 12 to 15 provide that countries should have a central office concerned with the co-ordination of enforcement with regard to counterfeiting, and article 15 provides for the setting up of an international central office for co-ordination at the international level. ICPO-Interpol has taken this function and the various NCBs either operate as the relevant central office or work closely with the regulatory authority responsible for enforcement in this area. About 70 countries and 33 territories have ratified or acceded to the International Convention. It should be noted that a number of countries have not yet done so and this is to be very much regretted.

Within ICPO-Interpol Group F of Sub-Division II of the Police Co-ordination Division is responsible for all counterfeiting cases referred to the General Secretariat. The prompt communication of accurate and complete information to the General Secretariat by the relevant NCB is vital, and to facilitate accuracy and clarity Group F have devised a set of special notification forms. These forms contain a good deal of technical information which if accompanied by a specimen of the counterfeit currency allows the General Secretariat to categorise the forgery according to a known classification. In practice it is of great importance that the relevant NCB sends with the notification a specimen of the counterfeit currency seized. In some cases there are legal objections to this, although article 11 of the International Convention does place an obligation on the country where the counterfeit currency was seized to surrender it to the country of purported issue. The main legal problem here is where only one note or coin is seized and it is thus required as evidence for the purpose of prosecution.

All information relayed to Group F is carefully processed and whenever appropriate warning notices are sent out. Speed is of great importance. Once a forger has disposed of the plates and uttered the counterfeit currency detection and arrest are exceedingly difficult.

One of the most successful aspects of Group F's work has been the dissemination of technical information and *modus operandi* notices. At the Paris Headquarters Group F has established a laboratory and has a comprehensive library of forgeries. The group is also responsible for the publication of the authoritative *Counterfeits and Forgeries*. Until a couple of years ago international conferences and training courses were regularly organised by the

General Secretariat on counterfeiting. These were extremely valuable. However, they were expensive and time consuming, and have therefore been curtailed. The U.S. Secret Service does run courses which are open to law enforcement officers from other countries. However, these courses concentrate almost exclusively on the counterfeiting of U.S. currency, and might therefore be of little value to Commonwealth police forces.

It is vital that the NCBs if they are not in fact the appropriate central office for counterfeiting enforcement co-operate fully with the relevant authority—which will usually be within the central bank. One of the weaknesses of the dependence of the ICPO-Interpol system on the NCBs is the difficulty that this creates in communicating speedily with a non-police specialist enforcement agency outside the relevant, national police force. It is interesting in this regard that in the U.S.A. where specialist agencies abound the NCB has officers and agents from the Drug Enforcement Administration, Customs Service, Secret Service and Bureau of Alcohol, Tobacco and Firearms and the FBI on its staff. One of the problems in the Commonwealth, possibly with the exception of Canada, Australia and Singapore is the insularity of the police. This tends to isolate the NCB and therefore ICPO-Interpol from the specialist law enforcement agencies. The degree of co-operation that Group F receives from the NCBs and banking authorities varies a great deal. The problems that do occasionally arise are invariably the result of inadvertence rather than deliberate non-co-operation. For example, the Bank of England evidently forgot to send the General Secretariat a specimen of the new £1 bank note when it was first issued.

Having regard to the vast amount of technical information that Group F is called upon to process and cross reference the development of electronic data processing for this function is imperative. At present Group F only has 8 officers and its operation is almost wholly manual. In 1975 some 3,516 cases of counterfeit currency being uttered were reported to the General Secretariat, in 1976 this figure rose to 4,434 and from 1978 to 1979 the figure is in excess of 7,000. On the other hand the number of countries whose currency is counterfeited remains static at around 30. It is not without interest that the Head of Group F considers that the regulatory authorities only see the tip of the iceberg. He also considers that the cases reported to ICPO-Interpol are probably only a relatively small proportion of the cases which come to the attention of the various regulatory authorities. Some Commonwealth countries have had their currency counterfeited and virtually all have had counterfeit currency uttered within their territory.

Surprisingly little research has taken place as to whether there is or may be any connection between known instances of counterfeiting and other forms of organised criminal activity. Certainly, counterfeiting has involved organised crime, particularly in regard to the uttering of the forged currency. There is little indication that counterfeit currency has been used to fund the illicit trafficking of arms or narcotics. A

senior officer in the Commercial Crimes Bureau of the Royal Hong Kong Police Force who has considered this question thinks it would be unlikely as the profits that are made from such trafficking are so large as to render counterfeiting unnecessary. A similar view is taken in Singapore and Malaysia. However, there have been instances in Thailand where the use of counterfeit currency and false negotiable instruments have related to the funding of narcotics trading. The Drug Enforcement Administration in the U.S.A. has also uncovered at least two similar instances. More recently agents of the National Bureau of Investigation in the Philippines uncovered a syndicate trafficking drugs, arms and counterfeit currency. This syndicate operated in at least two Commonwealth countries and some of the counterfeit currency purported to be the currency of a Commonwealth country. It is true that in the developing world counterfeit currency, even if it is known to be counterfeit, still has value on the black market.

There is possibly a need for a more integrated approach to this area of law enforcement and there is a feeling among some of the officers in the General Secretariat that Groups E and F should be merged. This could be particularly advantageous once the intelligence and liaison programme has been initiated in regard to commercial and economic crime.

Research and Study Division (Division III)

Until very recently there was a fourth Division responsible for the publication of The International Criminal Police Review. This has now become the sole responsibility of Division III. The Research and Study Division has been involved with a number of projects relating to commercial crime. It has prepared several general studies and is currently preparing information sheets describing what kind of information may be made immediately available by a country at the request of another for the purpose of an investigation. This particular project arose out of a proposal contained in a report submitted to the 1978 General Assembly by Canada. Similar projects have been conducted in the past. The Research and Study Division obtains all its information for these studies from the various NCBs. Not all NCBs are able or prepared to give to these projects the kind of attention and expertise they require if they are to be of any practical value. For example, the project to which I have just referred involving the ascertainment of what information can be promptly made available in each country has met with a certain amount of apathy. Although the questionnaires were sent out over a year ago only 30 countries have responded at the time of preparing this report. It should also be appreciated that this Division is very small, overworked and lacks resources.

THE COMMONWEALTH AND ICPO-INTERPOL

There is little doubt that all Commonwealth countries would accept and endorse the Constitutional aims of ICPO-Interpol as stated in article 2 of its Consti-

tution. Almost all the Commonwealth countries are members of ICPO-Interpol and the 4 or 5 smaller countries which have not sought formal membership in practice have co-operated with the Organisation. Of course, this is not to say that all Commonwealth countries equally value or support ICPO-Interpol.

Having regard to these factors and the desire of Commonwealth Law Ministers to further international co-operation in law enforcement I would propose that the Commonwealth, and in particular its main agency the Commonwealth Secretariat, should develop a closer relationship with ICPO-Interpol. In furtherance of this proposal I have made a number of specific proposals for consideration.

1. Co-operation between the Commonwealth Secretariat and the General Secretariat of ICPO-Interpol

It is strongly urged that Law Ministers and their respective government give their support to the development of a closer relationship between the Legal Division of the Commonwealth Secretariat and the General Secretariat of ICPO-Interpol. ICPO-Interpol has entered into a number of formal and informal agreements for co-operation with other official and unofficial international organisations. Article 41 of ICPO-Interpol's Constitution provides,

"Whenever it deems fit, having regard to the aims and objects provided in the Constitution, the Organisation shall establish relations and collaborate with other inter-governmental or non-governmental international organisations.

The general provisions concerning the relations with international intergovernmental and non-governmental organisations will only be valid after their approval by the General Assembly.

The Organisation may, in connection with all matters in which it is competent, take the advice of non-governmental international, governmental national or non-governmental national organisations.

With the approval of the General Assembly, the Executive Committee or, in urgent cases, the Secretary General may accept duties within the scope of its activities and competence either from other international institutions or organisations or in application of international conventions".

During the preparation of my submissions I visited ICPO-Interpol Headquarters in Paris on two occasions. On both occasions I was warmly welcomed by the General Secretariat. Having raised the matter of closer co-operation and collaboration with senior members of the General Secretariat and a member of the Executive Committee I have confidence that ICPO-Interpol would be most receptive to suggestions for achieving this. I have also raised the matter with senior police officers in the NCBs in a number of Commonwealth countries. Again it was clear that a closer relationship with the Commonwealth Secretariat would be most welcome.

ICPO-Interpol is essentially an organisation for policemen run entirely by policemen. Until recently the structure and operation of the organisation has been largely dominated by French police officers. With, I think only two exceptions, the Secretary

General has been a senior French police officer, and by article 43 of the General Regulations of ICPO-Interpol, it is expressly provided "he should preferably be a national of the country in which the seat of the Organisation is situated". The Headquarters are provided by the French Government and are situated in Paris. As of the 1st April 1979 out of a total General Secretariat staff of 190 some 142 were French citizens. Of course, many of these are technical and ancillary staff and thus it is not unlikely the bulk will be locally recruited. However, there are still some 40 French police officers in the General Secretariat, whereas there are only 26 police officers from the rest of the world. (See Appendix I). Whilst other governments, both of developed and developing countries, are reluctant to assume a proper degree of financial responsibility for the operation of ICPO-Interpol the strong French presence is both necessary and praiseworthy.

Contributions to the ICPO-Interpol general budget come on the whole from domestic national police budgets. National police forces are invariably short of resources and therefore it is not surprising that there is a tendency to give international co-operation a relatively low priority. Senior police officers are under great political and public pressure to get results at home. Unfortunately, governments have been slow to realise the implications of this. Whilst there is much appreciation throughout the world of the important role ICPO-Interpol performs this is rarely supported by the provision of funds. A good many member states are reluctant to assume a fair level of contribution and there are one or two countries who have not paid their dues or are significantly in arrears. This attitude is often apparent when one examines the position of the NCBs. Many lack resources and manpower. Some, even within the Commonwealth, exist only in name.

Among the 66 or so police officers detached or seconded to the General Secretariat there are few of very high rank. Most are commissioned officers in the middle to lower ranks. This observation is in no way intended to deprecate the work and competence of the organisation. Personally I would like to see many more junior officers seconded to the General Secretariat who would benefit at an early stage in their police career from the exposure to international co-operation. However, it does mean that the General Secretariat and therefore ICPO-Interpol lacks muscle both at intergovernmental level and perhaps more importantly at the national level in the respective domestic police forces. The operational heads of the various NCBs are generally not particularly highly placed in their national police forces either. Even within a national police force it would be exceptional, particularly within the Commonwealth, for even a senior policeman to have general access to the Law Minister and Law Officers. Invariably there is a serious communications problem at this national level. On the other hand, a diplomatic agency such as the Commonwealth Secretariat will have such access. Quite rightly, there is a fear within the ICPO-Interpol General Secretariat that its activities should not become susceptible to governmental pressures or

influence. However, there is a growing realisation of the advantages of communication directly to Law Ministers and Law Officers. This is particularly so with regard to matters of policy whether they relate to policing or legislation. The NCBs and even the national delegations that attend the General Assemblies do not provide this sort of access. There is little doubt that the Legal Division of the Commonwealth Secretariat, and hopefully a Commonwealth Fraud Liaison Officer, could provide a most useful service here. In appropriate circumstances the Legal Division should be prepared to raise matters on behalf of or in association with ICPO-Interpol either at Commonwealth level or with the government of a particular Commonwealth country.

ICPO-Interpol would clearly benefit from such a facility and so would, in my view, the Commonwealth. Apart from assisting international police co-operation, it would mean that Commonwealth countries had the impartial and possibly expert assistance of the Commonwealth Secretariat on matters upon which at present they would either be totally ignorant or at best entirely on their own. Of course, I appreciate that there is a danger that some will consider the Commonwealth Secretariat should not interfere in such matters. However, it is important to emphasise that the Commonwealth Secretariat would at most be acting in an advisory capacity and would only be making its good offices available to ICPO-Interpol to assist in the efficacy of communication.

If a closer relationship is to develop between the Legal Division of the Commonwealth Secretariat and the General Secretariat of ICPO-Interpol, it is desirable that a particular officer in the Legal Division should be responsible for dealing with ICPO-Interpol matters. It is important that a relationship of mutual trust and confidence be developed as quickly as possible. Obviously the appointment of a Commonwealth Fraud Liaison Officer would provide a ready and practical solution. Apart from liaising with Sub-Division II of the Police Co-ordination Division of the General Secretariat, the Commonwealth Fraud Liaison Officer should have general responsibility for developing closer co-operation with ICPO-Interpol in regard to all ordinary law crimes.

I would also propose that the Commonwealth Secretariat should explore as soon as possible with ICPO-Interpol the possibility of being given observer status at all ICPO-Interpol proceedings. The Secretary General of ICPO-Interpol has already allowed the Legal Division of the Commonwealth Secretariat to send an observer to ICPO-Interpol's Third International Symposium on Fraud in December 1979. I was honoured to serve in this capacity and I feel that it was of mutual benefit that the Commonwealth had such a presence. I was allowed to address the symposium on several occasions and was therefore able to put over points concerning the Commonwealth and Commonwealth countries that would otherwise have not been raised. In particular, it was possible to place on the record several issues of interest to several developing

countries in the Commonwealth. I feel that ICPO-Interpol would be receptive to such a proposal and I understand that the present Secretary General is keen to enter into general discussions with representatives of the Commonwealth Secretariat on this and other matters of possible common interest. The advantages that observer status would have for the Commonwealth are manifold. In particular, it would provide an effective channel for communication. Views could be exchanged at Commonwealth level on such matters as the surrender of fugitive offenders and pre-extradition procedure. Perhaps even more importantly it would allow certain Commonwealth countries a voice in such proceedings. Not all Commonwealth countries have the financial and manpower resources to be represented at all the proceedings of ICPO-Interpol in which they may have an interest. Indeed, certain Commonwealth countries are rarely if ever properly represented. A Commonwealth observer could make their presence felt and where appropriate speak on their behalf. This would be of benefit to both the country concerned and also ICPO-Interpol. The Commonwealth observer could also report back to the Law Ministers, and where relevant the appropriate Commonwealth government, on the proceedings. Whilst ICPO-Interpol generally sends out to delegates and NCBs a record of such proceedings this is not always an effective or efficient form of communication particularly on sensitive issues. The General Secretariat of ICPO-Interpol is grateful for this opportunity to raise certain issues through my submission before the Commonwealth Law Ministers meeting. It is sad that there is not a regular exchange of views and a greater awareness of each others problems.

2. Staffing

Apart from persons employed directly by the General Secretariat to carry out secretarial, technical and translational services all staff members are serving police officers either detached or seconded from national police forces. Virtually all these officers and those in the NCBs are paid solely by their respective police forces. Although the General Secretariat is able to provide limited financial assistance to officers detached or seconded to ICPO-Interpol through the payment of certain expenses the main financial burden is firmly on the country sending the officer to Paris. It is perhaps not surprising that the developing world and thus the Commonwealth is poorly represented in the General Secretariat. Even the more developed countries, possibly with the exception of France, Germany and the United Kingdom make only a marginally better showing. Indeed, there is a widespread feeling that the developed world does not pull its weight.

Most developing countries find it difficult to spare officers of the calibre that would justify them being temporarily seconded to ICPO-Interpol. Even if they can find a suitable officer there is still the expense. A number of officers that are sent to Paris from developing countries with relatively low standards of living find their ordinary police salaries totally inadequate and in some cases the General Secretariat has been forced to supplement their income. The cost

of living in Paris is significantly higher than that in most if not all Commonwealth countries.

At present there are very few Commonwealth citizens among the staff of the General Secretariat. I would estimate that out of a total staff of 190 there are 6 police officers and 9 ancillary employees from Commonwealth countries. This should be a cause for concern by Law Ministers. When one considers the inadequate state of many NCBs in Commonwealth countries the position is all the more disturbing. In my experience several major Commonwealth countries do not in practice operate permanent NCBs and supervisory responsibility is vested in a senior police officer who is burdened with a great deal of other administrative tasks. Some countries, even within the Commonwealth, are not prepared to increase their commitment to ICPO-Interpol because they consider that they get little return in practice. Obviously, this is something of a chicken and egg situation. The more a country invests in the organisation the more it can expect to get out of it. The situation in several federalist countries is also unsatisfactory because contact with ICPO-Interpol is invariably confined solely to the federal police. This is a problem faced by at least five Commonwealth jurisdictions.

There is at least one instance where a relatively senior police officer was seconded to ICPO-Interpol from the police force of a developing non-Commonwealth country. A good deal of resentment was caused by his being given basically a clerical assignment. This case, and there are probably others, has provided critics with the argument that officers from the less developed countries are assigned non-priority work affording them little opportunity to broaden their perspective. It is true that certain officers attached to the Administrative Division (Division I) and the Research and Study Division (Division III) feel frustrated about not being involved in traditional police work. Personally, I would have thought that a good many of these activities could have been equally well performed by non-police officers. However, it has to be admitted that some officers sent to Paris have proved to be unsatisfactory and not suited to a more demanding role in the organisation. The most likely cause for a lot of the frustration is a lack of appreciation as to what ICPO-Interpol does. Perhaps 90% of valuable intelligence work involves mundane clerical procedure.

In the past special arrangements have been entered into for the funding of specific ICPO-Interpol services. In most instances the General Secretariat has been able to assume full financial responsibility for the service at a later date. In regard to the communications network and the narcotics liaison scheme this has been achieved through differential budget contributions. In other words these member countries who wish to have the additional service must pay for it. In one of two cases the General Secretariat has taken the sole financial responsibility for a particular officer. Of course, the General Secretariat is responsible for all the ancillary, technical and secretarial staff.

ICPO-Interpol's operations would benefit by the provision of additional police officers of the right calibre from the developing world. There should be, at least, an equal benefit for the developing country concerned. The exposure of a career police officer to the work that the General Secretariat is presently engaged in and will in the near future be doing will give a depth and breadth of experience which would otherwise be unobtainable in the context of a national police force. The experience of living in a capital city such as Paris and being continuously subjected to international co-operation at this level again cannot but be advantageous. An astute officer seconded to the General Secretariat for two or three years should be able to develop enough practical experience of the ICPO-Interpol operation and in particular contacts for future reference to be of very real benefit to his country. Obviously, there is a real danger that an officer exposed to this kind of experience might on rejoining his police force be promoted to an administrative level where in practice the knowledge and understanding that he has acquired will be of only indirect utility. It is important that officers who are going to be involved directly in police work for a good many years should be the primary candidate for secondment to ICPO-Interpol. There is also the danger that policemen of this calibre are unlikely to remain in their respective police forces for any length of time. There are numerous examples of where officers from both developed and developing countries have been exposed to specialist training and in the result the officer leaves the public service and enters into some kind of private practice. Again great care has to be taken in the selection of the right officer. Resources are scarce and should not be wasted. Of course, this is not to underestimate the desirability of creating a greater degree of awareness and mutual understanding outside police forces. However, there are far cheaper and less wasteful methods for professional training and developing the desired relationship between police officers and the various professions. There is a constant danger that police training schemes if they attain the requisite degree of effectiveness will serve as little more than a stepping stone for ambitious officers into private practice. Frankly, I can see little opportunity for officers that have spent a few years at the ICPO-Interpol General Secretariat to make such a transition. As I have already pointed out ICPO-Interpol has been able to bear a major part of the cost of one or two officers from the developing world—particularly with regard to the narcotics liaison officer scheme. However, this is a burden that the General Secretariat is reluctant to assume given its limited financial resources. Special funding arrangements have been worked out in the past for a limited increase in staff for a specific service or programme. Given the growing concern with developing viable international co-operation with regard to certain categories of economic crime perhaps a similar approach might be feasible.

The following suggestions with regard to staffing at ICPO-Interpol are made:

(i) The attention of Commonwealth Law Ministers and their respective governments should be drawn to

the problems facing ICPO-Interpol in recruiting even a token representation from the developing world. The failure of most developed countries to adequately support the General Secretariat with regard to staffing should also be noted. The critical role played by NCBs in the ICPO-Interpol scheme should be emphasised. Commonwealth Law Ministers might like to consider what action would be appropriate in their own countries to increase the effectiveness of this facility. An effective and properly supported NCB is the first step in developing international co-operation through ICPO-Interpol.

(ii) Commonwealth Law Ministers might like to consider whether assistance could or should be given to police officers from Commonwealth countries to fund short periods of secondment at ICPO-Interpol. With respect such funding should be at Commonwealth level. It may be that the Education and Training Programme of the Commonwealth Fund for Technical Co-operation could be made available for this purpose.

3. Communications

The communications network that ICPO-Interpol has developed is of crucial significance to its operation. It is perhaps surprising that given the widespread concern for developing international co-operation in law enforcement that so many countries have not sought to take full advantage of the services that ICPO-Interpol offers. A disturbing number of countries, for a variety of reasons, have not joined the International Radio Network. This network covers NCBs that have access to one or more of the following; morse-code radio network, teletype network and protected communications. A report published by ICPO-Interpol in February 1977 contains a list of these NCBs. The Commonwealth makes a very poor showing. The only Commonwealth countries on the International Radio Network are Canada, Cyprus, India, Jamaica, Kenya, Malta, Mauritius, Nauru, Tanzania, Zambia and the United Kingdom. I understand that the situation has not changed significantly since the publication of this report. It would also seem that only the United Kingdom can receive and transmit phototelegraphic communications which are of major relevance in many areas of economic crime such as counterfeiting and forgery. A number of Commonwealth countries are on the telex network, but by no means all are. In the result, the only means of communication from ICPO-Interpol to the NCBs of a greater part of the Commonwealth is via the ordinary postal and telegram facilities. Personally, I find it surprising that a number of the more developed Commonwealth countries have not sought to develop radio communications with ICPO-Interpol. This is all the more surprising when one considers that several relatively small developing countries have done so. The cost of setting up a radio station is in the region of £15,000. Of course, added to this figure is the cost of servicing and operating it. This can be rather expensive and the Philippines gave up being the Regional Radio Centre for the Far East to Japan largely because of the cost of manning the station continuously. However, it is

only the few Regional Radio Centres that require continuous staffing and therefore this should not be an over important factor for most Commonwealth countries. Certainly, the vast majority of senior police officers to which I have spoken in those Commonwealth countries which are not on the International Radio Network would see great advantage in having this facility.

Membership of the International Radio Network is not only a benefit to the country in whose territory that station is situated, but is also a benefit to other countries in the same region and also to the whole network. Of course, it has to be appreciated that NCBs can and in fact invariably do communicate with each other through the network without passing through Paris. Furthermore, within each region something like 70% of communications are primarily of regional interest only. Perhaps certain governments in calculating the cost-benefit of membership of the International Radio Network have not given adequate weight to their international and regional responsibilities. Law enforcement on the international level requires consideration of other than wholly domestic priorities. In the context of economic crime and many forms of "white collar" crime involving international elements the ability of the various law enforcement agencies to communicate with each other quickly, effectively and in confidence is of great importance. Even more so when they are called upon to deal with international terrorism and narcotics and arms trafficking. The implications of an inadequate international communications system should be obvious. Commonwealth Law Ministers might like to consider whether some kind of financial and technical assistance could or should be provided at Commonwealth level for improving international police communications. This is particularly a matter of concern in the developing world. I should add that ICPO-Interpol considers that improvement in the scheme of communication is imperative, particularly with regard to Australasia and the Caribbean. Both regions should be of interest to the Commonwealth.

4. Fraud and Commercial Crime

ICPO-Interpol's concern with regard to commercial and financial crime has already been mentioned and the role that ICPO-Interpol plays in this area has been discussed above. There would appear to be close agreement between the Commonwealth and ICPO-Interpol as to the desirability of increasing the degree and efficiency of international co-operation in regard to economic crime. Elsewhere I have strongly urged Commonwealth Law Ministers to endorse the proposal that the Commonwealth and in particular the Legal Division of the Commonwealth Secretariat should assist and facilitate any programme which would result in ICPO-Interpol being more effective in regard to this category of criminal activity.

The planned development of an intelligence and possibly a liaison facility within Sub-division II of the Police Co-ordination Division of the General Secretariat should receive the support of the Commonwealth. I would like to raise the question as to whether it would be possible for the Commonwealth

to assist in the funding of this programme, either directly, or indirectly through giving assistance to Commonwealth countries who are willing to second specialist officers to assist in this project. This proposal is obviously linked to those I have already made with regard to staffing in the General Secretariat. I appreciate some may consider my proposal unrealistic because of the possible expense involved and the inevitable shortage of funds at Commonwealth level. However, I must emphasise that I am only suggesting secondment of a very limited number of individuals. Until recently the narcotics intelligence programme has been co-ordinated by a single officer. Even one additional officer would be welcomed by the General Secretariat. The narcotics liaison scheme when it was first introduced was funded largely by the U.S. Government. The General Secretariat is now able to provide this service through differential budgets. Essentially this means that those countries wanting the service are required to pay an additional contribution. Perhaps this approach could be followed with regard to commercial crime. If Commonwealth Law Ministers and their respective governments are prepared to accept my proposal with regard to the appointment of a Commonwealth Fraud Liaison Officer this officer could, and in my view should, develop a close working relationship with the relevant officers in the General Secretariat responsible for this programme.

5. Advisers and Experts

Article 36 of the ICPO-Interpol Constitution provides for the appointment by the Executive Committee of Advisers. It would seem that the Executive Committee only has power under the Constitution to consult scientific "advisers" although article 36 does state that "they (i.e. the Advisers) shall be chosen among those who have a world-wide reputation in some field of interest to the Organisation". In practice the General Secretariat are prepared to consult experts on a wide range of matters whether they have been formally appointed "advisers" by the Executive Committee or not.

This is an area where the Commonwealth and in particular the Legal Division of the Commonwealth Secretariat could develop a closer and mutually advantageous relationship with the General Secretariat of the ICPO-Interpol. If Commonwealth Law Ministers are prepared to support my proposal for the appointment of a Commonwealth Fraud Liaison Officer and the setting up of a Panel of Experts this proposal for greater co-operation and exchange of expertise would be all the more meaningful. The Commonwealth Fund for Technical Co-operation can be used to support certain activities of Divisions of the Commonwealth Secretariat and perhaps thought might be given to utilising this facility more in the context of the present discussion. Perhaps an example would best illustrate my point. Suppose a small Caribbean country wishes to develop an off shore banking and financial facility. The country has little technical expertise in the preparation and drafting of the relevant laws and none in the administration and policing of such operations. Assuming that the government of that country is

determined to keep out suspect enterprises and individuals and develop an off shore financial facility founded on respect and confidence it would be both in the interests of the Commonwealth and certainly ICPO-Interpol to provide the requisite degree of technical expertise and advice. Of course, this would be of limited duration and could be seen as merely providing technical assistance and advice until such time as appropriate local expertise had been developed. At present the Commonwealth Fund for Technical Co-operation would be prepared to consider an application to the Fund by that government for expert assistance in the drafting and preparation of legislation and also probably for training. Therefore, what I propose here is not essentially different from that which can and does already occur. However, I would see advantage in a more ordered and co-ordinated approach to such projects. As in other areas a Commonwealth Fraud Liaison Officer could provide a most useful service.

6. Studies

The Research and Studies Division of the ICPO-Interpol General Secretariat is responsible for carrying out general studies and surveys. Reference has already been made in this report to the work that Division III has done in regard to economic and commercial crime. It would be fair to say that this Division does not have a police function. Policemen seem to have an inbuilt suspicion of civilians, and there is a traditional reluctance to entrust to non-policemen anything which might bear upon police work no matter how remote and indirect that connection might be. There are signs that this attitude is changing and if police forces are going to stand any chance of combating the modern criminal, in particular the computer criminal, this attitude must change quickly. It is open to question how far the General Secretariat would go in being willing to work closely with non-policemen. There has been a reluctance in the past to deal with non-police organisations, although this has now almost disappeared. As I have stated several times the General Secretariat would welcome a closer relationship with the Commonwealth Secretariat. The only senior staff member at the General Secretariat who is not a policeman works in the Research and Study Division. He is a lawyer from Sri Lanka, whose official designation is legal attache. In fact, his work is largely concerned with the processing of information coming into the Research and Study Division and the preparation of information circulars and reports. Officers attached to the General Secretariat do not consider that Division III is a popular Division to work in. There is a good deal of frustration among the police officers that do work in it. They consider that their work is of no direct relevance to police activities. With respect, I would have thought that the work of Division III could with equal efficiency have been placed in the hands of civilians. Indeed, civilians would probably make a better job of some of the projects—there are few policemen who would feel at home preparing reports on the basis of information sent in by NCBs on such matters as what public information can be easily provided on the request of another country. At

present the Research and Study Division lacks the necessary resources and competence to play a more meaningful role.

There is an area of activity where the work of the Research and Study Division and the Legal Division of the Commonwealth Secretariat overlap. With respect, it would be beneficial to both organisations if there was a greater amount of exchange of information. Perhaps a degree of co-ordination could also be achieved. Apart from this, it is difficult to see what role the Commonwealth could play in directly improving the efficiency and capability of this Division. The use of outside consultants could be one solution for the General Secretariat. The Commonwealth's Panel of Experts, if such is set up, might be of relevance here. Furthermore, perhaps ICPO-Interpol could be encouraged to look more to academic and research institutions for assistance in the preparation of some of their material. Perhaps Commonwealth institutions could be encouraged to be more forthcoming in this regard. Hopefully, the appointment of a Commonwealth Fraud Liaison Officer within the Commonwealth Secretariat would provide a suitable channel for communication and contact with this Division.

7. Seminars and Conferences

ICPO-Interpol does hold seminars and conferences which might well be of interest to Commonwealth Law Ministers and their law officers. Perhaps the Commonwealth Secretariat's Legal Division could play a greater role in informing Commonwealth Law Ministers of these events. Possibly The Commonwealth Law Bulletin could be of assistance here. Certainly, the Commonwealth Secretariat should be willing to make available any expertise it or any of its consultants has to ICPO-Interpol. Of course, proposals have already been made with regard to the question of the Commonwealth sending observers to proceedings of the ICPO-Interpol institutions.

8. Training

A number of the activities organised by ICPO-Interpol do have educational and training value for police officers. The Commonwealth should encourage these and co-operate as fully as it is able. Reference has been made to the courses that ICPO-Interpol used to run with regard to currency counterfeiting. Within the context of the Commonwealth perhaps ICPO-Interpol with the support of the Commonwealth Secretariat could be persuaded to conduct similar courses. Commercial crime would lend itself well to this kind of treatment and immedi-

ate attention should be given to computer assisted and related crimes. Hopefully the proposed Commonwealth Fraud Liaison Officer and Panel of Experts could participate and assist in such programmes. Police training is a matter of great importance and is something that the Commonwealth Secretariat should promote and give assistance to.

CONCLUSIONS

No attempt has been made to present an exhaustive set of proposals aimed at developing a closer degree of co-operation between two such organisations as the Commonwealth and ICPO-Interpol. Rather, the proposals I made in this part of the report should be seen as signposts pointing to avenues for co-operation which might or might not be explored. It has to be appreciated that the Commonwealth and ICPO-Interpol are two entirely different types of organisations. Their function, structure, purpose and membership are not the same as each other, although in certain respects there is a similarity or overlap. For example, most Commonwealth countries are members of ICPO-Interpol, although the membership of ICPO-Interpol is twice as big as that of the Commonwealth. Although both organisations are so different, there is a common purpose with regard to international co-operation in law enforcement. This much was made clear at the Commonwealth Law Ministers' Meeting in Canada in 1977. Given this common purpose, with respect, it is my view that the two organisations can and should work together albeit in a strictly limited area. Each has much to offer the other and co-operation can only operate to their mutual benefit. The time is right for developing this relationship and it would be a great pity and a significant indictment of international co-operation if this opportunity was allowed to slip away. Once a closer working relationship has been created then other matters for consideration and mutual assistance will no doubt arise. These can be considered as and when they arise and there would be little point in entering into a detailed discussion as to all the implications of circumstances which might never develop. The creation of a climate for co-operation between the two organisations, perhaps with the setting up within the Commonwealth Secretariat of a facility for advancing this co-operation such as the proposed Commonwealth Liaison Officer, is the most important point, and the one to which I sincerely hope Law Ministers and their respective governments will direct their attention.

REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum by the Commonwealth Secretariat and a Discussion Paper prepared by
Professor I. A. Shearer of the University of New South Wales

It will be recalled that the draft of a Discussion Paper by Professor I. A. Shearer on the Scheme Relating to the Rendition of Fugitive Offenders within the Commonwealth was circulated to Law Ministers in November last year. The Governments of Sri Lanka and Jamaica have since forwarded their preliminary views on his paper, and these are contained in LMM(80)6 and LMM(80)7. It did not prove possible in the time available to arrange for Professor Shearer's paper to be revised and so his paper is attached substantially in its original form. If any further comments are received, these will be collated and distributed.

2. It might be helpful briefly to trace the history, and discuss the status of the Scheme which was finalised at the 1966 (London) Meeting of Commonwealth Law Ministers. The draft Scheme which was placed before that Meeting stemmed from a memorandum circulated by the British Government in May 1964, which recognised that the United Kingdom Fugitive Offenders Act, 1881 was outmoded in view of the constitutional changes which had occurred since it was enacted. Although as the Empire developed into a Commonwealth of independent nations, practice under the Act had assumed more the character of a particular law of extradition, it did not include some of the rules normally adopted in general international law to safeguard the interests of a fugitive.

3. The response to the 1964 memorandum indicated agreement that further discussions would be helpful. At these discussions, which took place in Canberra in the following year, it was decided that a draft Scheme should be produced for consideration at a future meeting.

4. The understanding that acceptance of the Scheme would signify no more than that Commonwealth Governments had agreed upon general principles which they would follow in the course of drafting their own legislation, was reflected in the relevant paragraphs of the Communiqué issued at the conclusion of the London Meeting, which were in the following terms—

“The Meeting considered that Commonwealth extradition arrangements should be based upon reciprocity and substantially uniform legislation incorporating certain features commonly found in extradition treaties, e.g. a list of returnable offences, the establishment of a *prima facie* case before return, and restrictions on the return of

political offenders. The Meeting accordingly formulated a Scheme setting out principles which could form the basis of legislation within the Commonwealth and recommended that effect should be given to the Scheme in each Commonwealth country.”

5. Since 1966, many Commonwealth jurisdictions have enacted legislation implementing the Scheme. Several have taken into account certain international Conventions when drawing up, or amending, their relevant statutes. Others, while not adopting the Scheme as such by their legislation, have in force statutes which partially comply with it.

6. It was felt that some 14 years after the introduction of the Scheme, it would be useful to review its provisions to see whether subsequent experience and developments suggested that it should be modified. The Commonwealth Secretariat therefore commissioned Professor Shearer to prepare a Discussion Paper for this purpose.

7. In his Paper, Professor Shearer concludes that the 1966 Scheme has worked well as a basis for co-operation, and suggests that any defects and ambiguities that it may be considered to have can be remedied by collective action after appropriate discussions.

8. It is not expected that Law Ministers will wish to submit the Scheme, and Professor Shearer's tentative suggestions to detailed scrutiny at Barbados. Apart from the crowded agenda, necessarily, few delegations will include in their number, representatives of the other departments of Government which are responsible for, or concerned with, extradition matters. However it is hoped that Ministers will wish to give their general views on the issues raised and their possible resolution, and take the opportunity of highlighting any other problems that may have arisen in their jurisdictions in this area of the law.

9. While being conscious of international principles and obligations, Law Ministers might feel that in their commitment to enhancing mutual assistance in the field of the administration of justice, it is a desirable aim that Commonwealth extradition arrangements should continue, as far as is practicable, to be based substantially on uniform legislation. If it is the wish of Ministers, the Secretary-General would arrange the preparation of firm proposals for consideration by Governments in the light of the discussions at Barbados.

REVIEW OF THE SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS WITHIN THE COMMONWEALTH

By Professor I. A. Shearer, University of New South Wales, Australia.

Summary

It has been thought desirable to attempt a broad review of the operation of the Commonwealth extradition scheme, adopted in 1966, in the light of subsequent experience.

The review embraces such questions as the extent of the adoption of the Scheme by Member countries and of its application; the description of returnable offences and the application of the double criminality rule; the principle of speciality; the return by a requested country of its own citizens; terrorism and the concept of political offences; other circumstances precluding return including the death penalty; the costs of extradition and reciprocal assistance; appeals; return by consent; and legal aid.

The object of this review is to stimulate thought among Member countries on the working of the Scheme and to encourage an exchange of views. The review has been kept brief, and citations largely avoided, so as to indicate as broadly as possible the areas where improvements might be thought desirable. To the same end specific proposals for amendment of the Scheme have not been formulated at this stage except hypothetically, in some instances, in order to clarify the point raised for consideration. It should also be emphasized that the questions raised in the review are not necessarily exhaustive of the matters deserving consideration.

In the light of comments which it is hoped that this review will provoke, a more detailed exposition of the questions covered in the review, and of other suggested questions, may be prepared.

Introductory

1. Thirteen years have now passed since the *Scheme relating to the Rendition of Fugitive Offenders Within the Commonwealth* was adopted by the Commonwealth Law Ministers at London in May 1966 [Appendix]. Although the Scheme has been kept under periodic review at subsequent meetings of Law Ministers, it has been thought that a more general review of the Scheme in the light of international and Commonwealth developments in this area of law would be useful.

Adoption of the 1966 Scheme

2. It will be recalled that the 1966 Scheme was never intended as a multilateral convention but was designed as an agreed basis upon which member States of the Commonwealth would enact legislation so as to provide for a uniform scheme of extradition within the Commonwealth.

3. The main advantages of such a uniform legislative pattern were seen as—

a) the replacement of the increasingly archaic Fugitive Offenders Act, 1881 (Imp.), which no

longer corresponded with the realities of contemporary Commonwealth relations, by a modern extradition system in harmony with general international principles;

b) the promotion of a uniform scheme to link Commonwealth countries which follow common legal traditions and share a similar perception of legal values;

c) the avoidance of complex and time-consuming bilateral treaty negotiations between Commonwealth countries in the field of extradition.

4. *The Survey of Extradition and Fugitive Offenders Legislation in Commonwealth Jurisdictions* prepared by the Secretariat for presentation at the Law Ministers' Meeting at Winnipeg in August 1977 showed that the following 28 Member States or Associated territories had legislated since 1966 consistently with the Scheme:— Antigua, Australia, Bangladesh, Botswana, Cyprus, Dominica, Fiji, Grenada, Kenya, Lesotho, Malawi, Malaysia, Malta, Mauritius, Nauru, Nigeria, Papua New Guinea, St. Christopher, Nevis and Anguilla, St. Lucia, St. Vincent, Western Samoa, Sierra Leone, Singapore, Sri Lanka, Swaziland, Tonga, the United Kingdom, Zambia. Some other jurisdictions have enacted legislation since the *Survey* was prepared, see, for example, the Extradition (Commonwealth Countries) Act 1979 of Seychelles and the Extradition Act 1979 of Barbados.

5. The United Kingdom Fugitive Offenders Act, 1967, was extended to a number of territories for whose international relations the United Kingdom is responsible. These territories are Belize, Bermuda, British Antarctica, British Indian Ocean Territory, Cayman Islands, Central and Southern Line Islands, the Sovereign Base Areas in Cyprus, Falkland Islands, Gibraltar, Hong Kong, Montserrat, New Hebrides, Pitcairn Island, St. Helena, Turks and Caicos Islands, the Virgin Islands. The cases of Brunei and Southern Rhodesia are exceptions. The United Kingdom legislation was also extended to a number of territories which have since become independent and are now full Member States of the Commonwealth, e.g. The Bahamas, Solomon Islands, Tuvalu and Kiribati.

6. The remaining Member States had not, at the time of the *Survey*, legislated specifically to adopt the 1966 Scheme, but in some cases partial uniformity with the Scheme is achieved by reason of pre-1966 or post-1966 amendments. These countries were:— Canada¹, The Gambia, Ghana, Guyana, India, Jamaica, New Zealand, Tanzania, Trinidad and Tobago, Uganda.

¹ A Bill to implement the 1966 Scheme lapsed upon the dissolution of the Canadian Parliament in May 1979.

Reciprocal application of legislation

7. The terms of the 1966 Scheme are silent as to the procedures for its application between Member countries which have implemented the Scheme. Clause 16(a) of the Scheme allows the possibility of bilateral arrangements between parts of the Commonwealth for further or alternative provision for the return of offenders, and Clause 16(b) envisages the application of the Scheme with modifications by any part of the Commonwealth which has implemented the Scheme to another part which is still operating under the Imperial Act of 1881 or has otherwise not fully brought the Scheme into effect.

8. There seems no reason therefore to suppose that application of national legislation in implementation of the Scheme in relation to other Member countries which have acted similarly requires any formal arrangement between those countries apart from the Scheme itself. As a matter of legislative technique, however, it has been found necessary in most parts of the Commonwealth to provide that a part of the Commonwealth to which the Act applies is a part so designated in subordinate legislation. For example, the United Kingdom Fugitive Offenders Act, 1967, s. 2 provides that—

“(1) Her Majesty may by Order in Council designate for the purposes of section 1 of this Act any country for the time being mentioned in subsection (3) of section 1 of the British Nationality Act 1948...or any other country within the Commonwealth; and any country so designated is in this Act referred to as a designated Commonwealth country...”

The Fugitive Offenders (Designated Commonwealth Countries) Order, 1968, No. 303 (S.I. 1968 I, p. 904) was then made listing all the Member countries of the Commonwealth, and subsequent Orders in Council have designated other countries as they have become Commonwealth Members.

9. An alternative legislative technique is to define “Commonwealth country” in separate legislation, e.g. Acts Interpretation legislation, and thereby achieve an internally uniform application of legislation, including that relating to extradition, to all parts of the Commonwealth. New Zealand has enacted the Commonwealth Countries Act 1977 which lists all Commonwealth countries in an easily amended Schedule and also makes executive certificates as to the status of a country or territory as being within the Commonwealth conclusive evidence.

10. Some Member countries which have implemented the Scheme have, by contrast, appeared to use designation procedures selectively and have not designated other Member countries before first seeking, by diplomatic notes, assurances of reciprocity. This seems in some cases to have been a time-consuming procedure and to have resulted in a far from complete application of the Scheme even among those Member countries which have fully implemented the Scheme in their own legislation. The extent of designations can be assessed by reference to the *Survey of Extradition and Fugitive Offenders Legislation in Commonwealth Jurisdictions* (Commonwealth Secretariat, 1977). Resort to what

in effect amounts to bilateral arrangements for the application of the Scheme seems contrary to the intentions of the Scheme and constitutes a partial failure in the present working of the Scheme that can, and ought to, be speedily remedied.

11. On the other hand, it is reasonable that a Member country having implemented the Scheme might not wish to apply its legislation in an unqualified fashion to a country which is operating under other legislation. To the extent of the inconsistency or incompatibility thereby arising, subordinate legislation to implement special arrangements of the kind envisaged by Clause 16 of the 1966 Scheme could be desirable. Thus the United Kingdom Fugitive Offenders Act 1967, for example, provides in s. 2—

“(3) Her Majesty may by Order in Council direct that this Act shall have effect in relation to the return of persons to, or in relation to persons returned from, any designated Commonwealth country...subject to such exceptions, adaptations or modifications as may be specified in the Order.”

Despite lack of full reciprocity many Member countries which have implemented the Scheme have designated without special arrangements such non-Scheme countries as Canada and New Zealand.²

Returnable offences

12. The 1966 Scheme provides in Clause 2(1) that a fugitive will only be returned for a returnable offence. Returnable offences are described in Annex 1 of the Scheme. The question arises whether the Annex requires revision in the light of the unilateral action by some Member countries to add certain offences as returnable under their legislation. The need for unilateral extension of the list arises particularly from the growing number of offences being created by international conventions; in countries of the British constitutional tradition treaties affecting private rights do not automatically become law without legislation, and the only convenient way of giving effect to such internationally created offences in relation to Commonwealth countries is to include them in the existing legislation implementing the 1966 Scheme. For example Australia has added a number of offences to the 28 listed in the Annex to the Scheme in order to give effect to the offences created by the Genocide Convention, 1948, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971, and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1973. It is unlikely that any Commonwealth member would object to such additions since they are consistent with the spirit, if not the letter, of the 1966 Scheme. If the Scheme were to be revised, however, it

² Both these countries, however, have indicated their intention to implement the Scheme in the near future. New Zealand has enacted the Fugitive Offenders Act, 1976, amending the Imperial Act of 1881, as a temporary expedient.

would be desirable to add, possibly as paragraph C. of Annex 1 such an inclusive category as “offences established under international conventions to which both the requesting and the requested parts of the Commonwealth are parties.”

13. Arising for separate consideration is the question whether offences, other than international offences, which are not described as returnable offences under the Scheme, ought in principle to be able to be added unilaterally in national legislation. For example, in the Canadian Fugitive Offenders Bill of 1978 (which lapsed in 1979) the following additional offences were listed—

Obstruction of judicial proceedings or proceedings before governmental bodies or interference with an investigation of a violation of a criminal statute by influencing, bribing, impeding, threatening or injuring by any means any officer of the court, juror, witness or duly authorized criminal investigator;

assisting or permitting the escape of a person from custody;

offences against the laws relating to civil disorders and riots;

offences against the laws relating to firearms and other weapons, ammunition, explosives, incendiary devices or nuclear materials;

income tax evasion.

While many such unilaterally determined offences might give rise to little controversy, income tax evasion has, at least in the past, been regarded as an offence falling outside the traditional operation of extradition arrangements. The wider category of fiscal offences, which would also include customs offences and violation of exchange control regulations, was left for future decision in the European Convention on Extradition, 1957. Article 5 of that Convention provides that “Extradition shall be granted...for offences in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offence or category of offences.”

14. A possible solution to the question raised is to leave the matter to be resolved on a basis of reciprocity. A further paragraph could be considered for addition to Annex 1 of the 1968 Scheme as follows—

“D. Offences not described in paragraphs A., B. and C. but which are returnable under the laws of both the requesting and the requested parts of the Commonwealth.”

The advantages of this solution would be the introduction of a degree of flexibility in the accommodation of the Scheme, and the avoidance of the necessity of universal agreement when only some Member countries feel the need to make certain other offences returnable.³ The disadvantage, if it should

³ Such a clause would also make waivers of the speciality rule under Clause 13(2) more flexible since waivers can be granted only in respect of returnable offences e.g. at present a requested country cannot consent to a prosecution for gaol breaking by the requesting country.

be seen to be such, is the consequent reduction, albeit slight, of the uniformity of application of the Scheme on a Commonwealth-wide basis.

Double criminality

15. A difficulty in the Scheme, or at least in the Act of 1967 implementing the Scheme in the U.K., is evidenced by the decision of the English High Court in *R. v. Brixton Prison ex parte Gardner* [1968] 2 Q.B. 399. While not questioning the decision as a matter of legal interpretation, officials in one Commonwealth country have described the point on which the extradition application was held to fail in this case as “a nuisance”; it is thought that this view may be entertained elsewhere also.

16. The point arose as follows. A warrant was issued in New Zealand charging the fugitive with offences of false pretences. The fugitive was arrested in England and committed for return. On application for habeas corpus the fugitive argued that the particulars of the offences alleged against him in New Zealand related to false representation as to *future events*; since the passing of the Theft Act 1968 such representations did not constitute offences under English law. The circumstance that the evidence tendered in support of the application contained facts which, if they had occurred in England, would enable *other* extraditable offences to be charged in England was irrelevant⁴; regard must be had only to the acts or omissions constituting the offences actually charged in the requesting state. The Court accepted this submission (which was supported also by counsel for the Governor of Brixton Prison) pointing out that s. 3(1)(c) of the Act of 1967 clearly required proof of double criminality in rigorous form—

“S. 3(1) For the purposes of this Act an offence of which a person is accused...is a relevant offence if—

...

(c)...the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom....”

(There was no evidence or argument before the Court that the particular ingredients of the offence as charged in New Zealand would be an offence against the law of Scotland—see s. 3(4).) It is undoubtedly true that the intention of the 1966 Scheme was to introduce the principle of double criminality into Commonwealth extradition. The Imperial Act of 1881, s. 9 had expressly applied to offences “notwithstanding that by the law of the part of Her Majesty’s dominions in or on his way to which the fugitive is or is suspected of being it is not an offence...” Paragraph 10 of the Scheme of 1966 stated the principle in the following terms—

⁴ In *R. v. Governor of Brixton Prison ex p. Rush* [1969] 1 All E.R. 316 it was held that, although the Canadian charges of conspiracy were *ex facie* a crime in England, the evidence disclosed the lack of an element necessary to constitute the offence in English law. It thus seems that regard will be had to the evidence for the purpose of characterizing the offence when to do so would operate *in favorem libertatis* and against the requesting State, but not where to do so would favour extradition.

"10. The return of a fugitive offender will either be precluded by law or be subject to refusal by law or be subject to refusal by the competent executive authority⁵, if the facts on which the request for his return is grounded do not constitute an offence under the law of the country or territory in which he is found." [emphasis added]

If in s. 3(1)(c) of the U.K. Act of 1967 the words "facts on which the request...is grounded" had been used in place of "the act or omission constituting the offence" the point upon which the applicant succeeded in *Gardner's Case* could not have been raised. The question thus arises whether the formulation of the double criminality rule in the U.K. Act of 1967 goes beyond what is required in order to provide for the substance of the principle and erects an unnecessarily technical barrier to extradition in cases where there is no doubt that the conduct of the fugitive, viewed as a whole, is criminal under the laws of both requesting and requested countries and constitutes an offence broadly described in the list of returnable offences.

17. It was pointed out by Lord Parker C.J. in *Gardner's Case* [1968] 2 Q.B. 399 at 412 that s. 3(1)(c) of the Act of 1967 goes further than s. 26 of the Extradition Act 1870, applying in respect of foreign States, which provides—

"26. The term "extradition crime" means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act."

There is an element of tautology in s. 26 but it is submitted, with respect, that Lord Parker C.J. is correct in his view that under the Extradition Act 1870 it is unnecessary for the purpose of satisfying the double criminality rule that the offence charged be examined in every particular of its constituent elements as required to sustain the charge under the law of the requesting State. Thus the surprising result emerges that the double criminality rule is more exacting, under United Kingdom law, in relation to Commonwealth extradition than it is in relation to extradition with foreign states.

18. It has not been possible for the purposes of the present study to survey the legislation of each of the Commonwealth member countries which have legislated on the subject of Commonwealth extradition since the Commonwealth Law Ministers' Meeting in 1966, but it would seem that many of these member States have legislated similarly to the United Kingdom with regard to the incorporation of the double criminality rule, e.g. Australia,⁶ Malaysia⁷ and Singapore.⁸ In Canada, by contrast, the lapsed Bill to give effect to the 1966 Scheme sought to provide in clause 2(1) similarly to the less rigorous

requirements of the Imperial Act of 1870 and thus to the test applied in respect of foreign countries—

"returnable offence" in respect of a part of the Commonwealth, means an offence, however described that, if committed in Canada or within Canadian jurisdiction, would be one of the crimes described in Schedule I..."

It is submitted that the Canadian formulation is to be preferred to that of the United Kingdom as more accurately reflecting the intention of Clause 10 of the 1966 Scheme and as avoiding the anomaly of imposing a more stringent test of double criminality in extradition applications from Commonwealth countries than in the case of foreign countries. The Canadian formula, or any other that looks to the facts underlying the offence charged rather than to the formal ingredients of the charge, would also meet the point made by the Rt. Hon. Lord Hailsham of St. Marylebone in his concluding remarks on the discussion of extradition at the 1973 Meeting of Commonwealth Law Ministers; speaking of *Gardner's Case* the Lord Chancellor remarked that that case would seem to require that "it was necessary for countries to keep each other informed of any changes in domestic criminal law for they could affect the rights of extradition."⁹

19. Problems of double criminality arise also in respect of extraterritorial offences. The Scheme avoids reference to jurisdiction and defines a returnable offence merely as one "punishable by a competent court" in the requesting country (Clause 2(a)). Under the Act of 1881 problems of extraterritorial offences could normally be resolved within the Commonwealth on the common basis of admiralty jurisdiction, but with the gradual replacement of that jurisdiction by local legislation¹⁰ and the fragmentation of the characterization of such ships as "British ships" a reciprocity of jurisdiction concept is needed in Commonwealth extradition. A simple realization of this concept is contained in the U.K. Fugitive Offenders Act, 1967, s. 3(c) which includes as a relevant offence an extraterritorial offence which would be an offence against the law of the United Kingdom if it were committed in corresponding circumstances outside the United Kingdom.¹¹ The point is an important one in view of the growing extent of activities related to the exploitation of the continental shelves and economic zones of coastal countries, as well as events occurring on board ships and aircraft.

The speciality rule

20. The speciality rule operates at two stages in most legislation implementing the Scheme. It operates first as a restriction on surrender where the requested country must be satisfied that the law of the requesting country, or the terms of a special arrangement, provide that the fugitive will not be dealt with for offences committed prior to his surrender other than as permitted by the rule. Secondly, the rule is incorporated as an express limitation on the rights to deal

⁵ O'Higgins points out that this phrase suggests an alternative legislative approach by leaving such questions to executive authority permitting discretionary waiver of the rule:

"Reform of intra-Commonwealth extradition" [1966] Crim. L.R. 361 at 364.

⁶ Extradition (Commonwealth Countries) Act 1966–1976, s. 4(1A).

⁷ Commonwealth Fugitive Criminal Act 1967, s. 8(2)(e).

⁸ Extradition Act 1968, s. 2(1).

⁹ Minutes, p. 73.

¹⁰ See, e.g., the Crimes at Sea Act, 1979 (Australia).

¹¹ See also Extradition (Commonwealth Countries) Act 1966–1976, s.4(5)(c), (7), (8) (Australia).

with a fugitive who has been surrendered by another Commonwealth country.¹²

21. Some difficulty has been felt by certain countries in giving legislative form to the definition of other offences caught by the rule. The Scheme itself, in clause 13(2) describes an offence in respect of which a returned fugitive may not be detained or tried as one "other than the one for which he was returned or any lesser offence proved by the facts on which that return was grounded or, with the consent of the requested country or territory, a returnable offence of the same nature as the offence for which he was returned." What is meant by a "lesser offence"? While the offence of inflicting grievous bodily harm might be proved by the same facts on which a surrender for attempted murder is requested and is clearly a "lesser offence", in other cases it may not always be so clear that one offence is "lesser" than another. For example, would the statutory offence in some Commonwealth jurisdictions of causing death by dangerous driving be a "lesser offence" than manslaughter when each carries the same maximum penalty of life imprisonment? The problem might therefore be overcome, with no evident prejudice to the rights of the fugitive, if the word "other" were substituted for "lesser" in clause 13 of the Scheme.

22. A related, though different, problem arises where the fugitive is returned on a charge of embezzlement of £5,000 and, after the return but before trial, further investigations reveal that the sum involved is £50,000. The offence is the same but the circumstances are more grave. Where the charges are separated into a number of counts of an indictment it would be necessary to seek the consent of the surrendering country to the charging of additional counts of a "returnable offence of the same nature". It would seem that in practice, although consent to charge additional offences is regarded as an exceptional procedure to be used only in special circumstances, consent will ordinarily be given where additional offences or evidence have come to light after the original requisition for extradition had been made, or where a fresh or re-formulated charge of a comparable nature could be preferred either on the basis of the same facts or in the light of additional evidence discovered after the fugitive's surrender. There may be, however, some special problems in federal countries, such as Australia and Canada, where State or Provincial authorities wish to charge a returned fugitive for other offences, and where the offences were known at the time of the requisition made by the federal authorities, but the State or Provincial authorities were unaware of the extradition proceedings. Such reflections prompt a re-examination of the relationship between the rule of speciality and the requirements of justice. Why should a fugitive be placed in such a tactically advantageous position with respect to other charges? Three reasons might be given: (a) where the fugitive is to be sent a long distance for trial, it is right that he should be surrendered only for those offences which

have been specified and in respect of which evidence has been adduced. There is a strong relationship between this aspect of the rule, and the requirement of showing a *prima facie* case of guilt. This reason applies the more strongly where the fugitive is not a citizen or habitual resident of the requesting country. (b) The rule of speciality indirectly reinforces both the double criminality rule and the rule against extradition in respect of political offences, by making it impossible for additional offences to be charged unless the surrendering authorities are satisfied that the offence is extraditable. (c) The rule protects from abuse the legal processes of the requested country which is called upon in extradition to surrender its personal jurisdiction over, and protection of, the accused fugitive.

23. For all these reasons, however difficult in practice some applications of the rule may be, it would seem unacceptable to propose abandonment of the rule of speciality altogether. It is strongly indicated, however, that executive practice in considering requests under Clause 13(2) of the Scheme for consent to prosecution for other offences be re-examined. Article 14 of the European Convention on Extradition, 1957, makes such consent mandatory "when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention", but, of course, the European Convention does not require the production of a *prima facie* case of guilt by the requesting authorities. Thus the nub of the problem of speciality seems to be the requirement of a *prima facie* case. A basis for solution of the difficulty may be the dispensing with the proof requirement in charges of a related nature connected with the course of conduct for which the fugitive has been returned. In respect of charges of a different nature, unrelated to that course of conduct, consent to waive the speciality rule might reasonably be refused.

Citizenship of fugitives

24. In countries of the British constitutional tradition the rule against the extradition by a State of its own citizens, favoured by countries of the Roman Law tradition, has not generally been followed. Although there is some evidence that at least a discretion to refuse surrender of citizens has been gaining greater acceptance in common law countries in recent years, the problem remains that criminal jurisdiction is primarily territorial. If extradition is refused on the grounds of citizenship in respect of an offence committed in the requesting State, justice will fail unless legislation in the requested country permits jurisdiction to be assumed on the basis of nationality or on some basis other than territoriality. For these reasons a discretion to refuse the return of citizens or permanent residents was not included in the body of the Scheme but was placed in the optional supplementary provision (2) of Annex 2; by virtue of Clause 17 other countries may reserve their positions with regard to a country applying the exception, or may apply the Scheme with modifications to such a country.

¹² See e.g. the Fugitive Offenders Act, 1967 (U.K.) ss. 4(3), 14.

25. It is appreciated that for special reasons some Commonwealth member countries cannot surrender their citizens, such as in the case of Cyprus whose Constitution forbids it. But where a Commonwealth country wishes to reserve its right to refuse surrender of citizens on a discretionary basis it should consider providing for jurisdiction over the alleged offender itself.¹³ This is the position of European countries; elementary justice would seem to require that a fugitive should not escape on grounds of nationality alone.

26. The Canadian Transfer of Offenders Act 1977–78 which permits Canada to enforce sentences imposed on Canadian citizens abroad and to repatriate for enforcement of their Canadian sentences citizens of reciprocating countries prompts the question whether the adoption of a Commonwealth-wide scheme for the transfer of convicted offenders would eliminate the need for any country to refuse to surrender its own citizens. With the two schemes operating side by side, extradition of a citizen would be for trial only, with repatriation following upon conviction for service of the sentence. Such a proposal is beyond the scope of the present paper, but is the subject of an Australian Memorandum presented to the 1977 meeting of Commonwealth Law Ministers.¹⁴

Political offences and terrorism

27. The concept of political offences in extradition is well-known and need not be traversed here. The particular formulation of the prohibition against the return of persons accused or convicted of an offence of a political character in the 1966 Scheme (clause 9(1) and (2)) is drawn from the similar provisions of the European Convention on Extradition, 1957, and includes not only a prohibition against the surrender of persons accused or convicted of offences of a “political character” but also those who, if returned, would be prosecuted, or might be prejudiced at their trial or punished, on account of race, religion, nationality or political opinions.

28. In view of the increasing use of violence in politically connected or motivated acts, such as hijacking of aircraft or the taking of hostages, the Member States of the Council of Europe adopted in 1977 the European Convention on the Suppression of Terrorism. The chief aim of the Convention was to restrict the concept of political offences contained in the 1957 Convention on Extradition by declaring that, for the purposes of extradition, a number of offences commonly associated with terrorism are not to be regarded as political offences. These offences are defined as including hijacking and other dangerous acts in relation to aircraft, offences against diplomats, kidnapping, the use of bombs and firearms, and other serious offences involving acts of violence. Derogation from the political offence

category is not, however, complete, for the right to refuse surrender where the fugitive might be tried or punished, or might suffer prejudice, on account of his race, religion, nationality or political opinions, is preserved. The qualification is thus a delicately balanced one, but it clearly places politically motivated violent crime outside the *prima facie* political offences category and protects only those persons against whom it could legitimately be established (to borrow the dictum of Lord Radcliffe in *Schtraks v. Government of Israel*¹⁵) that the requesting State is proceeding “for reasons other than the enforcement of the criminal law in its ordinary, what I might call its common or international, aspect.”

29. The United Kingdom has ratified the Convention and has given it the force of domestic law in the Suppression of Terrorism Act, 1978. The acts embraced within the legislation extend to 19 categories of offences. The Act applies in relation to the Fugitive Offenders Act, 1967 in respect of any Commonwealth country which is a party to the 1977 European Convention and may also be extended in respect of other Commonwealth countries whether they are parties to the Convention or not. The possibility of extension to non-Convention Commonwealth countries envisages that similar legislation might be adopted by those countries, and also embraces the possibility that the United Kingdom might return a fugitive accused or convicted of a violent offence coming within the Act even without the assurance of reciprocity. If there were a common mind among Commonwealth countries which tended towards the provisions adopted by the European Convention on Terrorism, any future steps towards revision of the 1966 Scheme should explore the possibility of adding similar provisions to existing clause 9 of the Scheme.

Other circumstances precluding return

30. The 1966 Scheme, in setting out three specific and exclusive grounds for consideration under this head, is more restrictive than s. 10 of the Fugitive Offenders Act, 1881 which provided additionally for discharge where “... for any reason it would, having regard to the distance, to the facilities for communication and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period.” The New Zealand case of *Re H.* [1971] NZLR 982, decided under the Act of 1881, held that it was a ground for discharge where the fugitive’s health would be so seriously impaired by a long journey (owing to an uncontrollable hysterical condition) that he would be unlikely ever to be fit to stand trial. No doubt this was an unusual case; more usual cases can be imagined where the state of health of the fugitive merely justifies a delay in return. Even these cases do not appear to be provided for in the 1966 Scheme. It would thus seem desirable to consider the addition of a fourth sub-paragraph to the existing paragraph (3) of Clause 9 of the Scheme as follows—

¹³ See, e.g. Lesotho, Fugitive Offenders (Amendment) Order, 1972. The Penal Code of India, by s. 3, extends to all offences committed by Indian citizens abroad.

¹⁴ LMM (77) 6. See also the accompanying paper by Mr. Anthony Webb on the transfer of offenders.

¹⁵ [1964] A.C. 556.

“(c) the passage of time since the commission of the offence, or

(d) the state of health or other personal circumstances of the fugitive,
it would, having regard to all the circumstances. . .”

Cases coming under this new sub-paragraph would normally be treated as cases calling for delay rather than discharge. The addition of the words “or other personal circumstances” should provide sufficient flexibility to deal with any other cases of an unusual nature.

31. Although a proposal for an amendment of the Scheme does not seem to be required, it is worth noting in passing the decision of the Queen’s Bench Division (Lord Widgery C.J., Griffiths and Gibson J.J.) in *Re Tarling* [1979] 1 All E.R. 981 holding that an applicant for habeas corpus is required to put forward on his initial application the whole of the case which is then fairly available to him; he is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the court. It would seem from the reasoning of the court that this principle would apply, in the absence of fresh evidence, even where the grounds set out under Clause 9(3) of the Scheme are not invoked, as they are under the U.K. Act of 1967, by way of habeas corpus or where there is no equivalent of s. 14(2) of the U.K. Administration of Justice Act 1960.

32. A more radical approach to Clause 9(3) of the Scheme is suggested by a reading of the Canadian Fugitive Offenders Bill, 1978. The Canadian Bill ignores Clause 9(3) altogether, thus prompting the question whether the three grounds for discharge or delay are necessary at all in the light of the changes that have occurred since their original appearance in the Act of 1881. The first ground, triviality, might be argued to be unnecessary in the light of the specified list of returnable offences under the Scheme coupled with the requirement that they be punishable by a possible penalty of at least 12 months’ imprisonment by the law of the requesting State. (The argument might have been made more strongly had the latter prescription under the Scheme applied also to the law of the requested State). The second ground, “bad faith”, is a difficult one to invoke against a fellow member of the Commonwealth, since it can scarcely be done without directly impugning the motives of the requesting country. It might persuasively be argued that cases of accusations “not made in good faith in the interests of justice” are already subsumed within the extended concept of political offences contained in Clause 9(2). The third ground, passage of time, might, however, be thought to have continued weight since a lengthy period of time, for which no adequate reason has been given, between the commission of the offence and the request for return, might raise a question of fairness, having regard to all the circumstances of the case. It is to be emphasized that the question of time-barred offences (prescription) which is usually dealt with expressly in treaties with civil law countries, does not normally arise as between common law countries.

33. While the Canadian Bill rejects implementation of Clause 9(3) of the Scheme, it incorporates a novel exclusionary ground. Section 18 provides that “The Minister may refuse to order the surrender of a fugitive offender where it appears to him that the fugitive offender would be likely to suffer an excessively severe or inhumane punishment for the returnable offence in respect of which his return is requested”. This section goes beyond Supplementary Provision 1 contained in Annex to the 1966 Scheme dealing with the death penalty. It might be concluded from the drafting history of the Canadian Bill that section 18 was the outcome of political factors special to Canada. The Canadian Bill thus sharpens the question whether Clause 9(3) of the 1966 Scheme should be left more or less in its present form (subject to the addition proposed above for cases of health or personal hardship) or whether it should be abandoned and redrafted more in line with the Canadian Bill. The result of the latter approach might be the drawing of the death penalty exception out of the optional Annex and its incorporation in the main body of the Scheme.

Costs

34. Extradition is a costly procedure and a significant extra burden is placed on the requesting country where it is required to engage counsel in the requested country. The 1966 Scheme is silent on the subject. Bilateral arrangements have, however, dealt with the problem as between some Commonwealth members.¹⁶ The United Kingdom (in respect of England and Wales) has made arrangements on a reciprocal basis to arrange and meet the cost of legal representation of the requesting country with Australia, Canada, Cyprus, Gibraltar, Hong Kong, Kenya, Malta and New Zealand. Australia offers the services of its Crown Solicitor to represent requesting countries in extradition proceedings, including any proceedings by way of appeal or review. Costs and disbursements are met by the Australian Government including, where necessary, the briefing of counsel by the Crown Solicitor. No undertakings that Australia will receive reciprocity of treatment are required but Australia may vary the terms of its assistance to particular countries if it should later transpire that they do not provide similar assistance in the case of an Australian request.

35. Reciprocal arrangements as to costs are not normally made on a formal treaty basis but are made as the occasion arises; when an extradition request is made one party will inquire of the other whether such a reciprocating understanding is desired. It may happen that an unusually complex case arises in which either the requested country will have to confess its inability to provide representation from its own resources or in which the requesting country prefers to engage at its own expense counsel of its own choice. But in the normal run of cases,

16 Commonwealth Secretariat, *Survey of Extraditions and Fugitive Offenders Legislation in Commonwealth Jurisdiction* (1977)—Annex, “Particulars of Legislation, Case-law or State practice regarding legal costs of extradition in the Commonwealth countries.”

representation of the requesting country by the government legal officers of the requested country appears to work satisfactorily and indeed to have certain advantages; a body of expertise and experience is built up in the government legal department and information on procedural or other difficulties can be readily exchanged with other countries. The question arises whether this practice should be formalised by being written into any revision of the 1966 Scheme. The main argument against such a step would seem to be that the cost burden might fall more heavily on the small Member countries if they are in such a position that they anticipate receiving more requests than they would make. In such circumstances Members might prefer to leave the matter to bilateral arrangements as and when the occasion arises. The argument in favour of formalising reciprocity of representation, at least in cases which are not usually difficult or complex, is that countries which have not previously made or received requests will have a starting point from which to approach the question of costs which may, of course, be varied in the light of special circumstances, by individual arrangements. It is worthy of note that an increasing number of bilateral extradition treaties outside the Commonwealth make express provision for reciprocal representation by local authorities in the requested State. The logic of this course within the Commonwealth seems inescapable, whether it is to be achieved by formal incorporation in the Scheme, or otherwise.

Appeals by requesting governments

36. It has long been accepted in England that there is no right of appeal by a requesting government against the refusal of a magistrate to commit for surrender, whether under the Extradition Act 1870 or the Fugitive Offenders Act, 1881 or 1967. In *Atkinson v. United States Government*,¹⁷ however, this view was for the first time challenged when the requesting government proceeded by way of a case stated by the magistrate. The House of Lords ultimately rejected the argument that an appeal by way of case stated lay, although Lord Morris's dissenting speech pointed out the anomaly thereby created that a mistake made by a magistrate as to a point of law would go uncorrected. In the unreported case of *Re Slater* in 1977 the Government of Singapore applied by way of certiorari to review the order of a magistrate, but a Divisional Court of the English High Court disposed of the application without pronouncing upon the availability of this procedure.

37. It is a plausible argument that requesting governments should be given a right of appeal against failure to commit, whether by way of review of the magistrate's finding of fact or on questions of law.¹⁸ The analogy of committal proceedings in domestic criminal law is not entirely apt; the

requesting government is disadvantaged by distance and by procedural complexities in renewing a requisition for return and in presenting further evidence. The cost factor is also much greater. The question whether a right of appeal lies at the instance of a requesting government against non-committal depends in England on legislation other than the Extradition or Fugitive Offenders Acts, and so it is likely to be in other Commonwealth jurisdictions. While other considerations obviously apply in proceedings other than extradition matters, the question whether special review procedures available to requesting governments, balancing those offered to the fugitive, ought to be written in to fugitive offenders legislation, is worthy of considerations.¹⁹

Return by consent

38. Some cases have occurred in recent years where the fugitive has desired that extradition proceedings be waived in order that he may return more speedily, and voluntarily, in order to face the charges made against him. Difficulty has arisen from the lack of any legislative provision empowering a magistrate to make a "consent order" for return in such cases. If proceedings have already commenced, the requesting government would have the option to withdraw its request, but in this case the fugitive could not lawfully be returned in custody and, if the fugitive suddenly changed his mind, proceedings would have to be begun afresh. There is merit in the suggestion that any revision of the 1966 Scheme should contain provision for "consent orders", which would dispense with the committal proceedings on express waiver by the fugitive. If a balancing advantage is to be given to the fugitive in such cases, it might be considered that the speciality rule should apply on his return to the requesting country notwithstanding the fugitive's essentially voluntary return.²⁰ If the speciality rule were to apply in such cases, care would be needed to ensure that all likely charges were fully considered before the order for return was made.

Legal aid

39. It is the position in a number of Commonwealth countries that legal aid is available, whether free or on a contributory basis related to need, to fugitives in extradition proceedings. Such aid is granted under legal aid provisions or schemes of general application and not specifically under fugitive offenders legislation.²¹ While there seems to be no evidence that fugitives are being denied legal assistance on account of indigence, in any revision of the Scheme a provision might appropriately appear to the effect that legal aid will be made available to the fugitive in proceedings for return under the Scheme in the same circumstances and under the same conditions as legal aid is made available to citizens of the requested country in criminal proceedings.

¹⁷ [1971] A.C. 197.

¹⁸ The Fugitive Offenders Bill, clause 13, of Canada which lapsed in 1979, provided for appeals on questions of law against committal or discharge.

¹⁹ A right of appeal against the granting of habeas corpus is available to a requesting government in England under the Administration of Justice Act, 1960, s. 15.

²⁰ Cf. *R. v. Corrigan* [1931] 1 K.B. 527.

²¹ E.g. India, Criminal Procedure Code, 1973, ss. 303, 304.

Conclusion

40. There is every reason to conclude that the 1966 Commonwealth Scheme on Rendition of Fugitive Offenders has proved to be a successful and progressive basis for co-operation, and that Commonwealth extradition has been placed on a footing consonant with the best international principles and practice. Such defects or ambiguities as the Scheme may be held to have, in the light of experience, can be remedied by collective action after

appropriate discussions. The intention of the present review has been to stimulate thought about some possible areas for improvement, without descending to too much detail. Much may be learnt from the judicial and executive experience of Member countries, and firm proposals for amendment of the Scheme, or the foreclosure of other possible areas for discussion, have been deliberately avoided at this stage.

APPENDIX

SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS WITHIN THE COMMONWEALTH

Scope

1. (1) The general provisions set out in this Scheme will govern the return of a person from one part of the Commonwealth, in which he is found, to another part thereof, in which he is accused of an offence; and in particular his return will only be precluded by law, or be subject to refusal by the competent executive authority, in the circumstances mentioned in this Scheme.

(2) For the purposes of this Scheme a person liable to return as mentioned in paragraph (1) is described as a fugitive offender and each of the following areas is described as constituting a separate part of the Commonwealth, that is to say—

- a) each sovereign and independent country within the Commonwealth together with any dependent territories (which expression, for the purposes aforesaid, includes protectorates and protected states) which that country designates, and
- b) each country within the Commonwealth, which, though not sovereign and independent, is not a territory designated for the purposes of the preceding sub-paragraph.

Returnable offences

2. (1) A fugitive will only be returned for a returnable offence.

(2) For the purposes of this Scheme a returnable offence is an offence described in Annex 1 (whatever the name of the offence under the law of the countries and territories concerned, and whether or not it is described in that law by reference to some special intent or any special circumstances of aggravation), being an offence which is punishable by a competent court in the country or territory to which return is requested by imprisonment for twelve months or a greater penalty.

Warrants, other than provisional warrants

3. (1) A fugitive offender will only be returned if a warrant for his arrest has been issued in that part of the Commonwealth to which his return is requested and either—

- a) that warrant is endorsed by a competent judicial authority in the part in which he is found (in which case, the endorsed warrant will be sufficient authority for his arrest), or
- b) a further warrant for his arrest is issued by the competent judicial authority in the part in which he is found, not being a provisional warrant issued as mentioned in clause 4.

(2) The endorsement or issue of a warrant as mentioned in this clause may be made conditional on the competent executive authority having previously issued an order to proceed.

Provisional warrants

4. (1) Where a fugitive offender is, or is suspected of being, in or on his way to any part of the Commonwealth but no warrant has been endorsed as mentioned in clause 3(1)(a) or issued as mentioned in clause 3(1)(b), the competent judicial authority in that part of the Commonwealth may issue a provisional warrant for his arrest on such information and under such circumstances as would, in the authority's opinion, justify the issue of a warrant if the returnable offence of which the fugitive is accused had been an offence committed within that authority's jurisdiction.

(2) A report of the issue of such a provisional warrant, together with the information in justification or a certified copy thereof, will be sent to the competent executive authority and, in a case in which that authority decides on the said information and any other information which may have become available that the fugitive should be discharged, that authority may so order.

Committal proceedings

5. (1) A fugitive offender arrested under a warrant endorsed or issued as mentioned in clause 3(1), or under a provisional warrant issued as mentioned in clause 4, will be brought, as soon as is practicable, before the competent judicial authority who will hear the case in the same manner and have the same jurisdiction and powers, as nearly as may be, including power to remand and admit to bail, as if

the fugitive were charged with an offence committed within that authority's jurisdiction.

(2) The competent judicial authority will receive any evidence which may be tendered to show that the return of the fugitive offender is precluded by law.

(3) Where a provisional warrant has been issued as mentioned in clause 4 but, within such reasonable time as with reference to the circumstances of the case the competent judicial authority may fix—

- a) a warrant has not been endorsed or issued as mentioned in clause 3(1), or
- b) where such endorsement or issue of a warrant has been made conditional on the issue of an order to proceed, as mentioned in clause 3(2), no such order has been issued,

the competent judicial authority will order the fugitive to be discharged.

(4) Where a warrant has been endorsed or issued as mentioned in clause 3(1) the competent judicial authority may commit the fugitive to prison to await his return if—

- a) such evidence is produced as establishes a *prima facie* case that he committed the offence of which he is accused, and
- b) his return is not precluded by law, but, otherwise, will order him to be discharged.

(5) Where a fugitive offender is committed to prison to await his return as mentioned in the preceding paragraph, notice of the fact will forthwith be given to the competent executive authority in that part of the Commonwealth in which he is committed.

Return or discharge by executive authority

6. After the expiry of 15 days from the date of the committal of a fugitive offender to prison to await his return, as mentioned in clause 5, for, if a writ of *habeas corpus* or other like process is issued with reference to him, from the date of the final decision thereon of the competent judicial authority (whichever date is the later), the competent executive authority will order his return unless it appears to that authority that, in accordance with the provisions set out in this Scheme, his return is precluded by law or should be refused, in which case that authority will order his discharge.

Discharge by judicial authority

7. (1) Where after the expiry of the period mentioned in paragraph (2) a fugitive offender has not been returned, an application to the competent judicial authority may be made by or on behalf of the fugitive for his discharge and if—

- a) reasonable notice of the application has been given to the competent executive authority, and
- b) sufficient cause for the delay is not shown, the competent judicial authority will order his discharge.

(2) The period referred to in paragraph (1) will be prescribed by law and will be one expiring either—

- a) not later than two months from the fugitive's committal to prison as mentioned in clause 5, or
- b) not later than one month from the date of the order for his return made as mentioned in clause 6.

Habeas corpus

8. It will be provided that an application may be made by or on behalf of a fugitive offender for a writ of *habeas corpus* or other like process.

Circumstances precluding return

9. (1) The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that the offence is of a political character.

(2) The return of a fugitive offender will be precluded by law if it appears to the competent judicial or executive authority—

- a) that the request for his surrender although purporting to be made for a returnable offence was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions, or
- b) that he may be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

(3) The return of a fugitive offender, or his return before the expiry of a specified period, will be precluded by law if the competent judicial or executive authority is satisfied that by reason of—

- a) the trivial nature of the case, or
- b) the accusation against the fugitive not having been made in good faith or in the interests of justice, or
- c) the passage of time since the commission of the offence,

it would, having regard to all the circumstances under which the offence was committed, be unjust or oppressive or too severe a punishment to return the fugitive or, as the case may be, to return him before the expiry of a period specified by that authority.

(4) The return of a fugitive offender will be precluded by law if the competent judicial or executive authority is satisfied that he has been convicted (and is neither unlawfully at large nor at large in breach of a condition of a licence to be at large), or has been acquitted, whether within or outside the Commonwealth, of the offence of which it is accused.

(5) The competent authorities for the purposes of this clause will include—

- a) any judicial authority which hears or is competent to hear such an application as is mentioned in clause 8, and
- b) the executive authority by whom any order for the fugitive's return would fall to be made.

(6) It will be sufficient compliance with any one of the paragraphs (1), (2), (3), (4) and (5) if a country

decides that the competent authority for the purposes of that paragraph is exclusively the judicial authority or the executive authority.

(7) If the competent executive authority—

- a) is empowered by law to certify that the offence of which a fugitive offender is accused is an offence of a political character, and
- b) in the case of a particular fugitive offender, so certifies,

the certificate will be conclusive in the matter and binding upon the competent judicial authority for the purposes mentioned in this clause.

Double—criminality rule

10. The return of a fugitive offender will either be precluded by law or be subject to refusal by the competent executive authority if the facts on which the request for his return is grounded do not constitute an offence under the law of the country or territory in which he is found.

Postponement of return of fugitive charged or sentenced when found

11. Where a fugitive offender—

- a) has been charged with an offence triable by a court in that part of the Commonwealth in which he is found, or
- b) is serving a sentence imposed by a court in that part of the Commonwealth,

then, until such time as he has been discharged (whether by acquittal, the expiration or remission of his sentence, or otherwise) his return will either be precluded by law or be subject to refusal by the competent executive authority as the law of the country or territory concerned may provide.

Priority where two or more requests made

12. Where requests for the return of a fugitive offender to two or more parts of the Commonwealth fall to be dealt with at the same time, the competent executive authority will determine to which part he should be returned and, accordingly, may refuse the other requests; and in determining the matter that authority will consider all the circumstances of the case and in particular—

- a) the relative seriousness of the offences,
- b) the relative dates on which the requests were made, and
- c) the citizenship or other national status of the fugitive and his ordinary residence.

Speciality rule

13. (1) This clause relates to a fugitive offender who has been returned from one part of the Commonwealth to another part thereof, so long as he has not had a reasonable opportunity of going back to the first mentioned part.

(2) In the case of a fugitive offender to whom this clause relates, his detention or trial in the part of the Commonwealth to which he has been returned for

any offence committed prior to his return (other than the one for which he was returned or any lesser offence proved by the facts on which that return was grounded or, with the consent of the requested country or territory, a returnable offence of the same nature as the offence for which he was returned) will be precluded by law.

(3) The reference in paragraph (2) to detention includes a reference to detention for the purposes of any proceedings for returning or surrendering the fugitive offender to any country or territory for trial or punishment and, accordingly in the case of a fugitive to whom this clause relates such return or surrender will be precluded by law if the offence for which his return or surrender is requested is such an offence as is mentioned in paragraph (2).

Return of escaped prisoners

14. (1) In the case of a person who—

- a) has been convicted of a returnable offence by a court in any part of the Commonwealth and is unlawfully at large before the expiry of his sentence for that offence, and
- b) is found in some other part of the Commonwealth, the provisions set out in this Scheme, as applied for the purposes of this clause by paragraph (2), will govern his return to the part of the Commonwealth in which he was convicted.

(2) For the purposes of this clause this Scheme shall be construed, subject to any necessary adaptations or modifications, as though the person unlawfully at large were accused of the offence of which he was convicted and, in particular—

- a) any reference to a fugitive offender shall be construed as including a reference to such a person as is mentioned in paragraph (1), and
- b) the reference in clause 5(4) to such evidence as establishes a *prima facie* case that he committed the offence of which he is accused shall be construed as a reference to such evidence as establishes that he has been convicted.

(3) The references in this clause to a person unlawfully at large shall be construed as including references to a person at large in breach of a condition of a licence to be at large.

Ancillary provisions

15. Each Commonwealth country or territory will take, subject to its constitution, any legislative and other steps which may be necessary or expedient in the circumstances to facilitate and effectuate—

- a) the return of a fugitive offender who is in transit in its territory for that purpose,
- b) the delivery of property found in the possession of a fugitive offender at the time of his arrest which may be material evidence of the offence of which he is accused, and
- c) the proof of warrants, certificates of conviction, depositions and other documents.

Alternative arrangements and modifications

16. Nothing in this Scheme shall prevent—

- a) the making of arrangements between two or more parts of the Commonwealth for further or alternative provision for the return of offenders,
- b) the application of the Scheme with modifications by any part of the Commonwealth in relation to any other part which has not brought clauses 1 to 15 fully into effect.

Supplementary provisions

17. Any part of the Commonwealth may or may not adopt either or both of the supplementary provisions set out in Annex 2 but, where such a provision is adopted, any other part of the Commonwealth may in relation to the first part reserve its position as to whether it will give effect to clauses 1 to 15 or will give effect to them subject to such exceptions and modifications as appear to it to be necessary or expedient or give effect to any arrangement made under clause 16(a).

ANNEX 1

Description of Returnable Offences

- A.
1. Murder of any degree
 2. Manslaughter
 3. An offence against the law relating to abortion
 4. Maliciously or wilfully wounding or inflicting grievous bodily harm
 5. Assault occasioning actual bodily harm
 6. Rape
 7. Unlawful sexual intercourse with a female
 8. Indecent assault
 9. Procuring, or trafficking in, women or young persons for immoral purposes
 10. Bigamy
 11. Kidnapping, abduction or false imprisonment, or dealing in slaves
 12. Stealing, abandoning, exposing or unlawfully detaining a child
 13. Bribery
 14. Perjury or subornation of perjury or conspiring to defeat the course of justice
 15. Arson
 16. An offence concerning counterfeit currency
 17. An offence against the law relating to forgery
 18. Stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property or credit by false pretences, receiving stolen property or any other offence in respect of property involving fraud
 19. Burglary, housebreaking or any similar offence
 20. Robbery
 21. Blackmail or extortion by means of threats or by abuse of authority

22. An offence against bankruptcy law or company law
23. Malicious or wilful damage to property
24. Acts done with the intention of endangering vehicles, vessels or aircraft
25. An offence against the law relating to dangerous drugs or narcotics
26. Piracy
27. Revolt against the authority of the master of a ship or the commander of an aircraft
28. Contravention of import or export prohibitions relating to precious stones, gold and other precious metals

B. Aiding and abetting, or counselling or procuring the commission of, or being an accessory before or after the fact to, or attempting or conspiring to commit, any of the offences listed in paragraph A above.

ANNEX 2

Supplementary Provisions

Discretion as respects return for offences punishable by death

1. The return of a fugitive offender may be refused by the competent executive authority where it appears to that authority that, by reason that—

- a) if he was returned he would be likely to suffer the death penalty for the offence for which his return is requested, and
- b) in the country or territory in which he is found or in any part thereof that offence is not punishable by death,

it would, having regard to all the circumstances of the case and to any likelihood that if not returned he would be immune from punishment, be unjust or oppressive or too severe a punishment to return him.

Discretion as respects return of citizens etc.

2. (1) The return of a fugitive offender who is a national or permanent resident of the part of the Commonwealth in which he is found—

- a) may be precluded by law, or
- b) may be refused by the competent executive authority: Provided that return will not be so refused if the fugitive is also a national of that part of the Commonwealth to which his return is requested.

(2) For the purposes of this paragraph a fugitive shall be treated as a national of a part of the Commonwealth if that part consists of, or includes—

- a) a Commonwealth country of which he is a citizen, or
- b) a country or territory his connection with which determines his national status,

in either case at the date of the request.

CROWN PRIVILEGE IN THE 1980's: A DECADE OF CHANGE

Memorandum by the Commonwealth Secretariat and a paper prepared by
Dr. D. C. Pearce, Reader in Law of the Australian National University

The suppressing of evidence in the public interest gives rise to difficult and important questions, for the public interest also requires that justice be done, and the private litigant's right to the production of all relevant documents otherwise admissible has to be weighed against claims based on the concept of Crown privilege.

2. Dr. Pearce's paper reviews recent decisions in the Commonwealth which have attempted to resolve a conflict which can never be eliminated. Against the background of decided cases, he discusses general

principles and the basis of the courts' approach to claims for Crown privilege; and gives an account of recent decisions which relate to particular types of evidence. Dr. Pearce also refers to legislation relating to the subject.

3. Ministers may wish to review these developments and exchange ideas and experience in an area of the law which has a potential for conflict between the executive and the judiciary regarding who should be the final arbiter in determining the issues involved.

CROWN PRIVILEGE IN THE 1970's: A DECADE OF CHANGE

By Dennis Pearce, LL.M., PhD., Reader in Law, Australian National University, Canberra

Introduction

Since the leading decision of the House of Lords in *Conway v. Rimmer* delivered in 1968, Crown privilege questions have come before the courts on many occasions. The purpose of this paper is to examine the attitude shown by the courts in recent years to the admission of government information in evidence in judicial proceedings.¹

This area of the law is usually referred to as "Crown privilege" but it is doubtful whether this expression is accurate. The non-revelation of governmental information embraced in the notion of Crown privilege is not a privilege in the sense in which that expression is used in the law of evidence.² Where evidentiary privilege attaches to certain communications, such as those between husband and wife or between solicitor and client, evidence of the communications cannot be given in judicial proceedings. The privilege is, however, personal and may be waived by the party for whose benefit it exists. Crown privilege, on the other hand, contemplates a situation in which certain information is not made available in judicial proceedings because the public interest demands that it be kept secret. It is not a privilege that the Crown possesses, but one which is exercised by the Crown on behalf of the public at large. The Crown may intervene in litigation between third parties to prevent disclosure. If the point is not taken by the Crown (as might well be the situation if the issue arises in the course of litigation between private individuals), it is the duty of the court to rule that the information be not revealed. Secondary evidence of the information in question cannot be given. But while it may not technically be a "privilege", the term "Crown privilege" has assumed a usage which makes it convenient for the purposes of this discussion and the expression will be employed accordingly.

1 Reference is made to the principal decisions in the reports of jurisdictions available to the writer. The following cases are referred to frequently throughout and, where appropriate, will be abbreviated in the manner indicated:

Conway v. Rimmer [1968] A.C. 910: "Conway"
R. v. Lewes Justices ex parte Secretary of State for Home Department [1973] A.C. 388: "Lewes"

Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2) [1974] A.C. 405: "Crompton"
Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] A.C. 133: "Norwich"

Australian National Airlines Commission v. The Commonwealth and Canadian Pacific Airlines Ltd. [1975] 6 A.L.J.R. 433: "A.N.A."

Hoffman La Roche A.G. v. Department of Trade and Industry [1975] The Times 19th April Ch.D: "Hoffman La Roche"
Konia v. Morley [1976] 1 N.Z.L.R. 455

D. v. National Society for Prevention of Cruelty to Children [1978] A.C. 171: "D. v. N.S.P.C.C."

Sankey v. Whillam [1978] 21 A.L.J.R. 505: "Sankey" *Burmah Oil Co. v. Governor and Company of Bank of England* [1979] 3 W.L.R. 722: "Burmah Oil"

Science Research Council v. Nasse [1979] 3 W.L.R. 762: "Nasse"

2 Cf. *Lewes* Lord Reid at 400; Lord Simon at 407

It is proposed to outline first the general principles adopted by the courts in determining Crown privilege questions and then to enumerate some of the factors to which the courts have had regard in determining Crown privilege claims. Finally, some recent decisions relating to the application of those principles to specific materials or fact situations will be considered.

It should be interpolated, at this point, that the matters here discussed have only limited application to those countries to which a provision equivalent to section 123 of the Indian Evidence Act applies. That section provides—

"123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."³

Most of the comments hereunder relate to "unpublished official records" and hence the issue of their admissibility would not arise where this provision applies. However, the courts have moved away from "Crown" privilege and are now determining the admissibility both of government documents and documents that are only marginally related to affairs of state by an application of public interest criteria. To this extent this paper is applicable to the countries mentioned above as the matters with which it is concerned are pertinent to the admission in evidence of documents not related to affairs of state⁴.

General principles

(1) *Body having power to determine whether privilege applies.* From the time when Crown privilege claims first made their appearance in the nineteenth century, most courts considered that they were bound by a certificate from a responsible authority stating that it was inappropriate for governmental documents to be revealed in the course of judicial proceedings. There were some notable exceptions⁵ to this, but in the main it was the accepted dogma. The primary authority for the view in later years was *Duncan v. Cammell, Laird and Co. Ltd.*⁶ The notion underlying this approach was that it was appropriate that the government determine the question of production because it was better placed

3 See further Field's *Law of Evidence*;
Morris: *Evidence in East Africa*

4 This is of greater significance because of the attitude of the courts in "section 123 countries" to limit the scope of the expression "affairs of state": see, for example, *Raj Narain v. Indira Nehru Gandhi* A.I.R. 1974 All 324; *Appuhamy v. Ilangaratne* [1964] 66 C.L.W. 17

5 See, for example, *Robinson v. State of South Australia* (No. 2) [1931] A.C. 704; *Glasgow Corporation v. Central Land Board* [1956] S.C. (H.L.) 1

6 [1942] A.C. 624; for earlier references see *Beatson v. Skene* (1860) 5 H & N 838; 157 E.R. 1415; *H.M.S. Bellerophon* (1874) 44 L.J. Adm. 5.

than the courts to make a decision as to where the public interest lay. However, the increasing assertion by the courts of the right to review administrative decisions coupled with abuse by governments of the right to prevent the production of evidence led to a reversal of this approach by the courts. It is now clear that, subject to legislation in force in some jurisdictions,⁷ it is for the courts to declare whether or not governmental information should be produced in judicial proceedings. In coming to its conclusion, a court is to have regard to whether or not it is in the public interest that the particular evidence be revealed. This issue is to be determined by balancing what may be two competing interests, namely, on the one hand, the necessity for a court to determine a case having regard to the best available evidence and, on the other, the desire of the government that its proceedings be free from public scrutiny except to the extent that information is revealed by or with the approval of a Minister. To enable it to reach a conclusion, the court may inspect the documents in question.⁸

In *Burmah Oil* the House of Lords rejected an argument that a ministerial certificate should be regarded as conclusive because to hold otherwise would mean that judges occupying lower levels in the judicial hierarchy would be entitled to inspect and rule on the admissibility of governmental documents. However, Lord Keith and Lord Scarman considered that where a claim for privilege was overruled, the Crown should have a right of appeal before the document was produced.⁹

(2) *Scope of documents covered by Crown privilege.* The adoption of the concept that the court should determine whether governmental documents should be admitted in evidence by having regard to the public interest has resulted in this same touchstone being applied in the case of documents that were brought into existence other than by the central organs of government. *Hoffman La Roche*, for example, was concerned with documents of the Monopolies Commission, a body which is not a department of government. It was nonetheless hardly surprising that Templeman J rules that the same approach should be adopted in regard to these documents as with departmental documents. The issue arose in a more difficult form in *D. v. N.S.P.C.C.* There the House of Lords held that information revealed by an informer to the National Society for the Prevention of Cruelty to Children should not, in the public interest, be admitted in an action for negligence brought against the Society.

⁷ See below p 11

⁸ *Conway; Sankey; Nasse; R. v. Snider* [1954] 4 D.L.R. 483; *Gagnon v. Quebec Securities Commission* (1964) 50 D.L.R. (2d) 329 (Canadian Courts seemed a little slower to accept the general principle of judicial supremacy, but see now *Re Board of Moosomin School Unit No. 9 and Gordon* (1972) 24 D.L.R. (3d) 505; *Augustine v. City of Saint John* (1975) 12 N.B.R. (2d) 59; *Homestake Mining Co. v. Texasgulf Potash Co.* (1977) 76 D.L.R. (3d) 521; *Corbett v. Social Security Commission* [1962] N.Z.L.R. 878; *Konia v. Morley; Public Service Association of Papua and New Guinea v. Administrator of the Territory* [1966] P. & N.G.L.R. 361

⁹ At pp 751, 761; see also Gibbs A-C.J in *Sankey* at 530

Their Lordships considered that the abandonment of the notion of "Crown" privilege meant that the issue had to be determined quite independently of whether or not the evidence emanated from, or had been provided to, a governmental or semi-governmental department. It should be pointed out that the N.S.P.C.C. is the leading organisation in the United Kingdom concerned with the protection of children and is recognised in legislation relating to the care of children. Nonetheless, the decision did not turn merely on the status of the body. The issues of public interest were those which concerned the Court and it said that it was essential that information of the kind in question should continue to be revealed to the N.S.P.C.C. It considered that knowledge by an informer that the information that he provided could be revealed or indeed that his identity could be made known would lead to a drying up of the information.

This decision is of considerable significance in relation to the whole array of quasi-governmental or community organised welfare agencies that function largely as a result of the confidential relationship established between the parties, such as, marriage guidance organisations, adoption agencies, rape crisis centres, women's and children's refuges, etc. Information given to these organisations will frequently be defamatory and may lead to other forms of investigation with the possible consequence of an action subsequently being brought. Is it necessary in the public interest that these organisations be free from the likelihood of having to disclose information that may have been revealed to them? It was essential and probably inevitable that the concept of public interest should not be tied to "government" information. But the extension of the privilege from the aegis of government to other bodies will almost certainly result in the courts having to make some difficult decisions about where the public interest lies.¹⁰

The movement from Crown privilege to public interest has also resulted in this more general principle being adopted to determine whether referees and other confidential personnel reports should be made available to a litigant: *Nasse*. The House of Lords in its decision stressed that they were not creating a new category of privileged documents but were merely applying established principles to resolve the issue.

(3) *Confidentiality as a ground for declining admission of evidence.* The mere fact that a document has been entrusted in confidence to a person against whom an order is being sought for production is no ground in itself for denying the order.¹¹ Lord Denning in the Court of Appeal in *Crompton's* case¹² endeavoured to elevate confidential documents to a position whereby they

¹⁰ On the revelation of information given to adoption agencies, see *Pollock v. Pollock and Grey* [1970] N.Z.L.R. 771 and see further below p 6.

¹¹ *Lewes*, Lord Salmon at 411; *Crompton*, Lord Cross at 429, 433; *Sankey*, Gibbs A-C.J at 529, Mason J at 574; *Minister of National Revenue v. Huron Steel Fabricators (London) Ltd.* (1973) 41 D.L.R. (3d) 407; *Nasse*.

¹² [1972] 2 Q.B. 102.

could not be revealed. His Lordship said, "A party to litigation is not obliged to produce documents, or copies of documents, which do not belong to him, but which have been entrusted to his custody by a third party in confidence."¹³ This view was expressly rejected by the House of Lords on appeal. However, the rejection was qualified by Lord Cross when he said, "Confidentiality is not a separate head of privilege, but may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest. What the court has to do is to weigh on the one hand the considerations which suggest that it is in the public interest that the documents in question should be disclosed and on the other hand those which suggest that it is in the public interest that they should not be disclosed and to balance one against the other."¹⁴ Similar views were expressed by Lord Salmon in *Lewes*.¹⁵ In the Court of Appeal decision in *D. v. N.S.P.C.C.*, Lord Denning endeavoured to resurrect this argument that information supplied in confidence should not be revealed but the House of Lords again rejected the view.¹⁶ It would seem therefore, that the fact that evidence is given in confidence is not enough; something more is necessary. Disclosure of the information must be likely to lead to the drying up of the source of information because of danger to or other adverse effects upon the communicator. The concept of confidentiality is thus closely linked with the approach adopted in regard to information provided by informers and by referees and it is suggested that it should be read in that context and not treated as a separate issue justifying refusal to produce information.¹⁷

(4) *Effect of prior publication of information for which privilege claimed.* It has long been accepted that the Crown cannot take objection to the production in court of information already made public—for obvious reasons. "...there can be no injury to the public interest which would preclude their publication when they have already been published."¹⁸ Perhaps the fullest early discussions of the point is by the High Court of Australia in *Marconi's Wireless Telegraph Co. Ltd. v. The Commonwealth (No. 2)*¹⁹ in relation to an assertion that information contained in a patent specification should not be disclosed. The matter was taken further in *Konia v. Morley*. There privilege was claimed in respect of evidence given at a police inquiry. The evidence had not been published nor had the inquiry been open to the public at large. But

the person whose complaints had stimulated the inquiry (and who was the plaintiff seeking the production of the evidence) had been present (together with his grandmother) during the inquiry. This, in the view of the Court of Appeal, was sufficient to make the evidence public and the claim that it be not admitted was rejected.

These authorities did not, however, consider the position if the information has been revealed but without authority. This issue was alluded to in *Lewes* by Lord Reid who observed that the mere fact that there had been an unauthorised disclosure of the information was no ground for refusing to allow it to be revealed in court if it were in the public interest that it be not revealed.²⁰ Presumably his Lordship was contemplating a disclosure to a very limited number of people. Reference was also made to the documents concerned having been obtained by unlawful means. Minogue J in *Public Service Association of Papua and New Guinea v. Administrator of the Territory*²¹ was not prepared to hold that a document had been published merely because one copy was, without authority, delivered to counsel for the applicant. Earlier, Kriewaldt J in the Northern Territory of Australia Supreme Court had ruled that privilege could not be claimed for a document that came into the possession of a party to the proceedings "by means not shown to be reprehensible".²² The argument against allowing disclosure in such cases has probably been put most forcefully by Goswami J in *Sujit Kantha Neogi v. Union of India*²³—

"It is a question of serious import whether a person should be allowed to take advantage of his illegitimate action in securing by any means whatsoever secret and confidential documents of the Government. It is not possible to show any leniency in a matter of this description and we cannot too strongly condemn this unlawful practice and would be loath to give the erring party any advantage of his wrong action."

The issue was more fully discussed in *Sankey* where a difference of opinion emerged between the judges. Two difficulties were seen to arise. One was how to establish that the document reproduced was the document for which privilege was claimed. The second problem was whether a court, by ordering production on the basis of prior unauthorised publication, was thereby countenancing the misdeed. On the identification issue, Stephen J²⁴ could see no objection to taking what he described as the "straightforward course" of the court comparing the relevant document to see if the published document was indeed a copy of the original. As far as the second issue was concerned, his Honour referred to the views expressed in *Lewes* that documents published after having been obtained by unlawful means should not be produced. But he distinguished

13 At 134.

14 At 433.

15 At 412.

16 See Lord Diplock at 220; Lord Hailsham at 230; Lord Simon at 237. The decision in *Nasse* now clearly puts the issue beyond peradventure.

17 See below pp 8 and 9

18 *Allen v. Byfield* (No. 2) (1964) 7 W.L.R. 69 at 71 per Phillips C.J.

19 (1913) 16 C.L.R. 178; and see also *Robinson v. State of South Australia* (No. 2) [1931] A.C. 704 at 718; *Sankey*. Publication of a document removes it from the protection of s. 123 of the Indian Evidence Act: *State of Punjab v. Surjit Singh* A.I.R. 1975 P. & H. 11.

20 At 402.

21 [1966] P. & N.G.L.R. 361.

22 *Christie v. Ford* (1957) 2 F.L.R. 202.

23 A.I.R. 1970 A & N 131 at 135.

24 At 547.

these remarks on the basis that they were limited to a case where publication would reveal the identity of an informer. Those “quite special considerations” did not apply to this case. And seemingly would only apply in a limited number of instances.

Gibbs A – C. J and Mason J on the other hand considered that the two issues referred to above could not be divorced. While contemplating that a comparison might properly be made to determine the accuracy of the copy, both justices indicated that this might (in the words of Mason J) “confer the mantle of authenticity on a publication which was made unlawfully or in breach of confidence.”²⁵ In some cases, they said, this might be a ground for upholding an objection to production. The matter did not have to be resolved finally as the Court ruled that the document concerned was not, in any case, entitled to privilege.

The question at issue is a difficult one as the differing views indicate. However, if resort is had to the basis for refusing production of a document, it is suggested that the view of Stephen J is to be preferred. Production is to be refused if it is necessary in the public interest for the document not to be disclosed. But it is the content of the document that should resolve this question, not the means by which the document came to public knowledge. If disclosure would interfere with the policy-making process of the government or would reveal the identity of an informer, production should be refused. But disclosure should not be denied as an indirect means of punishing a person for wrongly publishing the document. There are other laws to deal with such misconduct. Even in the case of a document that reveals the identity of an informer, once it has been published and the informer identified, the reason for refusing to allow publication of the document has disappeared.²⁶ It is suggested that the greater public interest in cases of this kind lies in ascertaining whether the alleged copy is authentic. The court should inspect the original and the published copy. If it finds the copy is accurate, it should order publication of the original on the basis of prior publication.

(5) *Production of documents associated with public document.* If one of a series of documents is made public and therefore can be produced in judicial proceedings, what is the position in regard to associated documents that have not been published? In *Sankey* both Gibbs A – C. J and Stephen J clearly saw the fact of publication of one or more of a series of documents as weighing strongly in favour of production of associated documents. The public interest that would deny production is curtailed once one or more of the documents relating to a topic become “public and subject to public speculation and discussion.”²⁷ A similar approach was adopted in *Raj Narain v. Indira Nehru Gandhi*²⁸ where it was

held that the document had ceased to be “unpublished” and had thereby lost the protection of section 123 of the Evidence Act.

(6) *Refusal by Crown to claim privilege.* *Conway v. Rimmer* made it clear that it is the duty of the court to prevent the production of a document harmful to the public interest even though no objection is raised by the Crown.²⁹ This circumstance would usually arise where the Crown had had no opportunity to object to production. But in *Sankey* the reverse situation applied. The Australian Government had been given an opportunity to object to production and had chosen not to do so. In the view of Gibbs A – C. J and Mason J this weighed strongly against privilege being accorded the documents. Gibbs A – C. J considered that in such circumstances “it would be most exceptional for the court to intervene.”³⁰ Stephen J, on the other hand, viewed the issue in the context of whether it was possible for a person other than the Crown to raise privilege at all. He concluded this was possible in a case where the Crown had not considered the issue but he reserved this position where the Crown had elected not to claim privilege. He seemed to contemplate that it might be that a third party could not claim privilege unless the Crown’s failure to act had been based upon some erroneous view of the law. It would seem, with respect, that the approach of Gibbs A – C. J and Mason J is to be preferred. The view of the Crown is a factor to be considered in determining the public interest, whether that view is opposed to, or is in favour of, disclosure. There could be circumstances in which the Crown was unfairly seeking to produce one document while denying access to others to disadvantage the other party. This could well be the case in an action with political overtones.³¹ Once the notion of the privilege being *Crown* privilege is abandoned, the view of the government is but one of the factors to be considered. Nonetheless, it will probably only be in exceptional cases that a court will decline publication of documents that have been considered by the Crown and in respect of which no claim of privilege is made.³²

(7) *Means of raising objection to admission of evidence.* While it may be that if the Crown fails to object to the production of information which can be said to be protected by Crown privilege the issue can be raised by a party or by the court, nonetheless the usual way in which the issue comes before the court is on an objection by the Crown. The form that this objection should take was fully discussed in *Robinson v. State of South Australia (No. 2)*,³³ *Duncan’s* case and *In Re Grosvenor Hotel, London*.³⁴ These cases all make it clear that the

25 At 575.

26 Cf. *Tipene v. Apperley* [1978] 1 N.Z.L.R. 761.

27 Stephen J. at 547 – 548.

28 A.I.R. 1974 All 324.

29 See, for example, Lord Reid at 950.

30 At 531.

31 As was *Sankey* where a private prosecution alleging conspiracy had been brought against a former Prime Minister and members of his Cabinet.

32 *Re McLeery and the Queen (No. 2)* (1974) 50 D.L.R. (3d) 387; *Raj Narain v. Indira Nehru Gandhi* A.I.R. 1974 All 324.

33 [1931] A.C. 704.

34 [1964] Ch 464.

objection has to be taken by the responsible Minister unless there is some special reason, such as his unavailability, in which case the permanent head of the appropriate department can lodge the objection. The cases suggest that, at the discovery stage, objection can be lodged by means of an affidavit. But at the trial, attendance of an official of the department is desirable. The form of the affidavit of objection must indicate that the Minister has himself examined the documents and formed the view that it would not be in the public interest to disclose them. If objection is being taken to production of documents because they fall within a class,³⁵ the affidavit is required to indicate to which class the document belongs and why that class of documents should not be disclosed. Surprisingly, in the light of these authorities, affidavits are still lodged by Ministers that do not satisfy the requirements as to form. In *Sankey*, the High Court commented adversely on the manner in which the objections to production had been made. There had been a failure by the Minister to indicate that he had personally perused the document for which privilege was claimed. Mason J indicated that the affidavits in support of the privilege claim "should state with precision the grounds on which it is contended that documents or information should not be disclosed so as to enable the court to evaluate the competing interests."³⁶

(8) *Claims for privilege in respect of a class of documents.* *Duncan's* case not only contemplated that the certificate of a Minister stating that a document should not be produced in the course of judicial proceedings was final but also stated that there were classes of documents that could not be produced in a court. Defence and security matters were pertinent to the claim in *Duncan's* case and were clearly contemplated as an example of the kind of document that could not be produced under any circumstances. While *Conway v. Rimmer* denied the approach that a ministerial certificate was final, the judgments of their Lordships seemed to recognise that there were classes of documents that would always be regarded as inadmissible. Examples given were Cabinet papers, high-level policy documents, documents relating to defence and security, matters relating to the detection of crime, etc.

This approach has now been called in question in England by the decision in *Burmah Oil*. There, three of the five Law Lords, with varying degrees of enthusiasm, rejected the notion that if a claim for privilege were made for documents falling within a nominated class, the court was precluded from considering whether privilege should rightly be afforded to every document within the class. Lord Scarman expressed the most forthright view: "I do not therefore accept that there are any classes of documents which, however harmless their contents and however strong the requirement of justice, may never be disclosed until they are only of historical interest."³⁷

³⁵ See below

³⁶ At 572. The affidavit of the minister was commended for its clarity in *Burmah Oil* and should be regarded as a model to follow.

³⁷ At 759.

Lord Edmund Davies and Lord Keith expressed like views.³⁸ On the other hand, Lord Wilberforce and Lord Salmon endorsed the accepted opinion that there are classes of documents that are privileged, regardless of content.³⁹ The position in England cannot therefore be regarded as settled. The trend would seem to be against class claims being allowed but there is no certainty that this will be followed should a differently constituted court have to consider the issue in the future. It would be very easy for the remarks of the majority to be set aside as obiter dicta because, after inspection, none of the documents for which production was sought were considered of sufficient relevance to warrant their production in the face of the ministerial objection.

In New Zealand privilege claims for classes of documents are allowed.⁴⁰ Richardson J in *Elston v. State Services Commission* put this on the basis that the courts are not in a position to form judgments as to the prejudice to the public interest of revelation or otherwise of certain types of documents. In Canada, there seems to have been some reluctance to accept privilege claims for classes of document too readily;⁴¹ but there has been no outright rejection of the notion that all documents falling within a particular class can be protected.⁴²

In Australia, however, the High Court in *Sankey* swept away the notion that there are classes of documents which may never be produced. The nub of the decision is to be found in the statement of Stephen J⁴³—

"The judge-made law relating to Crown privilege is no code, it erects no immutable classes of documents to which a so-called absolute privilege is to be accorded. On the contrary, its essence is a recognition of the existence of the competing aspects of the public interest, their respective weights and hence, the resultant balance varying from case to case."

No government documents in Australia are therefore per se free from protection—not even Cabinet papers. Whether in practice production will be required will depend upon a balancing of the possibly competing interests referred to previously.

The rejection of privilege for classes of documents does, however, reinforce the wisdom of the course proposed by Lords Keith and Scarman in *Burmah Oil* that production of disputed documents should not occur until the Crown has had an opportunity to appeal against the order of a lower court.⁴⁴

³⁸ At 745 and 749.

³⁹ At 730 and 737.

⁴⁰ See *Konia v. Morley* at 461, 465; *Elston v. State Services Commission* [1979] 1 N.Z.L.R. 193.

⁴¹ *Re Blais and Andras* (1972) 30 D.L.R. (3d) 287; *R. v. Snider* [1954] 4 D.L.R. 483; *Augustine v. City of Saint John* (1975) 12 N.B.R. (2d) 59; *Manitoba Development Corporation v. Columbia Forest Products Ltd.* [1973] 3 W.W.R. 593.

⁴² See also the Hong Kong case of *Khan v. Attorney-General* [1974] H.K.L.R. 63.

⁴³ At 546.

⁴⁴ At 751 and 761.

Basis of courts' approach to claims for Crown privilege

What then are the factors that a court will take into account when determining whether to refuse the revelation of information? *Conway v. Rimmer* talked only in general terms of matters that, in the national interest or the public interest, should not be revealed. Due weight, it was said, must be given both to the administration of the executive and the administration of justice. The exercise becomes one for the court to weigh the competing public interests. But detailed assistance can be extracted from the subsequent cases and an attempt will now be made to identify a number of these factors.

(1) The need to preserve candour in communications is not a factor in itself that will persuade a court to order that information be not revealed. The notion that public servants will be constrained in what they write because they will be afraid that the information may be revealed to the public was scorned by the House of Lords in *Conway v. Rimmer*. The approach taken was that the number of instances of revelation of information in judicial proceedings is infinitesimal when compared with the number of occasions on which it is necessary for a public servant to express his views. In addition, it would be belittling public servants to suggest that their advice would vary accordingly to whether or not it was exposed to public scrutiny. In *Lewes*, Lord Salmon referred to this argument as "the old fallacy."⁴⁵ The same general attitude was followed by Moller J in *Pollock v. Pollock and Grey*.⁴⁶ His Honour was impressed by the claim advanced in that case that welfare workers concerned with questions of adoption should be able to discuss the private lives of prospective adoptive parents without fear that the discussion would be revealed subsequently. But he was not prepared to allow this factor to outweigh the need to achieve justice between the parties in divorce proceedings. A similar approach was followed in Canada in relation to a report of the Superintendent of Bankruptcy in *Re Blais and Andras*.⁴⁷ On the other hand, in *Konia v. Morley* the Court did pay considerable attention to the possibility of police investigations being inhibited if views expressed by officers were to be generally available. Perhaps investigations of alleged misconduct can be treated as a special category. Richmond J stated that no general rule could be laid down "...except that the courts should be slow to order production of such documents if the circumstances suggest that information has been supplied in circumstances where it might well not have been supplied at all had it been thought that it would later be made public."⁴⁸ His Honour mentioned as a factor that the court should bear in mind that, in the absence of confidentiality, there might be a fear of victimisation. This is most pertinent to inquiries into the conduct of public servants and is particularly applicable to reports from junior officials. This view

was also stated by Gibbs A-C. J in *Sankey*. His Honour cited as an example the case of a Crown servant who is obliged to furnish a report on the suitability of one of his fellows for appointment to high office.⁴⁹ His Honour considered that he did not think it "altogether unreal" that in certain circumstances frankness in communication might be affected if disclosure were possible.

The question of whether or not referees' reports should be revealed to the persons who are the subject matter of the report raises this issue squarely and is discussed below.⁵⁰

(2) If the information is such that it must be kept secret to enable the body claiming protection to perform its statutory function, revelation should not be ordered.⁵¹ The circumstances in which this position is most likely to arise is where the information is obtained from sources that would dry up if the information were not kept secret. This approach is of long standing in regard to police informers.⁵² It was extended in *Lewes* to include information obtained from retailers in the peculiar circumstances of that case where the information related to the criminal or quasi-criminal activities of gaming clubs and would almost certainly not have been made available if it were thought that the information could not be kept secret. It is interesting to note that in that case the Court conceded that the contents of the documents, if revealed, were not such as would be damaging to the public interest. It was the source of the documents that was being protected.⁵³ The same thinking underlies the decision of the House of Lords in *D. v. N.S.P.C.C.* where the Court considered that the need to ensure that the N.S.P.C.C. was provided with information relating to cruelty to children required anonymity to be afforded to persons communicating information to the Society. Here again, disclosure of the information was likely to lead to the drying up of the source of information through danger to the communicator.

But the courts have not allowed too much to be made of this concept of having to make the statute work. In *Norwich* it was argued that disclosure of the information (the names of importers of goods) would result in falsification of documents in the future. This argument was rejected as being irrelevant to the application. It was not in the public interest to preserve one ill (in this case non-disclosure of the names of illegal importers) for the purpose of avoiding another ill.⁵⁴ Nor was the Court in that case prepared to give great credence to the argument that the knowledge that the information could be disclosed would impair the good relations of the Commissioners of Customs with traders. The Court considered that only dishonest traders would be reluctant to provide information—honest traders

45 At 413.

46 [1970] N.Z.L.R. 771.

47 (1972) 30 D.L.R. (3d) 287

48 At 465; see also *Liddle v. Owen* [1978] 21 A.L.R. 286

49 At 527.

50 At p 9

51 *Lewes*, Lord Reid at 401; Lord Morris at 405.

52 See further below p 8

53 Cf. Lord Morris at 405; and cf. the discussion in *Konia v. Morley* referred to above.

54 Lord Cross at 199.

had nothing to hide so therefore would not cease to co-operate with the Commissioners.⁵⁵

A similar approach was followed in Canada in relation to a claim that the revelation of information supplied in the tax returns of a defunct company would dissuade other tax payers from providing complete and accurate information in their returns.⁵⁶ The Federal Court of Appeal considered that the argument had “very little weight or validity by itself” and even less when considered in the light of the penal provisions in the Income Tax Act requiring the disclosure of information.

(3) The fact that the information has been disclosed under compulsion is not in itself sufficient to prevent its disclosure.⁵⁷ There seem to be two exceptions to this approach. One is where the information is given pursuant to a statute which provides that disclosure of the information is not to be permitted. Clearly, in these circumstances, the statutory requirement of non-revelation overrides any question of public interest in disclosure.⁵⁸ A second category contemplated by Viscount Dilhorne in *Norwich* is that of information being given to a government department where the information is of a personal character obtained in the exercise of statutory powers and is of such a character that the giver of it would not expect it to be used for any purpose other than that for which it was given and would not expect it to be disclosed to any person not concerned with that purpose.⁵⁹ But the fact that a government department treats information obtained under a statutory compulsion as confidential does not alter the basis of the court’s approach and will not prevent a declaration that it be produced in court.⁶⁰

(4) The greater the relevance of the information to the resolution of the issues before the court, the more likely it will be that the courts will order disclosure.⁶¹ In *A.N.A.* the information was described as having a decisive influence on the outcome of the case. The same point was made by Lord Cross in *Crompton*.⁶² Conversely where the information is not essential to the plaintiff’s case or would have little bearing on its outcome, *Burmah Oil* indicates that an order for production should not be made in the face of a claim for privilege. The balancing act in such cases comes down on the government’s side because the counter-

vailing interest of a court having all available information in making its decision will not be affected by the absence of the evidence.

(5) If the information is such as would be available in a criminal case it should also be available in a civil action.⁶³

(6) The fact that disclosure could result in industrial unrest is not relevant to the question of revelation where the information is otherwise of importance and should be revealed in the interests of justice.⁶⁴ Nor does the fact that the information pertains to the government’s industrial relations policy mean that it should not be revealed.⁶⁵

(7) There may perhaps be a leaning towards revelation where the information to be produced has not been brought into existence as part of the processes of executive government.⁶⁶ Added weight will be given to this point if the information is contained in documents of a commercial nature.⁶⁷ But the mere fact that the body producing the information is not a department is not conclusive: it is the information not its producer that is important.⁶⁸

Privilege relating to particular types of evidence

The general principles outlined above are relevant to all claims that evidence on a particular matter should not be revealed in the public interest. There have, however, been some recent decisions relating to particular types of evidence that warrant further mention in the present context.

(1) *State papers*. As mentioned previously, in *Conway v. Rimmer* a number of categories of documents were said to be of a kind that should never be produced in court. These categories or classes of documents included Cabinet papers—qualified by Lord Reid to the extent that they could be revealed when only of historical interest;⁶⁹ letters or reports on appointments to offices of importance;⁷⁰ high-level inter-departmental minutes, foreign office despatches and correspondence pertaining to the general administration of the military forces.⁷¹ Many of these categories of documents had been held to be privileged in earlier cases.⁷² To these categories of information might be added reports from Colonial officials to

55 Lord Reid at 175; Lord Cross at 198.

56 *Minister of National Revenue v. Huron Steel Fabricators (London) Ltd.* (1973) 41 D.L.R. (3d) 407.

57 *Norwich*, Lord Cross at 198; Lord Kilbrandon at 206; *Crompton*, Lord Cross at 433; *Minister of National Revenue v. Huron Steel Fabricators (London) Ltd.* (1973) 41 D.L.R. (3d) 407.

58 *Norwich*, Viscount Dilhorne at 189; Lord Cross at 198; see also *Rowell v. Pratt* [1938] A.C. 101; *R. v. Saint Merat* [1958] N.Z.L.R. 1147; *Canadian Pacific Tobacco Co. Ltd. v. Stapleton* (1952) 86 C.L.R. 1.

59 At 189.

60 *Norwich*, Lord Cross at 198.

61 *A.N.A.* at 443.

62 At 434. See also *Tipene v. Apperley* [1978] 1 N.Z.L.R. 761 (the information was “pivotal” to the plaintiff’s action).

63 *Norwich*, Lord Kilbrandon at 206.

64 *A.N.A.* at 442.

65 *Elston v. State Services Commission* [1979] 1 N.Z.L.R. 193.

66 *A.N.A.* at 442; *Broome v. Broome* [1955] p 190.

67 *Norwich*, Lord Reid at 175; *Robinson v. State of South Australia (No. 2)* [1931] A.C. 704 at 715; *Burmah Oil*

68 *Hoffman La Roche; D. v. N.S.P.C.C.*

69 At 952; and cf. the decision in *Attorney-General v. Jonathan Cape Ltd.* [1976] Q.B. 752.

70 Lord Pearce at 987; Lord Upjohn at 993.

71 Lord Upjohn at 993.

72 See, for example, *Asiatic Petroleum Co. Ltd. v. Anglo-Persian Oil Co. Ltd.* [1916] 1 K.B. 822 (security and defence matters); *Wyatt v. Gore* (1816) 1 Holt N.P. 299; 171 E.R. 250 (communications between Governor and Attorney-General).

government⁷³ and reports and records of the armed services.⁷⁴

Canadian⁷⁵ and New Zealand⁷⁶ courts seem generally to accept this approach, as did Papua-New Guinea in a pre- *Conway v. Rimmer* decision.⁷⁷ But this blanket exclusion of information from production was rejected by the High Court of Australia in *Sankey* and, after *Burmah Oil*, its acceptance in England must now be questioned. Gibbs A.C. J reflected the views of the High Court in *Sankey* when he said that this exclusion from disclosure fitted ill with the general principles expounded in *Conway v. Rimmer*. He continued—

“The fundamental principle is that documents may be withheld from disclosure only if, and to the extent, that the public interest renders it necessary. That principle, in my opinion, must also apply to State papers. It is impossible to accept that the public interest requires that all State papers should be kept secret forever, or until they are only of historical interest. In some cases the legitimate need for secrecy will have ceased to exist after a short time has elapsed; this will be so...when new taxation proposals have passed into legislation. In other cases it may be necessary to maintain secrecy for many years. This may be so where the documents concern national security or diplomatic relations, to give two obvious examples. In other words, State papers do not form a homogeneous class, all the members of which must be treated alike. The subject matter with which the papers deal will be of great importance, but all the circumstances have to be considered in deciding whether the papers in question are entitled to be withheld from production, no matter what they individually contain.”⁷⁸

So in Australia (except in New South Wales)⁷⁹ there is to be no class of undisclosed documents, but presumably, the higher the document on the policy formulation scale or the more it is concerned with defence or security issues, the harder it will be to persuade a court to order production. This is probably also the position in England.

(2) *Informers*. The earliest reported case concerned with the question of exclusion of evidence in the public interest related to evidence given by a police informer. *Hardy's case*⁸⁰ was a treason trial and in the course of examination questions were put

that were designed to elicit the avenues of information that had led the Crown to investigate the actions of the defendants and bring them to trial. The Court ruled that the questions were inadmissible. It said that revelation of the channels by means of which detection is made should not be unnecessarily disclosed. The correctness of this early decision was confirmed in *Marks v. Beyfus*⁸¹ subject to the rider that revelation may be allowed if it is essential to the establishment of the defendant's innocence. One of the rare examples of the making of an order requiring the disclosure of an informant's identity is *R. v. Tovarula*.⁸² There, Minogue C.J. considered that it was essential to the establishment of the voluntariness of a statement by the accused that it be known on whose word the police had acted in arresting him.

In *Crompton* the House of Lords determined that the exemption from disclosure of information supplied by informers in the course of judicial proceedings, extended beyond information communicated directly to the police. It included also information supplied generally to investigatory officers in circumstances analogous to the supply of information by police informers. In that case the information was communicated to customs officers. *D. v. N.S.P.C.C.* made it clear that this category of protected information was based squarely on the public interest principle. It is not a case of saying that information supplied by particular persons is privileged but rather of applying the test whether it is necessary in the public interest that the information be not disclosed. In that case the information concerned was a statement to the Society which claimed that Mrs. D's small child had been maltreated. The information, on investigation, proved to be false and Mrs. D sued the Society alleging negligence. For the purposes of her case she sought the revelation of the name of the person who had supplied the information to the Society. The House of Lords held that the identity of the informant should not be disclosed as the Society needed to be able to offer anonymity to persons supplying it with information if it were to perform its duties satisfactorily. The significance of the case is that the Society was not an organ of government and could not be readily equated with the police force or other investigatory-type bodies.

The matter of protection for persons giving information has, however, also arisen in the context of inquiries by company inspectors. In England, the Divisional Court declined to require the production of the transcript of a witness's evidence given to a company inspector who had conducted a non-public inquiry into the affairs of a company.⁸³ The informer cases were cited as authority for this approach by counsel and Lord Widgery seemed to accept this argument. His Lordship said, "...the public interest in maintaining the sources of information of this kind of inquiry would outweigh the private

73 *Anderson v. Hamilton* (1816) 129 E.R. 917 (the earliest Crown privilege case concerned with government documents); *Hennessy v. Wright* (1888) 21 Q.B.D. 509; *Wright & Co. v. Mills* [1890] 62 L.T. 558.

74 *Home v. Bentinck* (1820) 2 Brod. & B. 130; 129 E.R. 907 *Adams v. Ward* [1917] A.C. 309; *H.M.S. Bellerophon* (1874) 44 L.J. Adm. 5; *Duncan v. Cammell, Laird and Co. Ltd.* [1942] A.C. 624.

75 See, for example, *Reese v. The Queen* [1955] 3 D.L.R. 691; *Gronlund v. Hunsen* (1968) 68 D.L.R. (2d) 223.

76 *Corbett v. Social Security Commission* [1962] N.Z.L.R. 878. The general tenor of the judgments in *Konia v. Morley* indicated no great willingness to be bound by traditional thinking, but see now *Elston v. State Services Commission* [1979] 1 N.Z.L.R. 193 where the Cabinet and high level papers approach is clearly endorsed.

77 *Public Service Association of Papua and New Guinea v. Administrator of the Territory* [1966] P & N.G.L.R. 361

78 At 528.

79 See below p 11

80 (1794) 24 State Trials 199 at 808.

81 (1890) 25 Q.B.D. 494; affirmed in *D. v. N.S.P.C.C.*

82 [1972] P N.G.L.R. 140.

83 *R. v. Cheltenham Justices, ex parte Secretary of State for Trade* [1977] 1 W.L.R. 95

disadvantage (to the defendant)."⁸⁴ With this ruling should be contrasted the decision of the New South Wales Court of Appeal in *Barton v. Csidei*.⁸⁵ The Court there declined to hold that the evidence of a witness to a company inspector should not be revealed. While the relevant legislation is different in the respective countries, the Australian court expressly rejected the argument that the protection afforded to witnesses should be equated with that for informers. This view seems to be preferable, particularly when it is borne in mind that a company inspector in England can compel the attendance of a witness and it is an offence to refuse to co-operate and comply with his directions. The witness is thus afforded a reasonable answer to any accusations made against him by the company. In any case, the risk to the witness is not of the same order as that to a police informer whose identity and evidence is revealed.

It is submitted that the extension of inadmissible evidence to include that given to a company inspector is somewhat questionable. The reasoning of the Divisional Court would seem to be equally applicable to any inquiry that is not open to the public. This then takes the exclusionary rule into the area of evidence supplied in confidence: an approach to the question that has been rejected by the House of Lords⁸⁶ and also by the High Court of Australia.⁸⁷ If it is thought necessary to protect witnesses appearing before statutory inquiries, it would seem desirable for it to be so provided in the legislation relating to the conduct of the inquiry rather than leaving it to a court to make such a decision on the rather less certain ground of public interest.

A New Zealand case has sounded a cautionary warning about allowing the informer exception to become unconfined. In *Tipene v. Apperley*⁸⁸ the Court was concerned with a claim for privilege in respect of a statement made to the police by the defendant who later pleaded guilty to an offence. The statement contained allegations of complicity in the offence by the plaintiff. The plaintiff denied these allegations and no charges were brought against him. He sued the defendant for defamation and sought production of the defendant's statement from the police. The Court of Appeal, in overruling the privilege claim, said that where a member of the public makes a statement to the police in relation to a criminal investigation, the "informer" privilege should not be regarded as applicable to that statement. A person so acting can expect to be required to repeat his statement in court and have his identity revealed. He is not in the position of a police informer whose identity must be kept secret to protect him from reprisals.

Finally, informer evidence, like any other evidence regarded as inadmissible in the public interest, should not continue to be unavailable if the public interest against disclosure has been set to one side by other facts, such as the publication of the information. Once this has happened, the revelation of the evidence does not pose any greater risk to the informer than already exists and the reason for non-disclosure is therefore negated. This occurred in New Zealand and resulted in the Court of Appeal in *Tipene v. Apperley*⁸⁹ denying a claim that certain information provided to the police should not be disclosed.

(3) *Investigation of allegations against members of police force.* In *Conway v. Rimmer* Lord Reid noted, as information that was not protected by Crown privilege, routine governmental reports including personnel reports. That decision was itself concerned with a report prepared by a senior police officer relating to a probationary constable. The House of Lords held that the report could be disclosed in judicial proceedings. However, in two other cases decided after *Ridge v. Baldwin*, *Konia v. Morley* and *Liddle v. Owen*,⁹⁰ claims for privilege were upheld in respect of internal minutes relating to a police officer whose conduct had been the subject of a complaint by a member of the public. The documents included opinions expressed by senior officers relating to the respective police officers' actions and personalities. The court in each case considered that disclosure of the documents produced in the course of a police internal investigation could inhibit full investigation of complaints lodged by members of the public.⁹¹ The decisions in these cases reflect a similar attitude to that evidenced in relation to the decisions mentioned under the next heading. But it is to be noted that Richmond J in *Konia v. Morley* drew a distinction between documents which contained recommendations and expressions of opinion by officers conducting the inquiry and those which related more directly and immediately to the facts of the incident giving rise to the investigation. Privilege claims would more readily be allowed in respect of the former than of the latter.

(4) *Reports of referees.* One of the areas in which, traditionally, confidentiality of documents has been expected—and provided—has been that of personal reports on applicants or employees provided by referees or superiors. For example, in *Bell v. University of Auckland*⁹² Turner J declined to order the production of referees' reports. He based his decision in part on the fact that the plaintiff had nominated the referees himself and had impliedly indicated to them that their reports would be kept confidential. His Honour said that it was within his power to order disclosure but considered it inappropriate to do so. In *R. v. Teachers Tribunal*;

⁸⁴ At 100.

⁸⁵ *Barton v. Csidei*, 8 June 1979, unreported at time of writing, see also *Finnane v. Australian Consolidated Press Ltd.* [1978] 2 N.S.W.L.R. 435 where it was held that a witness in such an inquiry could publish his own evidence if he chose to do so.

⁸⁶ *D. v. N.S.P.C.C: Birmah Oil*

⁸⁷ *Sankey*

⁸⁸ [1978] 1 N.Z.L.R. 761.

⁸⁹ *Ibid*

⁹⁰ [1978] 21 A.L.R. 286

⁹¹ *Cf. Augustine v. City of Saint John* (1975) 12 N.B.R. (2d) 59 where a claim for privilege in respect of police reports was rejected. It is not clear, however, whether the reports were of internal investigations.

⁹² [1969] N.Z.L.R. 1029.

*ex parte Colvin*⁹³ Lush J declined to hold that an applicant for promotion had been denied natural justice where, in accordance with a long established procedure, referees' reports had not been disclosed to him. In *Slavutych v. Baker*⁹⁴ the Canadian Supreme Court upheld an appeal against dismissal that was founded upon allegedly false and malicious statements made by the plaintiff in a confidential report relating to a colleague. The report had been made on the understanding that it would be seen only by a tenure committee and would be destroyed, after the committee had completed its inquiry. But *Sankey* and *D. v. N.S.P.C.C.* make it clear that the fact that a document has been prepared in circumstances in which its author thinks its contents will be kept secret is not, in itself, sufficient to preserve the document from production in an appropriate case.⁹⁵ It will be a factor that a court will take into account in determining whether or not production should be ordered, but it is not conclusive.

The circumstances in which the question of production of personal reports could arise are increasing. It is pertinent to such long established actions as wrongful dismissal or certiorari or other remedy to question a decision of a statutory tribunal concerned with employment matters. But the recent adoption in many countries of equal opportunity legislation intended to prevent applicants for jobs being discriminated against on grounds of race, sex, etc., of necessity brings with it the disclosure of referees' reports. This fact is clearly demonstrated by the recent decision of the House of Lords in *Science Research Council v. Nasse*.

The judgments dealt with two applications: one by N. against the Science Research Council alleging that she had been denied promotion because of her union activities and because she was a married woman. The second was a claim brought by V. against Leyland Motors asserting that he had been refused promotion because he was black. The applications came before an Employment Appeal Tribunal pursuant, in N's case, to the Employment Protection Act 1975 and to the Sex Discrimination Act 1975 and in V's case, to the Race Relations Act 1976. N. was given access to her own personal file, including reports relating to her prepared, in confidence, by her superior officers. But she also sought access to the personal files of the persons who had gained promotion when she had been refused. V. was given access to his personal work record, but was refused access to other applicants' work records and also to notes made by members of an interviewing panel on all applicants, including V. The Employment Appeal Tribunal ordered access to be given to all documents sought by the respective applicants. The employers appealed. The Court of Appeal,⁹⁶ in allowing the appeal, did not order that the documents sought be not disclosed but so circum-

scribed the basis on which disclosure should be granted as to have that effect.

Lord Denning M.R., stated the principle that should govern cases of this kind in the following terms⁹⁷—

“The industrial tribunals should not order or permit the disclosure of reports or references that have been given and received in confidence except in the very rare cases, where, after inspection of a particular document, the chairman decides that it is essential in the interests of justice that the confidence should be overridden; and then only subject to such conditions as to the divulging of it as he shall think fit to impose—both for the protection of the maker of the document and the subject of it. He might, for instance, limit the sight of it to counsel and solicitors on their undertaking that it should go no further.”

Browne L.J. expressed his entire agreement with this statement of principle and Lawton L.J. agreed with the general effect of it. All judges emphasised the need for inspection by the Tribunal and for a decision being made that takes into account the circumstances of the particular case. But clearly, if the principle as formulated by Lord Denning were to be followed, it would place an extremely heavy onus on a person seeking the disclosure of a referee's report. Lord Denning indeed described the request to see the reports on other applicants for promotion as “the most presumptuous claim of all” and suggested that we might think “we were back in the days of the General Warrants.”

The circumscribed access that would have flowed from the Denning formulation did not commend itself to the House of Lords. Their Lordships regarded it as too rigid and not allowing sufficient flexibility to deal with individual fact situations. But Lord Edmund Davies and Lord Fraser were prepared to endorse the test propounded by Lord Denning modified by the deletion of the words, “in the very rare cases.”⁹⁸ The tenor of the other judgments of the House of Lords is to like effect. Thus, the position is reached that the confidence expected by the referee will be respected unless, after inspection, revelation is essential to the resolution of the dispute.

A person claiming discrimination against him is placed in a difficult position. He is asserting that he is better than another person and the best way to establish this fact is to see what referees have said about all parties concerned. But it must be recognised that persons concerned with the selection and promotion process, be it in government departments or industry or for admission to educational establishments, need to have frank and honest assessments of applicants. It is a weakness of human nature that if a referee knows the subject matter of his report will see that report, he is likely to be more guarded in what he writes. As far as the revelation of reports on other persons is concerned, there is also the question of the invasion of privacy—the point that Lord Denning was making as set out above. It is conceded that pres-

93 [1974] V.R. 905.

94 [1975] 4 W.W.R. 620.

95 Above p 2

96 [1978] 3 W.L.R. 754

97 At 768.

98 At 780 and 789.

ervation of secrecy is likely to protect the biased or unfair reference. But the right of a court or tribunal to inspect a confidential report, should, when it is viewed in the light of other evidence presented, enable this sort of unfairness to be mitigated. It is really up to the adjudicator to win the confidence of all parties so that they will accept his ruling on disclosure, after inspection, as being the correct course of action.

It is of interest to note that the Court of Appeal in *Nasse's* case observed that the various anti-discrimination Acts with which the Court was concerned were silent on the question of availability of referees' reports. This is a matter on which courts are entitled to expect some guidance from legislators. Proponents of such legislation should be prepared to grapple with the issue. It is suggested that Lord Denning's principle, as modified by the House of Lords, could well be given statutory form.

Legislation relating to Crown Privilege

Apart from section 123 of the Indian Evidence Act which has already been noted, some other provisions relating to claims for Crown privilege should be mentioned. Section 41 of the Canadian Federal Court Act provides—

“41. (1) Subject to the provisions of any other Act and to subsection (2), when a Minister of the Crown certifies to any court by affidavit that a document belongs to a class or contains information which on grounds of a public interest specified in the affidavit should be withheld from production and discovery, the court may examine the document and order its production and discovery to the parties, subject to such restrictions or conditions as it deems appropriate, if it concludes in the circumstances of the case that the public interest in the proper administration of justice outweighs in importance the public interest specified in the affidavit.

(2) When a Minister of the Crown certifies to any court by affidavit that the production or discovery of a document or its contents would be injurious to international relations, national defence or security, or to federal-provincial relations, or that it would disclose a confidence of the Queen's Privy Council for Canada, discovery and production shall be refused without any examination of the document by the court.”

For the reason mentioned below, it is not proposed to discuss this provision here, except to note that subsection (2) goes far towards explaining the relatively small number of Crown privilege cases that have come before Canadian courts. Section 41 will be repealed when the Canadian Freedom of Information Act becomes law. In addition to repealing that section, the Freedom of Information Act (among many other things) amends the Canadian Evidence Act by inserting the following provisions:

“36.1 (1) A Minister of the Crown or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(2) An objection to disclosure referred to in subsection (1) may be reviewed by a superior court, in which case, the court may examine or have the information in respect of which the objection was made and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.”

It can be seen that these sections restate the basic principles upon which the law of Crown privilege is founded. The sections do not attempt to set out the detailed law on the topic and it may be assumed that Canadian courts will turn to the principles enunciated in the cases cited in this paper in applying the sections.

It is somewhat ironic that when Canada should be amending its law on Crown privilege to give greater access to information, New South Wales should be legislating to restrict markedly the information that will be available in judicial proceedings. In what can only be described as an extraordinary over-reaction to the *Sankey* decision, the New South Wales State Government amended the Evidence Act of the State to provide—

“61 (1) When the Attorney-General certifies in writing that in his opinion—

- (a) any communication described in the certificate, or any communication relating to a matter so described, is a government communication and is confidential; and
- (b) the disclosure of the communication in any legal proceedings described in the certificate is not in the public interest,

the communication shall not be disclosed in or in relation to those legal proceedings or be admissible in evidence in those legal proceedings.

(2) A certificate under subsection (1) shall, without any court having examined, or heard a record of, the communication so certified or having inquired into the power of the Attorney-General to give the certificate, be accepted in the legal proceedings described in the certificate as conclusive that the communication is a government communication and is confidential and that the disclosure of the communication in those legal proceedings is not in the public interest.

(3) A certificate under subsection (1) may be revoked by the Attorney-General.

62 (1) A communication shall not be disclosed in or in relation to any legal proceedings or be admissible in evidence in any legal proceedings if—

- (a) it appears to the person presiding in the court before which the legal proceedings are held or taken that the communication is a government communication; and
- (b) the Attorney-General has not had an opportunity to give a certificate under section 61 in relation to the communication.

(2) Subsection (1) does not apply to a government communication the publication of which has previously been duly authorised.

(3) Subsection (1) does not prevent a communication from being disclosed in or in relation to any legal proceedings so far only as the disclosure is made to the person presiding in the court before which those legal proceedings are held or taken and is necessary to enable

the person to decide whether or not the communication is a government communication and, if the person decides that it is such a communication, whether or not it is a government communication referred to in subsection (2).”

It can be seen that these sections turn the clock back to the law as it was after *Duncan v. Cammell, Laird and Co. Ltd.*, without even the limited safeguards that that case provided. A ministerial certificate will be final and a court will not be able to question whether or not it is in the public interest for a document to be disclosed. Claims by the New South Wales Attorney-General that the Act merely restored the law to the position it was in prior to the *Sankey* case are not accurate, as it is quite clear that *Sankey* did no more than apply the principles espoused by the House of Lords in *Conway v. Rimmer*. The only exception to this was that the High Court did not accept that a court should bind itself by recognising a category of documents that would always be regarded as inadmissible in the court’s discretion: a view endorsed by the majority of the House of Lords in *Burmah Oil*.

Conclusion

The period since 1960 has seen a steady assertion by the courts of the supremacy of the judiciary over the executive as final determiner of the rights of citizens. The requirement of compliance with the rules of natural justice laid down in the early 1960s; the assertion of the right to review ministerial decisions made soon thereafter; and the continuing refusal to allow the jurisdiction of the courts to be ousted have all been part of the working out of the respective roles of the institutions making up our system of government. Evidentiary privilege was one of the last bastions of ministerial superiority. The right of the Minister to have the final say was removed by *Conway v. Rimmer*. The High Court of Australia in *Sankey* and the House of Lords in *Burmah Oil* have taken this concept of judicial right to its logical conclusion by the rejection of the self-imposed fetter that certain classes of documents are never admissible. The courts have been left with the task of balancing the public interest—a task that will not be easy for them to carry out. The significant feature, however, underlying all the more recent decisions in this field is that it is the courts that will have to undertake this balancing task, not the executive.

THE TRANSFER OF CONVICTED OFFENDERS FROM AND TO COMMONWEALTH JURISDICTIONS

Memorandum by the Commonwealth Secretariat and a Discussion Paper prepared by
Mr. A. M. F. Webb, CMG, QC

Those who participated in the Winnipeg Meeting will know that Australia suggested that consideration should be given to the feasibility of developing arrangements under which prisoners undergoing long sentences in one member country could be transferred to another to serve their sentences. Ministers agreed that there was scope for enhancing mutual assistance in the area of the administration of justice, and the Commonwealth Secretariat therefore commissioned Mr. A. M. F. Webb (who was a member of the Colonial Legal Service for many years, in Malaya and Kenya, and who served in the Lord Chancellor's Office until his retirement) to prepare a Discussion Paper on the subject).

2. It will be recalled that a draft of Mr. Webb's paper was circulated to Law Ministers in November last year. The Government of Barbados has since indicated that they would wish to see the proposals extended at this stage to cover the enforcement of other sentences as adumbrated in paragraphs 33 and 34 of the paper so that, from the outset, any arrangements made could encompass all the methods of punishment which are acceptable to all Commonwealth jurisdictions.

3. The Government of Jamaica have also given their preliminary views on Mr. Webb's paper, and these are contained in LMM(80)8.

4. It did not prove possible to arrange for Mr. Webb's work to be revised in the time available and so his paper is attached very substantially in its original form. If any further comments are received

from Governments, these will be collated and distributed.

5. Mr. Webb reviews the history and content of the United Kingdom legislation which became largely irrelevant to the new Commonwealth, and traces recent developments both in the Commonwealth and in Europe. Drawing largely upon Canadian experience, he suggests a possible Commonwealth approach to the development of arrangements which would allow the removal of prisoners in appropriate cases to serve their sentences in their home countries.

6. As in the case of the Meeting's review of extradition arrangements, it is recognised that the time available at Barbados, and the absence of representatives of all departments affected by the proposals, will make it impracticable for Ministers to reach firm conclusions. However, they will no doubt wish to discuss the ideas put forward in principle to serve as a guide for future action and, at the same time, consider the desirability of extending their scope as suggested by the Government of Barbados.

7. If it is the wish of Ministers, the Secretary-General could circulate revised proposals which would take into account the conclusions of this Meeting. Thereafter the matter could be taken further as developments dictate. It might be considered appropriate in certain parts of the Commonwealth for the proposed arrangements to be discussed at a regional level, so that their practical application could be examined in the light of local circumstances; and against the background of common problems.

THE TRANSFER OF CONVICTED OFFENDERS FROM AND TO COMMONWEALTH JURISDICTIONS

By A. M. F. Webb, CMG, QC, Barrister-at-law

Introductory

1. At the Meeting of Law Ministers held in Winnipeg in August 1977 Ministers considered a memorandum by the Government of Australia, "Mutual Assistance in the Administration of Justice" (LMM(77)6), paragraphs 26 and 28 of which refer to the possibility that a person serving a prison sentence in one Commonwealth country might be removed to serve that sentence in another Commonwealth country:—

26. The Colonial Prisoners Removal Act 1884 of the United Kingdom Parliament made provision for the removal in certain circumstances of a prisoner undergoing a sentence of imprisonment in a British possession to another British possession or the United Kingdom to complete service of his sentence. The removal was effected pursuant to the order of the Secretary of State acting with the concurrence of the Governments of the British possessions concerned.

27. The matters to be taken into account in making an order under the Act of 1884 included such things as whether the life of the prisoner would be endangered or his health permanently impaired by further imprisonment in the first British possession. Considerations of that sort are not really appropriate to present conditions. Instead it is suggested that new criteria be established to enable countries to transfer prisoners to, for example, countries in which they are domiciled or where they have close ties with relatives or other persons.

28. In the present constitutional development of the Commonwealth of Nations it would no longer be appropriate to use the provisions of the Colonial Prisoners Removal Act. It would be more appropriate to develop arrangements under which prisoners undergoing long sentences in one member country may be transferred to another country. (1977) Meeting of Commonwealth Law Ministers, Minutes of Meeting and Memoranda, p. 179 at p. 181).

2. The Law Ministers agreed that there was scope for mutual assistance in this area, amongst a number of others, of the administration of justice and endorsed the suggestion that the Commonwealth Secretariat should examine this problem and consult Commonwealth countries about the feasibility of making arrangements to this end.

3. The criminal law of the several member countries of the Commonwealth is governed, with some few exceptions, by the concept of national sovereignty. Each country takes as its basis the principle of territoriality, and the effect and consequences of the judicial decisions of its courts do not in general extend beyond its frontiers.

4. This situation does not fully meet present-day requirements. If society is to be effectively protected, account must be taken of trends in crime. The problems are, like many others, becoming international, largely owing to the considerable development of economic resources, improved

means of transport and communications, and to the ensuing mobility of populations.

5. Increasingly, Governments are being approached by the relatives of their nationals who have been imprisoned, often for lengthy terms, in foreign jurisdictions. Although Governments have at times wished to respond to requests that arrangements be made for the repatriation of their nationals in such circumstances, the absence of any international machinery or domestic legislation has rendered this impossible. There is, too, for the country of imprisonment the expense of maintaining a foreigner within its prison system, as the simple expedient of immediate deportation is, in effect, a pardon. Moreover, penal policy has come to lay greater emphasis upon treatment of the offender. It would seem that resocialisation is often considerably facilitated when the sanctions imposed upon the offender are carried out in his home country rather than in the country in which the offence was committed and the sentence passed. This policy is also rooted in humane considerations, in particular the understanding of the detrimental influences upon a prisoner of difficulties of communication by reason of language barriers, alienation from local culture and habits and the absence of contact with relatives and friends.

6. The Government of Canada has responded to these challenges by concluding treaties with the United States and with Mexico (reproduced as Annex A to this memorandum), and it is understood that consultations are taking place with a view to its concluding similar arrangements with a number of other countries.

7. In the past this state of affairs aroused little attention, since very few cases were involved. However, today there is so much movement between different countries of the world, and particularly between Member countries of the Commonwealth, that a more equitable and humane system has become desirable. The mutual aid which is now contemplated, not merely on a Commonwealth basis but potentially on an international scale, will facilitate the prevention of the relapse into crime by making available across frontiers those methods of individual amendment and social rehabilitation where they exist, which have proved successful on a national scale.

Colonial Prisoners Removal Acts 1869 and 1884

8. For particular reasons there was a development in this field within the former British Empire, not primarily prompted by abstract theories of penology but rather on practical considerations and for reasons of health. The Colonial Prisoners Removal Acts 1869 and 1884 were enacted by the Parliament of the United Kingdom in circumstances which were, of

course, very different from those which obtain today. The 1869 Act provides for the removal of an adult prisoner from one colony to another for the purpose of undergoing his punishment and for his return, in pursuance of an agreement made between the two governments concerned and sanctioned by Order in Council. There is no definition in the Act of "prisoner" and it would probably not include a juvenile offender undergoing modern methods of treatment. Agreements under the 1869 Act were sanctioned between the Falkland Islands and Malta (removal from the former to the latter); between Grenada, St. Lucia and St. Vincent (reciprocal between any two); between Nyasaland and Mauritius (removal from the former to the latter); and reciprocity, between Antigua and Montserrat, Antigua and the Virgin Islands, and Antigua and St. Christopher, Nevis, Anguilla.

9. When the Bill for the 1884 Act was before Parliament it was described as being no more than the logical extension of the principle already stated and enshrined in the 1869 Act. The Bills for both Acts had been circulated, in draft, to all colonial governments and no dissent from their provisions is recorded. The 1884 Act set up a centralised and rather less formal system. The principle is that an adult convict sentenced to imprisonment in one British possession may be removed to another possession to serve his sentence, and he may be returned to the possession where he was sentenced to complete his sentence or to be released. The Act applies to all British possessions, and could be extended by Order in Council to other places in which Her Majesty had jurisdiction. The receiving country, but not the sending country, may be the United Kingdom, and what, therefore, is particularly anomalous in present circumstances is that a convict sentenced to imprisonment in the United Kingdom cannot be removed to serve that sentence in a British possession, although a person sentenced in a British possession can be removed to the United Kingdom to serve his sentence there.

10. The 1869 Act defines "colony" as not including any place within the United Kingdom, the Isle of Man or the Channel Islands or within British India, but including "any plantation, territory or settlement situate elsewhere within Her Majesty's dominions and subject to the same local government" (section 2) and the 1884 Act defines "British possession" with the same exclusions and including "all other territories and places being part of Her Majesty's dominions, and all territories and places within Her Majesty's dominions which are not part of India and are under one legislature shall be deemed to be one British possession" (section 18). Both Acts could be extended by Order in Council, under the Foreign Jurisdiction Act 1890, to any place out of Her Majesty's dominions in which Her Majesty had jurisdiction as if that place were a British possession and part of Her Majesty's dominions. A number of Orders have been made in exercise of this power extending, in particular, the 1884 Act not only to former protectorates and protected states but also to other places in which Her Majesty's jurisdiction was less precisely

founded, although it was no less real. It is unnecessary, for the purpose of this memorandum, to list all these Orders; they can be traced in any of the standard works.

11. Although, as above remarked, neither Act defines a prisoner by reference to age, it is clear that these Acts applied in practice exclusively to adults, if only because of their application to prisoners. If at that period there was any form of custodial sentence applicable only to a juvenile offender, not being imprisonment, then neither Act could have been operated so as to effect the removal of such a juvenile offender.

12. Both the 1869 and the 1884 Acts applied to and in all those countries which were colonies/British possessions (as so defined) at the respective dates of their enactment, or to which they were subsequently extended by Order. It is at least arguable that some of those countries, upon becoming independent sovereign states, retained those laws as part of their inheritance, and that the effect of any agreements which had then been made and sanctioned remained in full force and effect. In a number of cases, however, it may be that these powers are regarded as now being obsolete. Even if it were desired to invoke them, the Acts have not specifically been adapted to changed circumstances: thus the Acts require action by "the Governor" or "the Governor in Council", and these, or other terms, may not have been appropriately amended.

13. Even if available it would not seem appropriate to use the provisions of the Colonial Prisoners Removal Acts 1869 and 1884 in the present state of constitutional development of the Commonwealth. Furthermore the Acts are deficient in at least four respects. The Acts are not territorially comprehensive. The Acts do not apply to all offenders upon whom a custodial sentence may be imposed. Even as regards those members of the Commonwealth in which, or in respect of which, the Acts are technically in force, they may not in practice be capable of being operated. And, as previously mentioned, it is today anomalous for there to be no possibility of removal from the United Kingdom. There is a further serious deficiency in as much as the Acts are restricted to persons sentenced to imprisonment, which could preclude their application to juvenile offenders.

14. Another consideration is the basis upon which the 1884 Act permits the removal of a convict. The 1869 Act specifies no criteria with regard to the prisoner which are required to be satisfied before he can be removed, but section 2 of the 1884 Act sets forth five factors:—

2. Where as regards a prisoner undergoing a sentence of imprisonment in any British possession for any offence it appears to the removing authority hereinafter mentioned either
 - (a) that it is likely that the life of the prisoner will be endangered or his health permanently injured by further imprisonment in such British possession; or

- (b) that the prisoner belonged, at the time of committing the said offence, to the Royal Navy or to Her Majesty's regular military forces; or
- (c) that the offence was committed wholly or partly beyond the limits of the said British possession; or
- (d) that by reason of there being no prison in the said British possession in which the prisoner can properly undergo his sentence or otherwise the removal of the prisoner is expedient for his safer custody or for more efficiently carrying his sentence into effect; or
- (e) that the prisoner belongs to a class of persons who under the law of the said British possession are subject to removal under this Act;

in any such case the removing authority may, subject nevertheless to the regulations in force under this Act, order such prisoner to be removed to any British possession or to the United Kingdom to undergo his sentence or the residue thereof.

15. It must be asked whether these limitations are still apt, or whether a citizen of one Commonwealth country who is sentenced in another Commonwealth country should be able to be transferred to his native country, there to serve his sentence, provided that the consent of both Governments and of the prisoner are given. This, indeed, is the formula which has found favour with Canada.

16. Although the United Kingdom Acts are restricted to the transfer of persons sentenced to imprisonment, there are no limitations in their application as to the length of such sentence or as to the nationality of the prisoner.

Recent Developments

17. Since the 1884 Act was passed there have been many developments in penology and a number of methods of disposal of those convicted of criminal offences, other than imprisonment, are now available and are constantly used. Sentences of imprisonment can now be modified by remission and by parole, and may even not take effect immediately (suspended sentences). Although the memorandum by the Government of Australia refers in its paragraph 28 to "long sentences" (see paragraph 1 above), so that the consequences of remission and parole must be considered in the context of any new arrangements, presumably this should not be taken to mean that the whole subject of alien offenders, and the possibility of securing the enforcement of any sentence in a country other than that in which it was imposed, should not be the subjects of future study.

18. Although the recognition of criminal judgments and the enforcement of sentences for criminal offences by a country other than that in which the conviction was entered and the sentence imposed is a recent development in international law, there are already a number of precedents. The first step was indeed taken by the United Kingdom a century ago, by the 1869 Act. In 1948 Norway, Denmark and Sweden entered into a treaty for the reciprocal enforcement of judgments in criminal matters involving fines, confiscation or legal costs. In 1963 the five Scandinavian countries made an agreement which permits the transfer of an offender to his

native country to serve a sentence passed in another Scandinavian country. The Council of Europe has formulated and adopted three conventions, two in 1964 and one in 1970, providing for the reciprocal enforcement, by member States of the Council on ratification or acceptance by them of a convention, of sentences imposed for road traffic offences; of sentences involving supervision of those conditionally sentenced or conditionally released and of sentences generally imposed for criminal offences. And, as has been mentioned, Canada entered into treaties in 1977 with the United States of America and with Mexico under which Canadian citizens undergoing sentences of imprisonment or on parole may be returned to Canada, there to serve their sentences or the residue thereof: similarly, American and Mexican citizens in prison in Canada may be transferred to their respective home countries. Australia has long had legislation, closely modelled on the 1884 Act of the United Kingdom, providing for the removal of prisoners between the States and within the Territories under the authority of the Commonwealth; however, because of its origins, this legislation has some of the limitations of the United Kingdom Act, and it is of restricted territorial application.

A possible Commonwealth approach

19. The European precedents, although interesting and stimulating, do not afford a great deal of assistance in suggesting how the Commonwealth might proceed with the matters under consideration. Although the civil law jurisprudence is a common factor in Europe, the many differences in the codes of criminal law and procedure, and in penal philosophy and methods, of the various countries in Europe have resulted in conventions of considerable complexity and of great detail. The instrument of an international convention, to whose terms all the participating governments must agree and to which individual governments can then accede (albeit with the possibility of reservations and special provisions) seems to be unnecessarily cumbersome, if not indeed impracticable. The Canadian concept of separate treaties, or perhaps even less formal agreements between members of the Commonwealth (for the most part bilateral, but possibly in certain regions, e.g. the Commonwealth Caribbean, multilateral), might well prove both easier to accomplish and more effective in practice.

20. Although local legislation is essential to implement any such arrangements, there are certain aspects which would properly be included in agreements made between governments. This would not only be constitutionally correct, but would also free a government to make agreements which differed in detail from one country to another, as do the Canadian treaties, which nevertheless serve as admirable models.

21. It will be observed that the treaties deal with the following matters: the offender must be a citizen of the country to which he is to be transferred; the category of offences to which the arrangements apply is specified, and the act of the offender must consti-

tute an offence in both countries; and certain classes of offences are excluded, such as fiscal offences and those affecting sovereign rights, security and other essential interests. Even with regard to prison sentences qualifications can be made: for example, short terms may be excluded and the minimum period remaining to be served may also be prescribed. As well, the scope of the arrangements can be extended to non-custodial sentences, such as probation, disqualification from driving, and even monetary sanctions. The responsibility for making the arrangements for transferring prisoners and the liability for the costs of transfer are, and should be, prescribed in the treaties, along with other administrative details.

22. As far as the financial implications of any arrangement for the transfer of offenders are concerned, there appear to be two clear alternatives. One is that the government of the country in which the offender is convicted, upon his transfer to his home country being agreed with the government of that country, should make the arrangements and pay for his journey on the basis that that government will be relieved of the future cost of keeping the offender in prison, and of supervising him on parole. The second alternative approach is that the government of the country whose national is being repatriated has the greater interest in the well-being and rehabilitation of the offender. The latter is the approach preferred in the Canadian treaties. It will, of course, be a matter for the particular governments, when negotiating any arrangements, to decide how to deal with this matter.

23. It will be necessary, both when negotiating any agreement with another country and especially when drafting a Bill for any proposed legislation, to consider the constitutional aspects of the matter as well as the implications of any international obligations or convictions which might have a bearing. The most obvious point concerns human rights provisions. Generally, local legislation will be able to make lawful the imprisonment in transit of an offender being transferred between two other jurisdictions, and it is thought that the requirement in the draft that any person who is to be transferred from one country to another, i.e. conveyed by arrangements made between governments and at their expense, must give his consent would avoid any other difficulty.

A draft Bill

24. Whenever such arrangements are made, it will, of course be essential for the governments concerned each to legislate in order to make them legally effective. An annotated draft Bill is annexed (Annex B), not in any sense as a "model Bill" but simply as a convenient way of highlighting some of the essential features of such legislation. The draft is perforce no more than an outline. For ease of reference, too, the Canadian Act which came into force on 17 July 1978 is reproduced as Annex C.

25. The draft is founded on two basic principles. First, following the Canadian precedent, it is only in respect of one of its own citizens that a country will

enforce a sentence imposed on him in another country. (The European conventions, on the other hand, require a country which adheres to one or other of them to enforce such a sentence on a person ordinarily resident therein). Secondly, again following Canada, that not only the consent of a person who wishes to be transferred from one country to his home country be required (except in the case of the mentally ill), but the consent of both the governments concerned will be necessary. (It is interesting to note that the European conventions, while stipulating the consents of governments, do not require that of the person concerned). The initiative for requesting the transfer of a person serving a prison sentence or otherwise detained in custody will lie either with the prisoner, or with the government of the country in which he is incarcerated.

26. A fundamental difference of principle between the European conventions and the arrangements now proposed is that under the former the obligations of adherents are strictly prescribed and the circumstances in which a government can refuse to enforce a sentence are limited, while under the draft each government must consider each case individually and decide whether or not to accept responsibility for enforcement.

27. It will be noted that the draft contains provision for more than the transfer of persons actually serving prison sentences and the immediate consequences of imprisonment, namely, parole, remission and after-care; the last-named is a period of compulsory supervision after release from prison (if the sentence imposed exceeds a specified minimum term), borstal or detention centre (so that all young offenders given any custodial sentence are supervised after release). The draft also provides for juvenile offenders on probation and for detained offenders suffering from mental illness. It will be for each Commonwealth government to decide which provisions should be included in any legislation to be enacted locally.

28. The draft envisages a schedule of countries to which the legislation would apply, and for that schedule to be added to as further arrangements are concluded. It would also be possible to provide that not every provision of the legislation should necessarily apply to every country named in the schedule, thus maintaining flexibility. Some notes on particular clauses of the draft are appended to those clauses.

29. The draft is designed for unitary Constitutions. Member countries which are federations would have to adapt the concepts underlying the various provisions of the draft to their own respective constitutional arrangements. It might, for example, be necessary to provide for the consent of a constituent government, if prison or other services involved with a transferred person, or with the implementation of a sentence imposed elsewhere are, the latter's responsibility rather than those of the central government.

30. In all circumstances save one the conviction and sentence actually recorded and imposed will be deemed for all purposes and by all authorities in the country enforcing the sentence to be a conviction and

sentence of a court in that country. This will import the consequences of escape or default. The exception concerns juvenile offenders. There are such differences between one country and another, even within the Commonwealth, in the classification and treatment of offenders who are not adults that it does not seem possible to equate automatically a transferred juvenile offender with a person of the same age who has been sentenced in the home country. The Canadian Act recognises the reality of this problem. Accordingly, the draft proposes that in these circumstances a transferred young offender shall be brought before a court of competent jurisdiction in his home country on arrival and that that court shall sentence him according to the law and practice of that country for dealing with an offender of his age. The conviction (by whatever name called) will not be in question. If two countries, in negotiating transfer arrangements, find that their respective laws relating to juvenile offenders, the procedure for dealing with them and their methods of treating them, are identical or are very nearly the same, they can agree that the order of the court in the one country shall be carried into effect in the other without any intervening court proceedings in that other.

31. The lawfulness of the custody of a prisoner during his transfer presents potential jurisprudential and jurisdictional problems. These will not arise in the rare cases of neighbouring countries with a common frontier across which the prisoner is transferred, and they may not arise if the means of transportation is within the sovereignty of one country or the other, for example, by ship or aircraft registered in the one or the other. But where the vehicle of transportation is foreign to both countries concerned in a transfer, difficulties could arise in practice which cannot with certainty be overcome. In the case of transfer by air the possibility of landing during the journey in a third country and of disembarking, even temporarily, may give rise to further difficulties and to the risk of escape. Immigration laws and airport security may minimise these difficulties in practice, and in some countries existing legislation may cover the point. While clause 13 of the draft is not proffered as being effective in all circumstances, even where the conducting officer is in the service of the government of the country to which the prisoner is being transferred, it is put forward on the basis that these potential difficulties do not appear to have materialised in respect of extradition, and if they are real one would have expected them to have done so.

32. The draft empowers the Minister to make rules prescribing the procedure to be followed in such cases. It is not possible to propose a draft of such rules, but the procedure might be on the following lines. The Minister, upon agreeing on behalf of his government to enforce a sentence or other order of a court, would transmit the request, with a copy of the

intimation of his agreement, and the accompanying documents to the proper official of the appropriate court, who either himself or on the order of a judge or magistrate, would issue a warrant to the offender to appear before the court. The court proceedings would not be a trial, but would resemble rather the proceedings in that court following conviction and sentence, when the effect and consequences are explained to the offender.

Suspended penal sentences, monetary penalties etc.

33. The ambit of the present study is confined to the question of prisoners and juveniles on probation. These appear to be the core element, but if the limited proposals now put forward find acceptance in principle and prove efficacious in practice, the possibility of widening the scheme would arise. As the European conventions illustrate, nowadays probation and suspended penal sentences are widely recognised facets of penal systems and are used to provide better protection against crime while at the same time lightening the burden of prison costs and of aid to prisoners' families. Sometimes, too, where foreigners or non-residents are involved, courts are reluctant to pass a sentence which is not certain to be put into effect in another country—in consequence, offenders who might normally have qualified for suspended sentences or probation are either given an immediate sentence of imprisonment or released only in order to be deported, thus making it more likely that they will reoffend in the country to which they are deported.

34. Although the emphasis has in the past been on the transfer of prisoners, modern trends suggest that at some time in the future thought may have to be given to the transfer of persons on whom sentences other than imprisonment have been imposed, and to the transfer of the enforcement of other sentences. Thus, a person convicted of an offence in one Commonwealth country, of which he was not a citizen, and ordered to pay compensation to the victim (and perhaps costs as well) might only be able to obtain the means to satisfy those orders if he could return to his own country, because it would be easier for him to obtain employment at home. It should be possible to make arrangements whereby money ordered to be paid by a court in one Commonwealth country could be paid to a court in another country and then transferred by inter-governmental channels to the court which had made the order. There is an analogy here with the existing arrangements for the reciprocal enforcement of maintenance orders. In times of increasing levels of road accidents, too, it may be thought desirable that a disqualification imposed in one country, for example, from driving a motor vehicle, should be enforceable in another country, rather than permit an offender to escape the consequences of his actions simply by crossing a frontier.

ANNEX A

TREATY BETWEEN CANADA AND THE UNITED STATES OF AMERICA ON THE EXECUTION OF PENAL SENTENCES

The Government of Canada and the Government of the United States of America,

Desiring to enable Offenders, with their consent, to serve sentences of imprisonment or parole or supervision in the country of which they are citizens, thereby facilitating their successful reintegration into society;

Have agreed as follows:

ARTICLE I

For the purpose of this Treaty:

(a) "Sending State" means the Party from which the Offender is to be transferred;

(b) "Receiving State" means the Party to which the Offender is to be transferred;

(c) "Offender" means a person who, in the territory of either Party, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, conditional release or other form of supervision without confinement. The term shall include persons subject to confinement, custody or supervision under the laws of the Sending State respecting juvenile offenders; and

(d) "Citizen" includes an Offender who may be a dual national of the Parties and in the case of the United States also includes nationals.

ARTICLE II

The application of this Treaty shall be subject to the following conditions:

(a) That the offense for which the Offender was convicted and sentenced is one which would also be punishable as a crime in the Receiving State. This condition shall not be interpreted so as to require that the crimes described in the laws of the two Parties be identical in such matters not affecting the character of the crimes as the quantity of property or money taken or possessed or the presence of interstate commerce.

(b) That the Offender is a citizen of the Receiving State.

(c) That the offense is not an offense under the immigration laws or solely against the military laws of a Party.

(d) That there is at least six months of the Offender's sentence remaining to be served at the time of his application.

(e) That no proceeding by way of appeal or of collateral attack upon the Offender's conviction or sentence be pending in the Sending State and that the prescribed time for appeal of the Offender's conviction or sentence has expired.

ARTICLE III

1. Each Party shall designate an authority to perform the functions provided in this Treaty.

2. Each Party shall inform an Offender, who is within the scope of the present Treaty, of the substance of the Treaty.

3. Every transfer under this Treaty shall be commenced by a written application submitted by the Offender to the authority of the Sending State. If the authority of the Sending State approves, it will transmit the application, together with its approval, through diplomatic channels to the authority of the Receiving State.

4. If the authority of the Receiving State concurs, it will so inform the Sending State and initiate procedures to effectuate the transfer of the Offender at its own expense. If it does not concur, it will promptly advise the authority of the Sending State.

5. If the Offender was sentenced by the courts pursuant to the laws of a state or province of one of the Parties, the approval of the authorities of that state or province, as well as that of the federal authority, shall be required. The federal authority of the Receiving State shall be responsible for the custody of the transferred Offender.

6. In deciding upon the transfer of an Offender, the authority of each Party shall bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender.

7. No Offender shall be transferred unless:

(a) he is under a sentence of imprisonment for life; or

(b) the sentence which he is serving states a definite termination date, or the authorities authorized to fix such a date have so acted; or

(c) he is subject to confinement, custody or supervision under the laws of the Sending State respecting juvenile offenders; or

(d) he is subject to indefinite confinement as a dangerous or habitual offender.

8. The Sending State shall furnish to the Receiving State a statement showing the offense of which the Offender was convicted, the termination date of the sentence, the length of time already served by the prisoner and any credits to which the Offender is entitled on account of work done, good behaviour or pretrial confinement. Where requested by the Receiving State a translation shall be provided.

9. Each Party shall establish by legislation or regulation the procedures necessary and appropriate to give legal effect within its territory to sentences pro-

nounced by courts of the other Party and each Party agrees to cooperate in the procedures established by the other Party.

10. Delivery of the Offender by the authorities of the Sending State to those of the Receiving State shall occur at a place agreed upon by both Parties. The Sending State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, that the Offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

ARTICLE IV

1. Except as otherwise provided in this Treaty, the completion of a transferred Offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Sending State shall, in addition, retain a power to pardon the Offender and the Receiving State shall, upon being advised of such pardon, release the Offender.

2. The Receiving State may treat under its laws relating to youthful offenders any Offender so categorized under its laws regardless of his status under the laws of the Sending State.

3. No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the date at which it would have terminated according to the sentence of the court of the Sending State.

4. The Receiving State shall not be entitled to any reimbursement from the Sending State for the expenses incurred by it in the completion of the Offender's sentence.

5. The authorities of each Party shall at the request of the other Party provide reports indicating the status of all Offenders transferred under this Treaty, including in particular the parole or release of any Offender. Either Party may, at any time, request a special report on the status of the execution of an individual sentence.

6. The transfer of an Offender under the provisions of this Treaty shall not create any additional disability under the laws of the Receiving State or any state or province thereof beyond those which the fact of his conviction may in and of itself already have created.

ARTICLE V

Each Party shall regulate by legislation the extent, if any, to which it will entertain collateral attacks upon the convictions or sentences handed down by it in the cases of Offenders who have been transferred by it. Upon being informed by the Sending State that the conviction or sentence has been set aside or otherwise modified, the Receiving State shall take appro-

priate action in accordance with such information. The Receiving State shall have no jurisdiction over any proceedings, regardless of their form, intended to challenge, set aside or otherwise modify convictions or sentences handed down in the Sending State.

ARTICLE VI

An Offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offense upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offense the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by a court, federal, state, or provincial, of the Receiving State.

ARTICLE VII

If either Party enters into an agreement for the transfer of sanctions with any other State, the other Party shall cooperate in facilitating the transit through its territory of Offenders being transferred pursuant to such agreement. The Party intending to make such a transfer will give advance notice to the other Party of such transfer.

ARTICLE VIII

1. This Treaty shall be subject to ratification and shall enter into force on the date on which instruments of ratification are exchanged. The exchange of instruments of ratification shall take place at Ottawa as soon as possible.

2. The present Treaty shall remain in force for three years from the date upon which it enters into force. Thereafter, the Treaty shall continue in force until thirty days from the date upon which either Party gives written notice to the other Party of its intention to terminate the Treaty.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments, have signed the present Treaty.

DONE in duplicate, in the French and English languages, each language version being equally authentic, at Washington this second day of March, 1977.

TREATY BETWEEN CANADA AND THE UNITED MEXICAN STATES ON THE EXECUTION OF PENAL SENTENCES

The Government of Canada and the Government of the United Mexican States,

DESIRING to promote the rehabilitation of offenders by enabling them to serve sentences in the country of which they are nationals,

Have agreed as follows:

ARTICLE I

(1) Sentences imposed in the United Mexican States on nationals of Canada may be served in Canada in accordance with the provisions of this Treaty.

(2) Sentences imposed in Canada on nationals of the United Mexican States may be served in Mexico in accordance with the provisions of this Treaty.

ARTICLE II

The application of this Treaty shall be subject to the following conditions:

(a) That the offence for which the offender was convicted and sentenced is one which would also be punishable as a crime in the Receiving State.

(b) That the offender is a national of the Receiving State.

(c) That the offender is not a domiciliary of the Sending State.

(d) That at least six months of the offender's sentence remain to be served at the time of the application referred to in paragraph 3 of Article IV.

(e) That no proceeding by way of appeal or of collateral attack upon the offender's conviction or sentence is pending in the Sending State and that the prescribed time for appeal of the offender's conviction or sentence has expired.

ARTICLE III

(1) Each Party shall explain the substance of the present Treaty to any offender who is within its scope.

(2) Every transfer under the Treaty shall be commenced by the Authority of the Sending State. Nothing in this Treaty shall prevent an offender from submitting a petition to the Sending State to be considered for transfer.

(3) If the Authority of the Sending State finds the transfer of an offender appropriate, and if the offender gives his express consent for his transfer, it will transmit an application, through diplomatic channels, to the Authority of the Receiving State.

(4) If the Authority of the Receiving State concurs, it will so inform the Sending State and initiate procedures to effect the transfer of the offender. If it does not concur, it will promptly advise the Authority of the Sending State.

(5) In deciding upon the transfer of an offender the Authority of each Party shall bear in mind all factors bearing upon the probability that the transfer will contribute to the social rehabilitation of the offender, including the nature and severity of his offence and his previous criminal record, if any, his medical condition, the strength of his connections by residence, presence in the territory, family relations and otherwise to the social life of the Sending State and the Receiving State.

(6) If the offender was sentenced by the courts of a state or province of one of the Parties, the approval of the authorities of that state or province, as well as that of the federal authority, shall be required. The federal authority of the Receiving State shall, however, be responsible for the custody of the transferred offender.

(7) No offender shall be transferred unless either the sentence which he is serving has a specified duration, or such a duration has subsequently been fixed by the appropriate administrative authorities.

(8) The Sending State shall furnish the Receiving State a statement showing the offence of which the offender was convicted, the duration of the sentence, the length of time already served by the prisoner and any credits to which the offender is entitled, such as, but not limited to, work done, good behaviour or pre-trial confinement. Such statement shall be translated into the language of the Receiving State and duly authenticated. The Sending State shall also furnish the Receiving State a certified copy of the sentence handed down by the competent judicial authority and any modifications thereof. It shall also furnish additional information that might be useful to the Authority of the Receiving State in determining the treatment of the offender with a view to his social rehabilitation.

(9) If the Receiving State considers that the documents supplied by the Sending State do not enable it to implement this Treaty, it may request additional information.

(10) Each Party shall take the necessary legislative measures and, where required, shall establish adequate procedures, to give, for the purposes of this Treaty, legal effect within its territory to sentences pronounced by courts of the other Party.

ARTICLE V

(1) Delivery of the offender by the authorities of the Sending State to those of the Receiving State shall occur at a place agreed upon by both Parties. The Receiving State shall be responsible for the expenses of the transfer from the time when the offender passes into its custody.

(2) The Sending State shall afford an opportunity to the Receiving State, if it so desires, to verify, prior to the transfer, that the offender's consent to the transfer is given voluntarily and with full knowledge of the consequences thereof, through the officer designated by the laws of the Receiving State.

(3) Except as otherwise provided in this Treaty, the completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise. The Sending State shall, however, retain its power to pardon or grant amnesty to the offender and the Receiving State shall, upon being advised of such pardon or amnesty, release the offender.

(4) No sentence of confinement shall be enforced by the Receiving State in such a way as to extend its duration beyond the period of confinement imposed by the sentence of the court of the Sending State.

(5) The Receiving State shall not be entitled to any reimbursement for the expenses incurred by it in the completion of the offender's sentence.

(6) At the request of one of the Parties, the other Party shall provide a report on the status of confinement of any offender transferred under this Treaty, including in particular parole or release.

(7) The transfer of an offender under the provisions of this Treaty shall not create any additional disability under the laws of the Receiving State or any state or province thereof beyond those which the fact of his conviction may in and of itself already have created.

ARTICLE VI

The Sending State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts. Consequently the Receiving State shall have no jurisdiction over such proceedings. The Receiving State shall, upon being advised by the Sending State of action affecting the sentence, take the appropriate action in accordance with such advice.

ARTICLE VII

An offender delivered for execution of a sentence under this Treaty may not be detained, tried or sentenced in the Receiving State for the same offence upon which the sentence to be executed is based. For purposes of this Article, the Receiving State will not prosecute for any offence the prosecution of which would have been barred under the law of that State, if the sentence had been imposed by one of its courts, federal state or province.

ARTICLE VIII

(1) This Treaty is also applicable to persons subject to supervision or other measures under the laws of one

of the Parties relating to youthful offenders. The Parties shall, in accordance with their laws, agree to the type of treatment to be accorded such individuals upon transfer. Consent for the transfer shall be obtained from the legally authorized person.

(2) Nothing in this Treaty shall be interpreted to limit the ability which the Parties may have, independent of the present Treaty, to grant or accept the transfer of youthful or other offenders.

ARTICLE IX

For the purpose of this Treaty,

- (a) "Sending State" means the Party from which the offender is to be transferred.
- (b) "Receiving State" means the Party to which the offender is to be transferred.
- (c) A "national" means, in the case of Canada, a Canadian citizen.
- (d) "Offender" means a person who, in the territory of one of the Parties, has been convicted of a crime and sentenced either to imprisonment or to a term of probation, parole, conditional release or any other form of supervision without confinement.
- (e) A "domiciliary" means a person who has been present in the territory of one of the Parties for at least five years with an intent to remain permanently therein.

ARTICLE X

(1) This treaty is subject to ratification. The exchange of instruments of ratification shall take place at Mexico, D.F.

(2) This Treaty shall enter into force thirty days after the exchange of ratifications and shall remain in force for three years.

(3) Should neither contracting Party have notified the other ninety days before the three-year period mentioned in the preceding paragraph has expired of its intention to allow the Treaty to terminate, the Treaty shall remain in force for another three years, and so on every three years.

ANNEX B

[Notes on the several provisions of the draft appear in brackets immediately following them]

DRAFT BILL

for

An Act for the carrying into effect of arrangements made for the transfer of persons/citizens convicted in other countries of criminal offences and for the enforcement of sentences passed upon them; and for purposes incidental thereto and connected therewith.

Short title	1. This Act may be cited as the Transfer of Offenders Act 19 . [In the interests of brevity the title is restricted to the principal purpose of the legislation. There seems to be no purpose in providing a commencement date or for an appointed day; the effective date will, in respect of any scheduled country, be that upon which the Schedule is amended by the inclusion in it of that country.]
Interpretation	2. In this Act, unless the context otherwise requires— “convicted” includes a finding of guilt; [To provide for the case of juveniles, who, in some jurisdictions, are not “convicted” of offences.] “foreign offender” means an offender who is a citizen of a scheduled country; “imprisonment” includes detention; [Juveniles may not be sentenced to imprisonment, but rather to be detained; this also applies to offenders who are mentally ill and found not to be responsible for their actions.] “offender” means a person, irrespective of age, being a citizen of X, who has been convicted of an offence by a court of competent jurisdiction and upon whom any sentence has been imposed in consequence thereof; [“X” means the country enacting the Bill, here and elsewhere in the draft.] “prescribed” means prescribed by rules made under section 15; “sentence” includes imprisonment, and supervision while at liberty on parole or on probation; [If enforcement of any other possible sentences, for example, community service is possible, these should be added to the definition.] “scheduled country” means a country named in the Schedule with which arrangements have been made for the transfer of offenders or for the enforcement of sentences; “transferred” means transferred from a scheduled country to X. [The provisions of the Interpretation Act will have to be borne in mind in drafting this clause.]
Request for transfer and signification of agreement	3.—(1) When the Minister is informed by the responsible authority of a scheduled country that an offender has requested transfer to X and that the government of that country has agreed to, and requests such transfer, the Minister shall cause the said authority to be advised whether the Government of X agrees or does not agree to such transfer; and if both governments agree to such transfer the Minister shall initiate the prescribed procedure. (2) The agreement of the Government of X to the transfer of an offender from a scheduled country, and to the enforcement of a sentence imposed upon him in a scheduled country, shall not be given unless the offender has completed the prescribed form and that form has been delivered to the Minister.
Transferred offenders Effect of transfer	4. A transferred offender shall be dealt with, and the sentence imposed upon him shall be enforced, in accordance with the provisions of this Act. 5.—(1) When an offender is transferred to X the conviction and sentence recorded by the court in the scheduled country shall, subject to subsection (3), be deemed for all purposes to be a conviction recorded and a sentence imposed by a court of competent jurisdiction in X.

(2) On the transfer of an offender any document transmitted by the responsible authority of the scheduled country from which the offender is transferred, being a document in which the conviction of, and the sentence imposed upon, the offender is set out, shall, if that document purports to be signed by a judicial officer or authority, or by the person in charge of any penal institution in that country, be accepted as evidence of the facts stated therein unless the contrary is proved, without proof of the signature or the official character of the person by whom it purports to be signed; and thereafter any such document shall be treated as a like document signed by a person convicted and sentenced in X, and shall, subject to the provisions of this Act, have effect according to the tenor thereof.

(3) The conviction of, and the sentence imposed upon, an offender shall not be subject to any appeal or to any form of review in X.

[The purpose of subsection (3) is to preclude the power of a Minister to refer a case to the Court of Appeal or himself to order a new trial, as well as to prevent an appeal.]

Prisoner to be
detained in
prison

6. A transferred offender who has been sentenced to a term of imprisonment shall be detained in prison or in such other institution as the Minister may direct.

Juvenile
offenders

7.—(1) A transferred offender sentenced to a term of imprisonment who would, if he had been convicted in X, have been treated, by reason of his age, as a child/juvenile/young person and sentenced accordingly, shall be dealt with as his age dictates in accordance with subsection (2).

(2) An offender to whom subsection (1) applies shall be produced before the High Court/a juvenile/magistrate's court having jurisdiction to try the offence of which the offender has been convicted and that court shall sentence him on the basis of the conviction by the court in the scheduled country and with regard to the nature of the offence and to any observations made by the convicting court in passing sentence as if the offender had been convicted of that offence by the court in X.

[The memorandum explains the thinking underlying subsection (2): see paragraph 30. By importing the law of the sentencing country it will be possible for orders against parents to be made in appropriate cases, if that law so provides.]

Remission

8.—(1) A transferred offender sentenced to a term of imprisonment—

(a) shall be credited with any remission of that term to which he had become entitled at the date of his transfer in accordance with the law in that behalf in force in the scheduled country; and

(b) shall be eligible to earn remission as if he had been sentenced to a term of imprisonment of the same length by a court in X.

(2) Any remission of imprisonment referred to in subsection (1)(a) shall be liable to forfeiture for a disciplinary offence as if it were remission earned by virtue of subsection (1)(b).

Aftercare

9. A transferred offender shall, on release from prison, be subject to the like compulsory supervision as if he had been sentenced to a term of imprisonment of the same length by a court in X as a person sentenced to such a term by that court would have been so subject.

[A clause to this effect will only be required in those countries in which there is provision for aftercare following custodial sentences.]

Parole

10.—(1) The Parole Act and the Board established thereby shall respectively apply to, and have jurisdiction over, a transferred offender as if he had been convicted and sentenced to a term of imprisonment of the same length by a court in X.

(2) A transferred offender serving a term of imprisonment who is not at the date of his transfer on parole shall become eligible for parole on the date on which he would have become eligible for parole if he had been convicted and sentenced in X.

(3) If a transferred offender has, before his transfer, been released on parole in the scheduled country in which he was convicted and sentenced and that parole was subsequently revoked, then the time spent on parole shall count towards the completion of his sentence in X.

(4)(a) A transferred offender who is, at the date of his transfer, on parole in the scheduled country in which he was convicted and sentenced shall be deemed for all purposes to have been convicted and sentenced in X and to have been released on parole by the Parole Board, notwithstanding that a person actually so convicted and sentenced might not be eligible for parole.

(b) A breach of any condition on which parole was granted shall render the offender liable to the same consequences as if he had been released on parole by the Parole Board on condition and he had broken that condition.

[This clause will have to be adapted to the legislative and administrative provisions relating to parole.]

Pardon	11. Where the prerogative of mercy has been exercised in a scheduled country in respect of an offender, the sentence on whom is being enforced in X, that offender shall no longer be detained in prison or otherwise, or be subject to parole or to supervision on probation by reason only of the sentence imposed for the offence for which pardon has been granted; and any disqualification or any monetary sanction which is being or has been enforced shall be cancelled or removed, or repaid to the offender, as the case may be.
Persons of unsound mind	12.(1) If a person who is a citizen of X, having been charged with an offence but whether or not convicted of that offence, has been ordered to be detained by a court in a scheduled country because he has been found to be incapable by reason of mental illness to stand his trial or to have been for the same reason, incapable in law of being convicted of that offence, that person may be transferred at the request of the government of that country, notified by the responsible authority of that country, and with the agreement of the Government of X to X, and section 3(3) shall not apply to such person. (2) A person transferred by virtue of subsection (1) shall be detained in prison or in such institution as the Minister may direct, and he shall be deemed for all purposes to be a person ordered to be so detained by a court in X in like circumstances. (3) Section 5 shall apply in relation to a person to whom this section applies as if he were a transferred offender. [The terminology of this clause will require adaptation to local usage.]
Offenders in lawful custody during transfer	13. An offender shall, while he is being transferred, be deemed to be in the lawful custody of the person duly authorised to conduct him and to be subject to the same restraint and, in the event of misbehaviour, to the same punishment as if he were in prison in X and as if the person conducting him were a prison officer; and if the offender escape or attempt to escape from such custody the offender and any person aiding or attempting to aid him in such escape shall be liable on conviction to the same penalty as if such escape or attempt to escape were an escape or an attempt to escape from such a prison.
Transfer of offenders from X	14. A foreign offender may request transfer to a scheduled country by applying to the Minister and if his transfer is agreed by the Government of X and by the government of that country the offender may be conveyed to that country and delivered to the authority designated by that government.
Rules	15. The Minister may make rules— (a) prescribing the form to be completed by an offender who wishes to be transferred to X; (b) prescribing the form and manner in which a foreign offender may apply to the Minister for transfer to a scheduled country; (c) prescribing the procedure to be followed for the enforcement in X of a sentence imposed on an offender in a scheduled country; and (d) generally for the carrying into effect of the purposes of this Act.

SCHEDULE

(Section 2)

Countries with which arrangements have been made.

26-27 ELIZABETH II

26-27 ELIZABETH II

CHAPTER 9

CHAPITRE 9

An Act to implement treaties on the transfer of persons found guilty of criminal offences

[Assented to 22nd March, 1978]

Loi de mise en œuvre des traités sur le transfèrement des personnes reconnues coupables d'infractions criminelles

[Sanctionnée le 22 mars 1978]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Transfer of Offenders Act*.

Titre abrégé

1. La présente loi peut être citée sous le titre: *Loi sur le transfèrement des délinquants*.

INTERPRETATION

INTERPRÉTATION

Definitions

Définitions

"Canadian offender"
«délinquant canadien»

2. In this Act,
"Canadian offender" means a Canadian citizen, within the meaning of the *Citizenship Act*, irrespective of age, who has been found guilty of an offence and is subject to supervision either in confinement or at large by reason of parole, probation or any other form of supervision without confinement, in a foreign state;

2. Dans la présente loi,
«délinquant canadien» désigne un citoyen canadien au sens de la *Loi sur la citoyenneté*, quel que soit son âge, qui a été reconnu coupable d'une infraction et qui est sous surveillance soit en détention, soit en raison d'une ordonnance de probation, d'une libération conditionnelle ou d'une autre forme de liberté surveillée, dans un État étranger;

«délinquant canadien»
"Canadian..."

"criminal offence"
«infraction...»

"criminal offence" means an offence against an Act of Parliament;

«délinquant étranger» désigne un citoyen d'un État étranger, quel que soit son âge, qui a été reconnu coupable d'une infraction criminelle et qui est sous surveillance soit en détention, soit en raison d'une ordonnance de probation, d'une libération conditionnelle ou d'une autre forme de liberté surveillée, au Canada; cette expression comprend aussi les nationaux;

«délinquant étranger»
"foreign offender"

"foreign offender"
«délinquant étranger»

"foreign offender" means a citizen or a national of a foreign state, irrespective of age, who has been found guilty of a criminal offence and is subject to supervision either in confinement or at large by reason of parole, probation or any other form of supervision without confinement, in Canada;

"foreign state"
«État...»

"foreign state" means a state, the name of which is set out in the schedule, with

«État étranger» désigne un État, dont le nom est mentionné à l'annexe, avec lequel le Canada a conclu un traité sur le transfèrement des délinquants;

«État étranger»
"foreign state"

	which Canada has entered into a treaty on the transfer of offenders;	«infraction criminelle» désigne une infraction à une loi du Parlement;	«infraction criminelle» "criminal..."
"Minister" «Ministre»	"Minister" means the Solicitor General of Canada;	«Ministre» désigne le solliciteur général du Canada;	«Ministre» "Minister"
"penitentiary" «pénitenciers»	"penitentiary" has the meaning assigned to that term by the <i>Penitentiary Act</i> ;	«pénitenciers» a le sens que la <i>Loi sur les pénitenciers</i> lui donne;	«pénitenciers» "penitentiary"
"prison" «prison»	"prison" means a place of confinement other than a penitentiary as defined in the <i>Penitentiary Act</i> .	«prison» désigne un lieu de détention à l'exclusion d'un pénitencier au sens de la <i>Loi sur les pénitenciers</i> .	«prison» "prison"
TRANSFER OF CANADIAN OFFENDERS TO CANADA		TRANSFÈREMENT DES DÉLINQUANTS CANADIENS AU CANADA	
Transfer	3. A Canadian offender who requests transfer to Canada pursuant to a treaty on the transfer of offenders entered into between Canada and the foreign state in which he was found guilty shall be dealt with in accordance with this Act.	3. Un délinquant canadien qui demande son transfèrement au Canada en vertu d'un traité sur le transfèrement des détenus conclu entre le Canada et l'État étranger où il a été reconnu coupable doit être traité conformément à la présente loi.	Transfèrement
Effect of transfer	4. Where a Canadian offender is transferred to Canada, his finding of guilt and sentence, if any, by a court of the foreign state from which he is transferred is deemed to be a finding of guilt and a sentence imposed by a court of competent jurisdiction in Canada for a criminal offence.	4. Lorsqu'un délinquant canadien est transféré au Canada, sa déclaration de culpabilité et sa sentence, s'il y en a une, par un tribunal de l'État étranger d'où il est transféré sont présumées être celles qu'un tribunal canadien compétent lui aurait imposées pour une infraction criminelle.	Conséquence du transfèrement
Idem	5. (1) Section 617 of the <i>Criminal Code</i> does not apply in respect of the offence of which a Canadian offender has been found guilty in the foreign state from which he is transferred and his finding of guilt and his sentence, if any, are not subject to any appeal or to any other form of review in Canada.	5. (1) L'article 617 du <i>Code criminel</i> ne s'applique pas à l'infraction dont un délinquant canadien a été reconnu coupable dans l'État étranger d'où il est transféré; sa déclaration de culpabilité et sa sentence, s'il y en a une, ne sont sujettes à aucun appel ou autre forme de révision au Canada.	Idem
Evidence	(2) On the transfer of a Canadian offender, documents supplied by the foreign state from which the offender is transferred setting out the finding of guilt and, where the offender has been sentenced, the sentence imposed are, if they purport to be signed by a judicial official or director of a place of confinement of the foreign state, in the absence of evidence to the contrary, evidence of the facts alleged therein without proof of the signature or official character of the person by whom they purport to be signed.	(2) Lors du transfèrement d'un délinquant canadien, les documents que fournit l'État étranger d'où le délinquant est transféré énonçant sa déclaration de culpabilité et, si une sentence lui a été infligée, sa sentence et apparemment signés par un fonctionnaire judiciaire ou le directeur d'un établissement de détention de l'État étranger font preuve, en l'absence de preuve contraire, des faits qui y sont allégués, sans qu'il soit nécessaire de faire la preuve de la signature ni de la qualité officielle de la personne qui les a apparemment signés.	Preuve

Transfer	6. (1) Where the Minister is informed on behalf of a foreign state that a Canadian offender has requested transfer to Canada and that the responsible authority in that state agrees to such transfer, the Minister shall cause the foreign state to be advised whether he approves or disapproves the transfer of such offender and, where he approves the transfer, he shall make the necessary arrangements therefor.	6. (1) Lorsque le Ministre est avisé par un État étranger qu'un délinquant canadien demande son transfèrement au Canada et que l'autorité compétente de cet État l'a approuvé, il informe l'État étranger de son acceptation ou de son refus de ce transfèrement et, en cas d'acceptation, il prend les mesures nécessaires à ce transfèrement.	Transfèrement
Approval of a province	(2) Where a Canadian offender who has requested transfer to Canada has been sentenced to imprisonment for less than two years, the Minister shall not approve such transfer unless (a) the authority responsible for the administration of prisons in the province in which the Canadian offender would be detained agrees to the transfer; and (b) the Canadian offender completes the prescribed form.	(2) Le Ministre ne peut accepter le transfèrement au Canada d'un délinquant canadien condamné à moins de deux ans d'emprisonnement à moins que a) l'accord des autorités responsables de l'administration des prisons dans la province où ce délinquant serait détenu ne soit obtenu; et b) ce délinquant ne remplisse le formulaire réglementaire.	Accord de la province
TRANSFER OF CANADIAN OFFENDERS UNDERGOING IMPRISONMENT		TRANSFÈREMENT DES DÉLINQUANTS CANADIENS EN DÉTENTION	
Where committed	7. A Canadian offender transferred to Canada while undergoing imprisonment shall be detained in a penitentiary if he has been sentenced to imprisonment for two years or more or in a prison in any other case.	7. Un délinquant canadien transféré au Canada alors qu'il purgeait une peine d'emprisonnement est détenu dans un pénitencier s'il a été condamné à deux ans ou plus d'emprisonnement ou dans une prison dans les autres cas.	Endroit
Eligibility for parole	8. Subject to section 9, a Canadian offender transferred to Canada becomes eligible for parole at a date determined by the National Parole Board as being the date, so far as can be ascertained by the Board, at which he would have been eligible for parole had he been convicted and his sentence imposed by a court in Canada.	8. Sous réserve de l'article 9, un délinquant canadien transféré au Canada devient admissible à la libération conditionnelle à la date que la Commission nationale des libérations conditionnelles détermine, en autant que faire se peut, comme étant celle à laquelle il le deviendrait s'il avait été déclaré coupable et condamné par un tribunal canadien.	Admissibilité à la libération conditionnelle
Idem	9. A Canadian offender convicted of an offence that, if it had been committed in Canada, would have constituted murder within the meaning of section 212 or 213 of the <i>Criminal Code</i> and transferred to Canada becomes eligible for parole when ten years have elapsed after his conviction unless the documents supplied by the foreign state in which he was convicted and sentenced show to the satisfaction of the Minister that	9. Un délinquant canadien coupable d'une infraction qui, si elle avait été perpétrée au Canada, aurait été un meurtre au sens des articles 212 ou 213 du <i>Code criminel</i> et transféré au Canada devient admissible à la libération conditionnelle à l'expiration d'un délai de dix ans à compter de sa déclaration de culpabilité sauf si les documents que fournit l'État étranger où il fut déclaré coupable et condamné établissent, à la satisfaction du	Idem

the circumstances in which the offence was committed were such that, if it had been committed in Canada after July 26, 1976, it would have been first degree murder within the meaning of section 214 of the *Criminal Code*, in which case he becomes eligible for parole when fifteen years have elapsed after his conviction.

Ministre, que les circonstances entourant la perpétration de l'infraction sont telles que, si elle avait été perpétrée au Canada après le 26 juillet 1976, il se serait agi d'un meurtre au premier degré au sens de l'article 214 du *Code criminel*; dans un tel cas, il ne devient admissible à la libération conditionnelle qu'à l'expiration d'un délai de quinze ans à compter de sa déclaration de culpabilité.

Temporary
absence and
day parole for
murderers

10. Notwithstanding the *Penitentiary Act* and the *Parole Act*, a Canadian offender transferred to Canada who was convicted of an offence that, if it had been committed in Canada, would have constituted murder within the meaning of section 212 or 213 of the *Criminal Code* may not be granted

- (a) an absence without escort under the *Penitentiary Act*,
- (b) a day parole under the *Parole Act*, or
- (c) an absence with escort for humanitarian or rehabilitative reasons under the *Penitentiary Act* that has not been approved by the National Parole Board, until the expiration of all but three years of the period during which he is ineligible for parole.

10. Par dérogation à la *Loi sur les pénitenciers* et à la *Loi sur la libération conditionnelle de détenus*, un délinquant canadien transféré au Canada qui a été déclaré coupable d'une infraction qui, si elle avait été perpétrée au Canada, aurait été un meurtre au sens des articles 212 ou 213 du *Code criminel* n'a pas droit

- a) à une absence sans escorte en vertu de la *Loi sur les pénitenciers*,
- b) à une libération conditionnelle de jour en vertu de la *Loi sur la libération conditionnelle de détenus*, ou
- c) à une absence sous escorte pour des motifs humanitaires ou de redressement moral en vertu de la *Loi sur les pénitenciers* qui n'aurait pas été approuvée par la Commission nationale des libérations conditionnelles

avant l'expiration du délai préalable à sa libération conditionnelle, exception faite des trois dernières années de ce délai.

Absence
temporaire ou
libération de
jour pour les
meurtriers

Remission

11. (1) A Canadian offender transferred to Canada

- (a) shall be credited with any time toward completion of his sentence that was credited to him at the date of his transfer by the foreign state in which he was convicted and sentenced; and
- (b) is eligible to earn remission as if he had been committed to custody on the date of his transfer pursuant to a sentence imposed by a court in Canada.

11. (1) Un délinquant canadien transféré au Canada

- a) bénéficie des remises de peine que lui a accordées l'État étranger où il fut déclaré coupable et condamné calculées au jour de son transfèrement; et
- b) peut bénéficier d'une réduction de peine comme s'il était incarcéré le jour de son transfèrement conformément à une condamnation prononcée par un tribunal canadien.

Réduction de
peine

Forfeiture

(2) Any time referred to in paragraph (1)(a) except time actually spent in confinement pursuant to the sentence imposed by the foreign court is subject to forfeiture for a disciplinary offence as if it were remission credited under the *Penitentiary Act* or the *Prisons and Reformatories Act*.

(2) Les remises de peine mentionnées à l'alinéa (1)a) sauf celles accordées pour le temps véritablement passé en détention conformément à la sentence que lui a imposée le tribunal étranger sont sujettes à déchéance pour une infraction disciplinaire comme s'il s'agissait de réductions de peine acquises en

Déchéance

Mandatory supervision	12. A Canadian offender transferred to Canada is, on his release from custody, subject to mandatory supervision pursuant to section 15 of the <i>Parole Act</i> if a sentence imposed by a foreign court was imposed after July 31, 1970 and would, pursuant to section 659 of the <i>Criminal Code</i>, have resulted in committal of the Canadian offender to a penitentiary if it had been imposed on him in Canada.	vertu de la <i>Loi sur les pénitenciers</i> ou de la <i>Loi sur les prisons et les maisons de correction</i>. 12. Un délinquant canadien transféré au Canada est, lors de sa mise en liberté, assujéti à une surveillance obligatoire conformément à l'article 15 de la <i>Loi sur la libération conditionnelle de détenus</i> si une sentence que lui a infligée un tribunal étranger l'a été après le 31 juillet 1970 et aurait entraîné son incarcération dans un pénitencier, conformément à l'article 659 du <i>Code criminel</i>, si elle lui avait été infligée au Canada.	Surveillance obligatoire
	TRANSFER OF CANADIAN OFFENDERS ON PAROLE	TRANSFÈREMENT DES DÉLINQUANTS CANADIENS EN LIBÉRATION CONDITIONNELLE	
Jurisdiction of National Parole Board	13. Subject to section 15, the National Parole Board has jurisdiction over Canadian offenders transferred to Canada.	13. Sous réserve de l'article 15, la Commission nationale des libérations conditionnelles a compétence à l'égard des délinquants canadiens transférés au Canada.	Compétence de la Commission nationale des libérations conditionnelles
Effect of revocation	14. Where the parole granted by a foreign state to a Canadian offender who is transferred to Canada is revoked, he is entitled to count toward completion of his sentence any time spent on parole after October 14, 1977 and immediately prior to his transfer to Canada, in the foreign state from which he was transferred.	14. Lorsque la libération conditionnelle qu'un État étranger a accordé à un délinquant canadien transféré au Canada est révoquée, ce dernier peut calculer pour l'achèvement de sa peine le temps passé en libération conditionnelle, après le 14 octobre 1977, immédiatement avant son transfèrement au Canada, dans l'État étranger d'où il est transféré.	Effet de la révocation
Jurisdiction of provincial parole boards	15. A provincial parole board has jurisdiction over a Canadian offender transferred to Canada (a) who is not on parole at the time of his transfer; and (b) who is detained in a provincial institution where that parole board has jurisdiction over other prisoners.	15. Une commission provinciale des libérations conditionnelles a compétence à l'égard d'un délinquant canadien transféré au Canada a) qui n'est pas en libération conditionnelle au moment de son transfèrement; et b) qui est incarcéré dans un établissement provincial à l'intérieur duquel cette commission a compétence à l'égard de d'autres prisonniers.	Compétence des commissions provinciales des libérations
	TRANSFER OF CANADIAN OFFENDERS ON PROBATION OR EQUIVALENT	TRANSFÈREMENT DES DÉLINQUANTS CANADIENS SOUMIS À UNE ORDONNANCE DE PROBATION OU À DES CONDITIONS ÉQUIVALENTES	
Probation order	16. (1) Where a Canadian offender is transferred to Canada while at large under conditions equivalent to those that would prevail if he had been found guilty in Canada and released on conditions prescribed in a probation order,	16. (1) Lorsqu'un délinquant canadien est, au moment de son transfèrement au Canada, en liberté en vertu de conditions équivalentes à celles qui auraient pu être prescrites dans une ordonnance de probation s'il avait été reconnu coupable au Canada,	Ordonnance de probation

	(a) a magistrate, within the meaning of that term for the purposes of Part XVI of the <i>Criminal Code</i>, may, on application of the Canadian offender or of the Attorney General of the province in which the offender resides, modify the conditions on which the offender is entitled to be at large in Canada in any manner provided by subsection 664(3) of the <i>Criminal Code</i> as if he were subject to a probation order; and (b) a wilful violation of the conditions on which he is entitled to be at large is an offence under subsection 666(1) of the <i>Criminal Code</i>.	a) un magistrat, au sens de la Partie XVI du <i>Code criminel</i>, peut, à la demande du délinquant ou du procureur général de sa province de résidence, modifier les conditions en vertu desquelles il a droit d'être en liberté au Canada de la façon prévue au paragraphe 664(3) du <i>Code criminel</i> comme s'il était soumis à une ordonnance de probation; et b) le défaut volontaire de se conformer aux conditions en vertu desquelles il a droit d'être en liberté est une infraction au paragraphe 666(1) du <i>Code criminel</i>.	
Powers of the court	(2) On conviction of a Canadian offender of an offence under subsection 666(1) of the <i>Criminal Code</i>, the convicting court may, if the offender was transferred to Canada while at large under circumstances equivalent to those that would prevail if he had been found guilty in Canada and released on conditions prescribed in a probation order, (a) if it imposes imprisonment, revoke the entitlement of the Canadian offender to be at large, or (b) make changes in or additions to the conditions on which he is entitled to be at large or extend the application of those conditions for a further period not exceeding one year, and shall inform the offender of its decision.	(2) La cour qui déclare un délinquant canadien coupable d'une infraction au paragraphe 666(1) du <i>Code criminel</i> peut, si le délinquant a été transféré au Canada alors qu'il était en liberté en vertu de conditions équivalentes à celles qui auraient pu être prescrites dans une ordonnance de probation s'il avait été reconnu coupable au Canada, a) si elle impose une peine d'emprisonnement, révoquer le droit du délinquant d'être en liberté, ou b) modifier les conditions en vertu desquelles il a le droit d'être en liberté, en ajouter d'autres ou en prolonger la durée pour une période supplémentaire maximale d'un an, et doit aviser le délinquant de sa décision.	Pouvoirs de la cour
Limitation	(3) Subsection 664(4) of the <i>Criminal Code</i> does not apply to a Canadian offender transferred to Canada while at large under conditions equivalent to those that would prevail if he had been found guilty in Canada and released on conditions prescribed in a probation order.	(3) Le paragraphe 664(4) du <i>Code criminel</i> ne s'applique pas au délinquant canadien transféré au Canada alors qu'il était en liberté en vertu de conditions équivalentes à celles qui auraient pu être prescrites dans une ordonnance de probation s'il avait été reconnu coupable au Canada.	Réserve
JUVENILE DELINQUENTS JEUNES DÉLINQUANTS			
Committal of juvenile delinquents	17. Where a Canadian offender transferred to Canada (a) is committed to a prison in a province, and (b) would have been a juvenile delinquent within the meaning of the <i>Juvenile Delinquents Act</i>, as that Act applied in the province at the time of his transfer, had	17. Lorsqu'un délinquant canadien transféré au Canada a) est incarcéré dans une prison dans une province, et b) aurait été considéré comme un jeune délinquant au sens de la <i>Loi sur les jeunes délinquants</i>, tel que cette loi s'appliquait dans la province au moment de son trans-	Incarcération

the offence for which he was convicted and sentenced been committed in Canada, an official designated for the purpose by the Lieutenant Governor in Council of the province where the offender is detained may transfer him to any institutional facility for young persons in which a juvenile delinquent may be held but no person so transferred shall be detained by reason only of the sentence imposed by the foreign court beyond the date such sentence would terminate.

PARDON

Pardon

18. Where a foreign state has exercised the power to pardon a Canadian offender transferred to Canada, that offender shall no longer be subject to incarceration or other form of supervision by reason only of the sentence imposed for the offence in respect of which the pardon was granted.

TRANSFER OF FOREIGN OFFENDERS FROM CANADA

Transfer

19. A foreign offender may request transfer to a foreign state by applying to the Minister and may be transferred if the conditions set out in this Act are met.

Obligation to provide information

20. The Minister shall, on request by a foreign offender, provide him with a copy of the treaty on the transfer of offenders entered into between Canada and a foreign state designated in the request.

Delivery

21. Where the transfer of a foreign offender to a foreign state has been approved by the parties concerned, he shall be delivered to the responsible authority designated by that foreign state.

Transfer from prisons

22. No foreign offender may be transferred from a prison in a province to a foreign state without the approval of the authority responsible in the province for the administration of prisons.

Schedule

23. The Governor in Council may, by order, amend the schedule by adding thereto or deleting therefrom the name of any foreign state that has entered into or terminated

fèrement, si l'infraction pour laquelle il a été déclaré coupable et condamné avait été perpétrée au Canada,

un fonctionnaire désigné à cette fin par le lieutenant-gouverneur en conseil de la province où il est détenu peut le transférer dans un établissement de détention de jeunes délinquants; il ne peut y être gardé, en vertu uniquement de la sentence imposée par le tribunal étranger, au-delà de la date où cette sentence prend fin.

PARDON

Pardon

18. Lorsqu'un État étranger accorde un pardon à un délinquant canadien transféré au Canada, ce délinquant ne doit plus être emprisonné ou soumis à une autre forme de surveillance en raison de la sentence imposée pour l'infraction à l'égard de laquelle le pardon a été accordé.

TRANSFÈREMENT DES DÉLINQUANTS ÉTRANGERS DU CANADA

Transfèrement

19. Un délinquant étranger peut demander son transfèrement vers un État étranger en en faisant la demande au Ministre et peut être transféré si les conditions prévues à la présente loi sont remplies.

Obligation de fournir une copie du traité

20. Le Ministre doit, sur demande d'un délinquant étranger, lui fournir une copie d'un traité sur le transfèrement des délinquants conclu entre le Canada et un État étranger qu'il précise dans sa demande.

Remise

21. Le délinquant étranger est remis aux autorités compétentes que désigne l'État étranger, une fois que les parties concernées ont accepté son transfèrement vers cet État étranger.

Transfèrement d'une prison

22. Un délinquant étranger ne peut être transféré d'une prison dans une province vers un État étranger sans l'accord de l'autorité responsable de l'administration des prisons dans la province.

Annexe

23. Le gouverneur en conseil peut, par décret, modifier l'annexe en y ajoutant ou en en retranchant le nom des États étrangers qui ont conclu ou dénoncé un traité avec le Canada sur le transfèrement des délinquants.

a treaty with Canada on the transfer of offenders.

REGULATIONS

Regulations

24. The Governor in Council may make regulations

- (a) prescribing the form and manner in which a foreign offender may apply to the Minister for transfer to a foreign state;
- (b) prescribing the form to be completed by a Canadian offender who, if transferred to Canada, will be detained in a prison; and
- (c) generally for the carrying out of the purposes of this Act.

COMMENCEMENT

Coming into force

25. This Act shall come into force on a day to be fixed by proclamation.

SCHEDULE

1. United States
2. Mexico

RÈGLEMENTS

Règlements

24. Le gouverneur en conseil peut établir des règlements

- a) prescrivant la façon dont un délinquant étranger peut demander au Ministre son transfèrement vers un État étranger;
- b) prescrivant le formulaire que doit remplir un délinquant canadien qui, s'il était transféré au Canada, serait incarcéré dans une prison; et
- c) généralement pour l'application de la présente loi.

ENTRÉE EN VIGUEUR

25. La présente loi entre en vigueur au jour fixé par proclamation.

Entrée en vigueur

ANNEXE

1. États-Unis
2. Mexique

REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum by the Government of Sri Lanka

The Sri Lanka Extradition Law No. 8 of 1977 came into operation on 18 February 1977. One of its objectives, so far as intra-Commonwealth rendition of fugitive offenders is concerned, is to give effect to the Commonwealth Scheme of 1966.

2. Basing itself on the experience acquired in operating this Statute over the past three years, the Government of Sri Lanka wishes to make the following observations—

Requirement of a prima facie case

3. The Commonwealth Scheme provides for the necessity of establishing a prima facie case against the person sought to be returned. The Sri Lanka Extradition Law seeks to give effect to this principle in section 10(4)(a) which requires that evidence should be adduced as—

“would be sufficient to warrant his trial for that offence if it has been committed within the jurisdiction of the Court”.

4. While in no way attempting to dispense with a prima facie case which Sri Lanka considers fundamental to the law of extradition the Government of Sri Lanka would like Commonwealth Governments to examine the procedures which Courts in Commonwealth countries have adopted to give effect to this principle.

5. Bearing in mind that what is at issue here is not the innocence or guilt of the person whose return is requested (which is solely the function of the appropriate Court in the requesting State) the Government of Sri Lanka feels that in order to satisfy the requirement of a prima facie case, it is not necessary to conduct an inquiry on the lines of a normal court case where lawyers for each side lead evidence and call for witnesses. Consideration may be given to a more expeditious and simplified form of inquiry before a single judicial authority or, even better, a panel of judges and where such judge or panel arrives at a decision on the basis of the evidence contained in the dossier which the appropriate authorities of the requesting State would necessarily have to furnish in support of their request.

Returnable offences

6. In drafting the schedule of extraditable offences, Sri Lanka has not confined itself to the offences set out in the 1966 Scheme. Having regard to local conditions and the obligations of international conventions, the schedule includes offences such as, for example, offences against the law relating to exchange control and jeopardising the safety of aircraft in or of the persons or property on board such aircraft.

7. Anticipating the need for greater flexibility in regard to the categories of extraditable offences, and accepting the limited effect of unilateral additions of offences in national legislation, Sri Lanka views with favour the suggestions made by Professor Shearer to add the following general categories to the schedule of extraditable offences—

- i offences established under international conventions to which both the requesting and the requested country are parties; and
- ii offences agreed upon on a reciprocal basis.

Citizenship of fugitive

8. Although the Sri Lanka Extradition Law makes no distinction between citizens and non-citizens, in practice requests for extradition of citizens will only be considered if the executive authority is satisfied from an examination of the merits of the case that there will be no derogation of the principles of natural justice by the requesting State and provided that, on the basis that the requesting State undertakes to return its own citizens to Sri Lanka upon a request being so made.

Appeals by requesting Governments

9. Since requesting States are represented in Sri Lanka by the Attorney-General who appears as *amicus* and is not therefore a party to the proceedings it is arguable that he may not have the status to appeal unless express provision is made in our law to enable him to do so in extradition cases. Although the Court may be moved by way of revision, it would appear to be more realistic to amend the existing provisions making special revision procedures available to requesting States.

REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum by the Government of Jamaica

Adoption of the 1966 Scheme

1. A Bill to adopt the 1966 Scheme has now been drafted in Jamaica.

Reciprocal Application of the Scheme

2. It is felt that reciprocal application of the scheme should not be necessary.

In this connection we mention the Jamaican case of *R. v. Commissioner of Correctional Services, ex parte Raphael Constantine Dillon and Errol Williams* which concerned a request for the return of an offender made by Bermuda under the Fugitive Offenders Act 1881. It was argued on behalf of the applicant for habeas corpus that the Resident Magistrate had no jurisdiction to make an order at the instance of Bermuda as that country, having by its legislation adopted the 1966 Scheme, had opted out of the reciprocal provisions of the Act of 1881 by the repeal of that Act in respect of Bermuda and by replacing it with fresh statutory provisions which involved no mutuality with Jamaica. It was further argued that a country with the provisions of legislation adopting the 1966 Scheme cannot support a request to a country that has the Act of 1881 as the latter Act must be viewed as a scheme of multilateral relations with reciprocal rights and duties under it available only to participants under the Act. The Court held, however, that in Jamaica, as in other common law countries, no power exists to surrender a fugitive offender apart from statute, and where there is statutory authority, the power to surrender is not affected by the existence or lack of reciprocal legislation in respect of fugitive offenders in the State from which the request for surrender comes unless that is a requirement of the statute authorising the surrender.

Returnable Offence

3. Paragraphs 12 and 13 of Professor Shearer's Paper raises the question of the need for revision of Annex 1 to the 1966 Scheme, which describes "returnable offences", in the light of the unilateral action by some member countries of adding certain offences as returnable under their legislation, and having regard to the growing number of offences being created by international conventions.

The proposal for the revision of Annex 1 of the Scheme is strongly supported. It is of special importance to Jamaica as the draft (Jamaican) Extradition Bill will include as extraditable offences the following offences which are not included in the Scheme:

- i certain offences created by the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft;

- ii certain offences against the 1971 Montreal Convention for the Suppression of Unlawful Acts against the safety of Civil Aviation;
- iii offences against the law relating to Exchange Control.

It is suggested that it would be useful to have the Law Ministers' Meeting discuss the rationale which, in the past, dictated the choice of certain offences for inclusion in, and the exclusion of other offences from, the extradition Scheme, and any changing attitudes, within the Commonwealth, to that rationale.

Double Criminality

4. Paragraph 16 of the Paper questions whether, having regard to the decision in *R. v. Governor of Brixton Prison, ex parte Gardner* [1968] 2 Q.B. 399, a decision on the 1967 U.K. Act, it is not now desirable to replace the words "the act or omission constituting the offence" now in s.3(1)(c) of the U.K. Act, and in any other Commonwealth legislation, with words such as "the facts on which the request for his return is founded" as in paragraph 10 of the 1966 Scheme.

The question is raised for consideration whether the proposed amendment would have the desired effect. It is suggested that what may be necessary is to consider the matter in terms of the documents to be looked at to determine whether the double criminality rule is satisfied, that is, whether the warrant and the authority to proceed should be the documents by which to determine whether the offence for which the extradition sought is an offence against the laws of the requested country, or whether, for that purpose, the magistrate should not look also at the depositions submitted.

The Speciality Rule

5. Paragraphs 21 of the Paper highlight possible interpretation problems as regards the words "any lesser offence" used in the formulation of the Speciality Rule in certain Commonwealth statutes. It suggests that for the words "any lesser offence proved by the facts before the committal court" there be substituted the words "any other offence proved by the facts before the committal court".

The history of the final text of the 1966 Scheme as regards this point is interesting. Originally the draft Scheme provided as follows:

In the case of a fugitive offender to whom this clause relates, his detention or trial in the part of the Commonwealth to which he has been returned for any offence committed prior to his return (other than one proved on the facts on which that return was grounded) will be precluded by law.

One of the participants at the Meeting objected that those words were too loose and suggested the substitution of the words “other than a returnable offence proved on the facts on which that return was grounded” for the words in brackets. That also was objected to on the basis that the effect would be “that if an offender was returned on a charge of manslaughter (a returnable offence) arising from a car accident and the charge failed it would be impossible to follow the normal procedure of substituting a charge of dangerous driving”. A suggestion was then made that the words in brackets be amended to read “(other than the one for which he was returned or any lesser offence proved by the facts on which the return was granted or, with the consent of the requested country, a returnable offence of the same nature as the offence for which he was returned)”. A number of delegates had reservations as to this provision on the basis that it would open up a new difficulty in trying to define “lesser”. A final decision was then postponed until the next session at which the reservations were withdrawn.

The preliminary view on this matter arrived at after discussion is that the proposed amendment is undesirable as it would permit the trial of an extradited offender for a more serious offence than that for which he was extradited, provided the facts before the committal magistrate proved such an offence. It is considered that it would be preferable to retain the words “any lesser offence”.

Nationality Rule

6. Jamaica’s position on the Nationality Rule, which is dealt with in paragraphs 24 and 25 of the Paper, appears from the following provision included in the draft (Jamaican) Extradition Bill:

The Minister may, in his discretion, refuse to extradite a fugitive on the ground that the fugitive is a citizen of Jamaica, but he shall not refuse to extradite the fugitive on that ground if the fugitive is also a citizen of the approved State that has requested the extradition.

Political Offences and Terrorism

7. It is not proposed, at this stage, to express any views on the proposals in paragraphs 27–29 that offences commonly associated with terrorism should not be regarded as political offences and hence, that offences such as hijacking, dangerous acts in relation to aircraft, offences against diplomats, kidnapping, the use of bombs and firearms and other serious offences involving violence would not be so regarded. It may be mentioned, however, that under the draft (Jamaican) Extradition Bill the reference to an “offence of a political character” will not include—

- a) any offence against the life or person of the Head of any approved State or the aiding, abetting, counselling or procuring of the offence; or
- b) an offence against the law relating to genocide;
- c) offences against the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.

Circumstances Precluding Return

8. Paragraph 32 of the Paper queries whether the triviality and bad faith grounds are still necessary as circumstances precluding the return of an offender.

The triviality ground, it is said, might be argued to be unnecessary in the light of the specified list of returnable offences under the Scheme coupled with the requirement that they be punishable by a possible penalty of at least 12 months’ imprisonment by the law of the requesting State. That argument seems to break down when one considers (a) that the reference to the 12 months’ or more imprisonment is really a reference to the *maximum* period of imprisonment to which a person may be sentenced for the offence and (b) that this refers to the maximum imprisonment which the offence carries under the law of the requesting State. It is felt, therefore, that the triviality ground should be retained.

The Paper describes the “bad faith” ground as a difficult one to invoke against a fellow member of the Commonwealth, since it can scarcely be done without directly impugning the motives of the requesting country. The same argument could be raised however as regards the prohibition against extradition for an offence of a political character and yet it is widely agreed that such a provision is desirable in Commonwealth extradition legislation. It is also said that it is arguable that the bad faith ground is subsumed under the political offence concept. It seems however that bad faith is a wider concept and therefore not completely covered by the provision relating to offences of a political character. It seems therefore that that ground also should be retained.

Paragraph 30 of the Paper also suggests the addition of a further factor by reference to which the judicial or executive authority would determine whether, having regard to all the circumstances, it would be unjust or oppressive to extradite. That factor would be the state of health or other personal circumstances of the fugitive. The words “or other personal circumstances” the Paper argues, should provide sufficient flexibility to deal with any other cases of an unusual nature. It is not proposed at this stage to express any views on this proposal. The matter will be given further consideration.

Costs

9. Paragraphs 34–35 of the Paper deal with arrangements for legal representation of the requesting State in the requested State in extradition matters and the question whether certain existing arrangements should not now be formalised by inclusion in the Commonwealth Scheme. On this matter the preliminary view, arrived at after discussion, is that arrangements as to costs should not be formalised in this way.

Appeals

10. Paragraphs 36–37 of the Paper raise the questions whether the requesting country should not be given a right of appeal a magistrate’s refusal to com-

mit. This question has been reserved for further consideration. No view will therefore be expressed on it at this stage.

Return by Consent

11. The proposal in paragraph 38 regarding “consent orders” for return is considered a useful one and is supported.

Legal Aid

12. As regards the proposal in paragraph 39 of the draft Paper, our preliminary view is that the Scheme should not deal with the availability of legal aid to persons against whom extradition proceedings have been instituted and that the matter should simply be left to be governed by any relevant legal aid legislation.

THE TRANSFER OF CONVICTED OFFENDERS FROM AND TO COMMONWEALTH JURISDICTIONS

Memorandum by the Government of Jamaica

The Scheme is regarded as desirable in principle. It is recognised however that the factors determining the economic feasibility of transfer arrangements between any two countries would include:

- i the scope of the scheme;
- ii the likely number of offenders, having regard to the migrant population, who would be transferred in any year to and from each of the participating countries;
- iii the capacity of existing penal institutions in the receiving country to cope with the influx of transferred offenders.

2. Mr. Webb's Paper under consideration has proposed that the transferred offender must be a citizen of the country to which he is transferred. Under the Canada/U.S.A. treaty this includes offenders who are dual nationals of both the sending and the receiving state. Under the Canada/Mexico treaty an offender is excluded from the application of the Scheme, if notwithstanding that he is a citizen of the receiving state, he has been present in the sending state for at least five years with an intent to remain there permanently.

3. It is agreed that as a basic principle the transferred offender should be a citizen of the country to which he is transferred. It is felt however that there should be some limitation of that general applicability of the Scheme to nationals of the receiving country and hence, that the Scheme should not apply to nationals of the receiving country—

- i who have been ordinarily resident in the sending country for a period of two years or more; or
- ii who have never resided in the receiving country.

Dual nationality of both the sending and the receiving country, as a basis for exclusion from the Scheme, was considered but rejected.

4. Paragraph 21 of the Paper refers to the question of the exclusion from the treaties mentioned of certain classes of offences, such as fiscal offences and those affecting sovereign rights, security and other essential interests. The Canada/U.S.A. treaty excludes offences against immigration laws or solely against the military laws of the State. This matter was discussed and the view arrived at that the determining factor, as regards the applicability of the scheme, should be the sentence imposed for the offence and not the type of offence. Hence, it is felt that the scheme should apply to all types of offences although the sending country should have a discretion to refuse to transfer offenders convicted of certain types of offences.

5. Paragraph 34 of the Paper raises the question of the application of the scheme to persons on whom

sentences other than sentences of imprisonment have been imposed. In this connection mention was made of probation orders and compensation orders as well as orders for costs. As regards these matters it is agreed that persons in relation to whom probation orders were made should be included in the scheme. No view is expressed at this stage however, as regards compensation or cost orders.

6. Paragraph 22 of the Paper suggested two alternatives as regards the financial implications of arrangements for the transfer of offenders:

- a) that the government of the country in which the offender was convicted should pay for his journey on the basis that the government will be relieved of the future cost of keeping the offender in prison and of supervising him on parole;
- b) that the government of the country whose national is being repatriated, as the government having the greatest interest in the well-being and rehabilitation of the offender, should stand the cost of transfer.

It appears that both alternatives would be included in the scheme and that it would be a matter for the parties to a transfer treaty to decide which alternative to adopt. On this question it is felt that the responsibility to pay for the transfer should rest with the sending country unless both the sending and the receiving country agree otherwise.

7. Under clause 10(4) of the model Bill, an offender on parole in the sending country at the date of his transfer will be deemed to have been released by the Parole Board of the receiving country. It may well be however that conditions imposed by the Parole authorities in the sending country prove inappropriate in the receiving country. It seems necessary therefore to give the Parole authorities of the receiving country the necessary power to substitute their own parole conditions for those made in the sending country.

8. Clause 7 of the model Bill deals with the re-sentencing of transferred juveniles by the courts of the receiving country. It is not clear how this new sentence will take into account any period of sentence already served in the sending country. This seems to require some clarification.

9. There was discussion of the question of the exercise of the prerogative of mercy, as regards a transferred offender, in the receiving country. It is felt, bearing in mind that the transferred offender will be treated as having been convicted in the receiving country, that the relevant authorities of the receiving country should be able to exercise the prerogative of mercy so as to grant remission of sentence

or respite from the execution of any punishment imposed on the offender, or to substitute a less severe form of punishment for that imposed on the offender, but that the power to pardon should rest exclusively with the authorities of the sending

country. It is also felt that the power to pardon should be the only exercise of the prerogative of mercy which should rest with the sending country. Perhaps these questions could be highlighted for discussion.

CONFISCATING THE PROCEEDS OF CRIME

Memorandum by the Commonwealth Secretariat and a paper prepared by
Mr. William Clifford, Director, Australian Institute of Criminology

In the paper which is attached, Mr. William Clifford, Director of the Australian Institute of Criminology, discusses the need to prevent an offender (especially the corporate or organised criminal) and his family, from enjoying the fruits of his crime. He suggests that it is one thing for crime to pay, but quite another for it to pay after it has been detected, and the offender prosecuted and sentenced. When this happened as it undoubtedly did in many Commonwealth jurisdictions, then the legal system fell into disrepute and the incentive to commit crime was increased even if a considerable risk of detention existed.

2. He accepts that it is difficult to separate the concept of the confiscation of stolen or illegally obtained property from the related and overlapping subjects of forfeiture, restitution and compensation, but suggests that there are lines of distinction. He recognises that once such property is confiscated problems arise of distinguishing between the conflicting claims of victims, but asserts that the need for the State to do all it can to dispossess the offender is clear.

3. Mr. Clifford then discusses informal and formal compensation systems and the new approach in some jurisdictions to restitution. While it was difficult to distill from the mass of statutory provisions in force relating to restitution, the precise sections which touched upon the confiscation of illegally obtained property, there was little doubt that it was provided for in a number of ways. Against this concern reflected in legislation, it was both striking and surprising that offenders were still so often able to benefit from their illegal activities.

4. Mr. Clifford reviews the international dimensions of the problem created by the transnational nature of much modern crime, and puts forward for consideration a range of options available both at domestic and international level that might be employed to help reduce the material advantages gained from crime. He concludes with suggestions for collective Commonwealth and international measures primarily designed for dealing with illegal enrichment from organised, corporate or drug related crime.

CONFISCATING THE PROCEEDS OF CRIME

by William Clifford, Director, Australian Institute of Criminology

Introduction

There is accumulating evidence that crime pays—and that it pays more now than it ever did in the past. This disturbing observation is supported by far more than the fabulous life styles of organised criminals, the amounts converted by corporate offenders, the corruption swelling foreign bank accounts, the increasingly grave risks which people are willing to take for the enormous profits to be made in the illegal drug traffic or the continuing media celebration of the Great Train Robber disporting himself on a Latin American beach. Much more significant are the declining rates of detection by the police, the fact that Interpol acknowledges its failure to trace more than a fraction of the drug smuggling; the knowledge that some of the larger corporations can continue to make huge illegal profits, even whilst protracting the proceedings against them; the vast disproportion between the value of property stolen and property recovered by the police¹; the extent to which funds illegally obtained are financing the take-over of legitimate enterprises; and, above all, the enormous burden of higher prices and increased taxation needed to make good the losses incurred by vandalism, shop lifting, stealing from work, medical or welfare frauds and, indeed, to make up for the widening spread of that youthful irresponsibility and unprincipled acquisitiveness which criminal justice services alone cannot be expected to prevent.

This report is concerned with only one aspect of the preventative measures required to deal with this parlous situation, namely the need to ensure that the ill-gotten gains of convicted offenders cannot be enjoyed by himself or his family either whilst he is under-going sentence or after his release. Clearly it is one thing for crime to pay, but quite another for it to pay *after* it has been detected and the offender prosecuted. If this does happen—as unquestionably it does in many parts of the Commonwealth at the present time—then the legal system falls into further disrepute and the incentive to commit crime is increased even though there may be a great risk of detection. Where fines are inadequate, they may become a form of licence to conduct an illicit trade. Where the amounts illegally obtained exceed by millions what the offender could possibly earn legitimately in a life-time, they are sometimes worth the imprisonment which can be awarded. In fact this paper is chiefly concerned not with the cases usually coming before the magistrates courts where the damage or loss is countable in a few hundred or a few thousand dollars: it is mainly concerned with the large scale operator who has accumulated huge

amounts—usually already invested in real estate, stocks, bonds and other businesses before his arrest.

Unfortunately English Common Law has been built upon the kind of principles which protect possession more than ownership and these are the very principles behind which such an offender can shelter his illegal proceeds once he is before the court.

There was a time when a person convicted of an offence automatically lost his legal rights. At common law, the person sentenced for a felony was in a state of attainder which signified the loss of his property². However, this automatic loss of property was mitigated over the years. With legislation similar to that of the U.K. Forfeiture Act of 1870, the confiscation of a prisoner's property was brought to an end. But what exactly was the prisoner's property? If it consisted of only stolen property, he could still lose it by an order for restitution and/or he could be sued for it by the victim in a civil court. There was always the question of property identification and the victim might be disadvantaged by his property not being sufficiently labelled and identified. A clever offender could convey unlabelled property to a third party or spend the proceeds: as a man of straw he could be sued in vain by his victim. A third party who had bought in *marché ouverte* would challenge ownership: and as soon as wives could hold property separately they could be the third party themselves—whether or not the property was identifiable.

For centuries the victim lacked effective redress. Crime being a breach of the King's Peace, the convicted offender paid his fine to the Crown or served his sentence in H.M. Prisons. The victim had no claim on that fine or on the proceeds (if any) from the prisoner's labour. This is still the case, although for sixteen years or so there have been provisions in Commonwealth countries for victims of violence to be compensated from public funds, i.e. by the taxpayer rather than the offender. American and European countries have also followed this pattern for victims of violent offences. New Zealand has recently expanded this to economic loss or damage.

Needless to say, if over any period of time, the fine was overtaken by inflation, that is if wages and prices rose whilst the fines remained unchanged, then the penalty might be worth paying if the illegal proceeds were substantial. Since there was also the possibility of not being caught at all, the inducements were enhanced. Much the same could be said about the length of imprisonment, though here the proceeds would have to be attractive indeed to justify the risk of a prison sentence. For many people they were: and the whole issue has been greatly affected by the rapid

1 E.g. see Norman Fowler M.P. *The Cost of Crime*, London: Conservative Political Centre which quotes Metropolitan police figures for 1971 showing only one eighth of property recovered—and less if thefts of motor vehicles be excluded. Also quoted is the *Security Gazette* showing that in 1971 in the U.K. generally property and money totalling £74 million stolen but only £14 million ever recovered.

2 It was this provision which gave Henry VIII the opportunity to make homosexuality a capital offence, accuse the abbots of those powerful monasteries likely to oppose him of this offence and so confiscate their land and property for redistribution to his supporters.

urbanisation of recent years. At one time, the offender would find it difficult to dispense his ill-gotten gains in a community aware of his circumstances and likely to be curious about his affluence. Nowadays, in the anonymity of the towns, to turn a corner is to become a stranger, so that it is the mere possession (i.e. not the source) of wealth which brings prestige. In a big city wealthy people are taken for granted. No-one is inclined to ask questions if the spender is generous.

Confiscation and related measures

Unfortunately the separating of the offender from his illegally obtained property is mixed with a variety of other issues both public and private attaching to the questions of restitution and compensation. Usually the situation cannot be restored to what it was before the crime and the offender is to be punished anyway. If the damage or loss was small it is possible to obtain recompense but where the loss was great it may be unrealistic to expect some offenders to pay. That is why the state has intervened with compensation to some victims. But this would be a grossly unjust way of dealing with the enormous proceeds of organised or corporate crime. There could be no question of the general public having to make payments to victims whilst the offender kept his loot hidden to be enjoyed later.

It is difficult to separate the confiscation of stolen or illegally obtained property from the related and overlapping subjects of forfeiture, restitution and compensation. Yet there are lines of distinction. Forfeiture generally has been historically wider than the confiscation only of those goods illegally obtained³. All the offender's property was taken. Moreover, forfeiture alone could be unjust if it merely enriched the state and ignored the claims of the victims of the crime. Restitution could mean that the illegally obtained property would be restored or its value abstracted for the benefit of the victims: but restitution does not necessarily mean the confiscation of the property stolen or wrongfully obtained and a restitution order could go too far for effective implementation or not so far enough if it is hoped to recover the property illegally obtained. If in the hands of a third person, then it is really a question of the extent of compensation for the wrong—a related but rather different question to the confiscation issue.

Sometimes, in legal terminology, the term "restitution" is a synonym for the word "confiscation" as used in this paper. Then "compensation" means payments made to the victim by the state and often the word "damages" is borrowed from civil law to indicate payments by the offender to the victim other than the return of the specific property taken or illegally obtained.

3 N.B. Since the older concept of forfeiture as extending to any or all property held by a felon has been abolished by Statutes in many parts of the Commonwealth, the word "forfeiture" has frequently been used to refer only to the required surrender of property illegally obtained. Defined in this way it is similar to "confiscation" as discussed here.

Basic to these related concepts is the comment made by the Law Reform Commission of Canada in 1974—

"Doesn't it seem to be a rejection of commonsense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss".⁴

This has become an issue with emotional and political overtones in some countries where efforts are sometimes being made to specifically legislate for victims' interests to take precedence over the offenders'.⁵ Focusing only on the victim's interests, however, can be just as odd as thinking only of the offender's interests. Where, for example, the victim is a huge corporation or a bank and the offender was in provable need at the time of the offence, it would be unjust to prosecute these victim's interests as necessarily prior to those of this type of offender. Yet when this situation is reversed and a corporation has been guilty of dispossessing or damaging thousands of wage earners and even pensioners, the indiscriminating support of these victims seems both logical and just. But discrimination might be necessary where a fraudulent company deliberately raises credit and then goes bankrupt. Consumers defrauded should not get less consideration than the firms that have extended credit. There exists on the one hand the need to protect the general public as well as business associates. On the other hand firms extending credit in good faith can become so easily victimised that the business confidence on which the economy depends may be eroded. All such factors are relevant. And to be just to all with a claim, the extent of insurance for loss has to be taken into account.

Actually the whole issue of the extent to which victims of property crimes should be compensated is raised in a working paper of the Canadian Law Reform Commission. Whilst the Commission favours compensation for victims of personal assault it is opposed to claims for property losses. It points out that property crimes are the most numerous and that such an enormous extension of claims would be publicly onerous—the loss from property offences in Canada (excluding auto-theft) being in the region of \$96 million. If offences against corporations and cases where the offender could make restitution are excluded it would still have a bill for \$40 million dollars for the taxpayer. Moreover there would be scope for fraudulently inflated claims, the reporting of offences would be double or treble what it is now because of the hope of compensation and the reality of all such claims of loss would be difficult for the police to cope with. For such reasons the Commission opposed compensation for property losses. It

4 Law Reform Commission of Canada "Restitution and Compensation" Working Paper No. 5: 1974.

5 Cf. The U.K. National Victims' Association founded in 1972. Also the White Cross Society for promoting victims' interests in Germany and the organisation for Victims Aid in the U.S., Europe, Canada and Australia which include and sometimes grow out of Rape Centres. See the Bill introduced in 1977 in Illinois giving priority to victims interests—described below.

qualified this however by saying that property crimes such as breaking and entering (and presumably robbery) should be regarded as crimes of violence.⁶

There is no doubt that this argument can be distinguished from the objective of this paper which is to deal with the need to prevent the offender—especially the corporate or organised criminal, from enjoying his crime. Doubtless once such property had been confiscated by the state there might well be problems of distinguishing between the conflicting claims of victims, but the need for the state to do whatever is necessary to dispossess the offender would seem to be clear.

Informal compensation

Where victims have not been compensated, it has not always meant that the legal provisions for restitution were not in the statutes: but simply that these provisions were not working effectively to right the wrong. Yet there are countries in which, at an informal level, or in relation to minor offences, the principle of restitution works very well. In some of the Commonwealth countries, customary courts, religious courts, or local informal tribunals are still used to settle disputes and deal with minor crime. In such courts or at such hearings the offender may be required to compensate his victim. In some situations, this type of remedy may amount to a kind of diversionary procedure to relieve the formal courts of unnecessary litigation. Sometimes only the failure to pay compensation leads to formal proceedings: conversely, if compensation is paid, it cancels the risk of a formal prosecution in the higher courts. There are even situations in which the compensation to be paid may be exemplary or punitive—with the intention of discouraging others who might be tempted.

In this same connection it should be borne in mind that many of the Civil Law countries give wide discretion to a cadre of public prosecutors to sift the cases brought by the police and to settle to the satisfaction of the victim and the public, in so far as possible, any cases which need not, in their opinion take up the time of the courts. These interviews with the prosecutor amount to settlement hearings: and satisfying the victim and the public frequently involves the offender making good the damage he has done. In Japan he probably has to write out an apology too!

A distinction has to be drawn between the reconciliation of offender and victim which may have little to do with the concept of crime and the punishment of an act or omission prohibited by the community. Restitution or compensation may not satisfy the public outrage aroused by a crime. Conversely, as already shown, the punishment of a crime may not satisfy the victim. Often these have been treated as quite separate issues not necessarily related: but where a crime has been committed, they are closely related. Even where informal procedures are available for settling matters out of court wherever

possible, the shadow of the court hovers to persuade the offender to pay. Though such informal procedures are now often advocated and are generally favoured, there have been periods of legal history when the negotiations for settlement would have been regarded as collusion. They would have been prohibited as amounting to the compounding of a felony. No private arrangement could be made with the offender not to lay information to the authorities. It is but a very short step from this to a recognised procedure for settling the disputes which could have arisen from crime.

Formal Compensation

Modern movements to help victims have generally followed the pattern of compensation by the state—usually on the grounds that there are practical difficulties about getting money out of the offender and that anyway the state must accept some responsibility for allowing the offence to take place at all. Thus the U.K. government decided upon a pattern of common law damages for victims of crimes of violence rather than an Industrial Injuries scheme. New Zealand's Criminal Injuries Compensation Act of 1963 had provision for the amounts paid in compensation by the State to be recovered from the offender but this has not proved very practicably. Yet New Zealand has allowed compensation to be claimed by the victim from the state for economic as well as personal injury.

The confiscation of the specific property obtained by crime is slightly different from compensation in that the property sought is that which is the subject of the crime. Making good the damage can go further or not so far. With the restitution of the specific property taken or damaged all victims may be treated equally, whether they be individuals deserving of sympathy or large corporations or even governments. Compensation going beyond the precise property taken or damaged is different, of course, since, as already indicated, this changes in perspective when the victim is a public or private authority covered by insurance or already compensated by the on-costing which is a normal business procedure anyway.

Confiscation not usually distinguished

In the scholarly literature reviewed for this paper, it was interesting to see that hardly any material was available on the specific question of the confiscation of illegally acquired property. This is remarkable because—it is a provision common to a great many legal systems.⁷ Moreover it is a subject not merely of ancient concern but touched upon by some famous writers of earlier ages in this field. For example Herbert Spencer suggested that prison work and the prisoners income should be the means of making restitution. He thought that the offender should be held in prison until the damage was repaired. Raffaele Garofalo (1852-1934), one of the pioneers of criminology, thought that the property of a solvent offender should be confiscated and restitution

6 "Community Participation in Sentencing", Law Reform Commission of Canada: 1976 Minister of Supply and Services, Canada: Working Papers—Compensation. pp. 17-23.

7 Cf. S.4 of U.K. Forfeiture Act 1870 as affected by Criminal Law Act 1967. S.8 of Criminal Damage Act 1971 and S.1 of Criminal Justice Act 1921.

made from this. If an offender was insolvent he should become a state workman.⁸

It is also interesting to see that where anything had been written on the confiscation of such property, it was mixed up with the subjects of compensation or restitution which as already shown are at once wider and yet narrower. No less significant is the fact that the literature which deals with restitution (with or without compensation) deals with it as either—

- a a retributive tool designed to balance the scales—
as a means of justice by making sure that what was lost is regained, or an equal amount restored;
- b as a therapeutic instrument helping the offender to become re-integrated into the community—or perhaps as a means of restoring the harmony between the offender and victim which the offence had broken to the detriment of the community.

In other words, however viewed, the studies of restitution had in focus the individual offender committing the conventional crimes. The unconventional offender and the special situation he creates had apparently been given little attention. This rather casual interest in the organised or corporate offender hiding his untold loot is not easy to understand, since there are the celebrated examples of racketeers in the United States being imprisoned before the Second World War, not for their more serious crimes, but for serious tax evasions. The effort was made to get at them through the profits made on bootlegged liquor and other forms of organised crime. It might also have been expected that as a facet of the surging interest in corporate, company and white collar crime, the subject of confiscation would have attracted rather more attention than it has so far.

Restitution—a new approach

On restitution itself, a whole new library has developed as countries have turned back to this traditional way of dealing with the crime that modern criminal justice systems seem incapable of controlling. The U.S.A. held its first National Symposium on Restitution in 1975 and a second one in 1977. The U.S. Law Enforcement Assistance Administration has given massive financial support to a variety of different restitution programmes in the States of California, Colorado, Connecticut, Maine, Georgia, and Oregon. Forty formal restitution projects were traced by the Minnesota Department of Corrections three years ago and there are probably many more now. These take various legal and administrative forms.

In California restitution is required as a condition of probation and a special Release and Restitution Board is created which runs special work centres to which prisoners can be released on parole if they negotiate with victims the amounts to be paid off by their work. It should perhaps be noted that negotiations for the payments to be made to victims may have the services of a mediator, so that the amount the offender actually works to pay, though it cannot be more than the stated loss, may well be less.

Illinois had a 1977 Bill before the State Congress formulating as public policy the principle that a higher priority will be given to restitution and the restoration of the victim than to rehabilitation of the offender. Georgia has Adjustment and Restitution Centres in seven or more cities, where again offenders on probation work off the restitution.⁹ In many cases in the U.S., restitution centres are run by the probation and parole systems.

Curiously enough, in the light of such federally aided special hostel or workshop projects outside the prisons, the 1978 study of their spread across the U.S.A. observed that it had not been able to find a single prison where the inmates were making restitution to victims from their earnings.¹⁰ The sugar of early release had, therefore, been needed to sweeten the pill of working for the victim.

Between 1962 and 1963 the U.S. Department of Health funded a study by an associate professor of Sociology at the University of Ohio. 819 persons convicted of murder, assault or violent theft who were received by Florida Correctional institutions were surveyed. In none of the cases had restitutions or compensation been made by the offender. In only 88 cases was a positive or negative attitude to restitution detected. It appeared that the overwhelming majority of those committing murder did wish to make some kind of reparation. Those convicted of aggravated assault were much less inclined to help the victim. A large proportion regarded their debt as being only to the state. The robbers and burglars were only about 50 per cent in favour of recognising an obligation to the victim.¹¹

Perhaps the very fact that restitution does not recommend itself to such considerable numbers of offenders, that they are so often prepared to be indifferent to their victims is sufficient to recommend a policy of aid to the victims by the offender to those who are responsible for determining penalties.

In 1974 the U.K. Home Office Research Unit in cooperation with Chief Constables and Justices clerks conducted a national survey on the use of compensation orders in magistrates courts.¹² This did not separate out the extent to which property illegally obtained was specified by the compensation orders but the property which was the subject of the charge would obviously have been of immediate concern—as would be damage caused by the offender.

This showed that, excluding those property offences which did not result in loss or damage there was a significant difference between the 90 per cent of persons convicted of criminal damages who were ordered to pay compensation and the 60 per cent of

8 R. Garofalo "Criminology", 1914.

9 Steve Chesney, Joe Hudson and John McLagen "A New Look at Restitution: Recent Legislation Programs and Research".

10 Ibid p. 354.

11 Stephen Schafer "Restitution to Victims of Crime—An Old Correctional Aim Modernised", Minnesota Law Review: 1965: Vol. 50 : DEC pp. 250-251.

12 See P. Softley "Compensation Orders in Magistrates' Courts" Home Office Research Study No. 43: H.M.S.O.: 1978.

those convicted of burglary, theft and obtaining by deception who were ordered to pay compensation. The study speculated that maybe the property stolen had often been recovered or that magistrates were reluctant to order compensation where they had also imprisoned but this is unknown and it is certainly odd that up to 40 per cent of persons guilty of dishonesty escaped compensation orders. Only 9 per cent of the persons convicted of wounding or assault were ordered to compensate.

The Howard League for Penal Reform in England has drawn attention to the fact that in 1974/5 the Criminal Injuries Compensation Board paid out about £5 million to only 12,500 applicants though in 1974 there were 77,250 violent crimes known to the police. Even allowing for the victims ineligible to aid this still seemed to the League to be "disquietingly small".¹³

The study suggested that the unemployed were less likely to be asked to pay compensation than the employed—except where they had caused damage. The amounts of compensation ordered were small (over 60 per cent no more than £25 and 90 per cent less than £100) yet 25 per cent of the orders had not been paid in a period of 18 months from the time of the order and only 8 per cent of those ordered to pay were committed to prison in default. Of this 8 per cent, nearly a half were already serving prison sentences and the study confirms the U.S. study of prisoners attitudes already quoted above in that there was a correlation between the length of the criminal record and the extent of non-payment¹⁴ offenders over 21 were less likely to have paid than those under 21 and urban dwellers had a higher record of non-payment.

The greater problem is of course the offender who had made a large amount out of his crime and whose case would be heard in the higher courts. No similar survey has been made of the position in such cases but experience indicates that authorities have been relatively unsuccessful in helping victims by laying hands on such ill-gotten gains.

Apposite to this discussion are Articles 110-111 of the 1938 *Codigo de Defensa Social* of Cuba. At that time in that country every offence created a civil obligation and the court hearing the criminal charge had the responsibility for determining to whom the civil responsibility was owed and the amount. In every case the civil responsibility included

1. *restitutio in integrum*
2. reparation of the material damage
3. reparation of the moral damage
4. indemnification for all expenses and losses

The moral responsibility could include a public apology to the victim, an obligatory marriage of the offender to the injured party in appropriate circumstances (or a suitable financial compensation to

avoid the marriage), recognition of any children born (e.g. as a result of rape) except where this conflicted with a husband's rights, compensation by providing a dowry for a woman whose matrimonial prospects had been reduced by the offence etc.¹⁵

Also a third party deriving benefit from the offence could become civilly liable where he could not be charged with a crime. And an Indemnity Fund was established into which all the earnings from the prisoners compulsory labour was paid. This Indemnity Fund carried as a first charge the compensation of victims: the balance met other charges and anything left could go to the prisoner himself or his family.¹⁶

Gratifying as this older Cuban law might be to the most single minded of victim-interest campaigners because of its emphasis on making the offender repay—and suitable as it is for exacting full accountability from those organised or corporate offenders who have victimised ordinary people, it has problems attached: it will be apparent that when it is applied to property crimes where the victim is rich and the offender poor the law itself seems to be squeezing the last ounce from an already deprived minority. Sometimes therefore it is not so much the justice of the legislation but the justice of its administration which is important.

Confiscation in law

As part of the preparation for this paper the Australian Federal Department of the Attorney-General was asked to make a computer search for legal provisions dealing with the possible confiscation of illegally obtained property. For reasons already given the word "confiscation" was not coded and the nearest key word was "restitution". The computer read-out for "restitution" provided a list of no less than 150 statutes enacted by the Commonwealth Government alone in which clauses had been inserted to allow for some form of restitution.¹⁷ This did not include of course the separate and no less voluminous legislation existing for each of the different States of Australia: if these had also been surveyed it might well be conservatively imagined that 800 or more Australian statutes might have been discovered with relevant provisions. Of course it is only possible to say that a proportion of this total would be dealing specifically with the confiscation of illegally obtained property—or with an obligation for its value to be paid to the state or the victim.

The range of subjects covered by the statutes providing for restitution (in the computer read-out) was vast and varied from the Australian Antarctic Territory Act to the Crimes Act; from the Income Tax Assessment Act to the Social Services Act; and from the Life Insurance Act to the Fisheries Act, the list extended.

13 The Howard League for Penal Reform "Making Amends" A Discussion Paper, Chichester Sussex: Barry Rose (Publishers) Ltd: 1977. p. 18.

14 P. Sofitley. H.M.S.O. op. cit.

15 Stephen Schafer *Compensation and Restitution to Victims of Crime*, Montclair, New Jersey: Patterson Smith: 1970 p. 66 and segg.

16 Ibid.

17 Excluding Interpretations Acts.

There would seem little reason to suppose that the subject of restitution is less well covered by the laws of other Commonwealth countries. There are probably thousands of legal enactments to provide for restitution. This being so there can be no complaint that restitution has not received adequate *legal* attention. And although it is difficult to distill from all this the precise sections touching upon the confiscation of illegally obtained property there is little doubt that it is provided for in a variety of ways.

Against this substantial background of legal concern the evidence that offenders are so often able to benefit from their illegal activities is both striking and surprising. If there is any conclusion to be drawn it is surely that legislation still does not cover the need, that the law is not working in practice, that the courts cannot adequately implement the intentions of legislators—or perhaps that the legislation is too loosely drafted or deficient in the enforcement procedures available for making the confiscation of wrongfully obtained property an inevitable and automatic consequence of arrest and conviction.

In India the civil nature of the victims remedies used to be indicated by the provision that where an offence was both a crime and a tort only civil courts could entertain suits for damages. Pakistani courts had power to pay prosecution expenses or award compensation out of fines but this was not much used.

Perhaps, needless to say, the situation is far more complicated and less effective when it becomes international. The transnational nature of much modern crime reduces the efficiency of purely national laws. Proceeds of crime can be placed beyond the reach of the authorities which convict the offender. Mobile offenders operate within and between countries. They can be careful to avoid being caught with the goods on them. They may pay for offences to be committed by the nationals of another country to whom payment can be made in foreign banks. One offender employed by foreign organised criminals, who also operated casino's, used to take a holiday abroad every year. He would play the casinos and he always won—making it impossible for the winnings to be identified as proceeds of crime. This international aspect is developed further below.

The real issue in cases of drugs or corporate crime or extensive corruption is however the possibility of the courts or the authorities being able to confiscate the property which is in the possession of the offender in the sense that it is within his control but which is not amenable to the usual provisions of the law.

The possibilities

It may be presumed that the subject of confiscation of illegally obtained property turns on the fact that the body of the offender is at the disposal of the court, subject of course to his inalienable human rights. He has been convicted of an offence. He still holds the proceeds of the offence, his only right to such property being his possession of it at the time he

is before the court. Such possession may be difficult to substantiate legally but for the purposes of this part of the paper it may be assumed that, whoever may claim legal ownership or possession, the goods are effectively within the control of the offender and difficult for the courts to reach.

(a) Contempt of Court

If both the goods and the offender are within the same national borders it is legally possible for the offender to be held in custody *until* the goods have been surrendered. In this connection it is apposite that the fine as it is known today really began as a way by which the offender could buy himself out of custody. As long as the offender is held, he cannot enjoy the benefit of his crime: and even if he is happy to sacrifice himself whilst his family or friends enjoy the proceeds there is a human limit to this self sacrifice as the years go by.

To effect this the device of contempt of court could be employed. If the goods in question were not placed at the disposal of the court when the hearings began the accused could be committed for contempt. Obviously if the goods proved to have been innocently obtained and the accused is eventually acquitted, the control of the goods in question could be returned to him. Whilst the court has control of the property in question it should be possible for any necessary interim obligations to be met from the assets e.g. payments of rent, mortgages, school fees etc.

Since guilt is not yet established this is a necessary provision and where such funds or property are large the services of the public trustee could be used to administer estates during periods of trial. Any reduction in the value of illegally obtained property occasioned by this payment of on going expenses during the court hearing could be recovered as compensation or restitution by court order when the accused has been guilty.

Four difficulties arise with this procedure. The first appertains to the identification of the property concerned. There will always be difficulty drawing precise lines of distinction between property which is suspected of having been illegally obtained and that which is unquestionably legitimate. This is a familiar problem in law however and each legislature will have its own way of drawing the lines necessary. Secondly, the retention in custody could be regarded as unjust especially if it dragged on for months or years. Moreover there could be defiant persons accused who would go on hunger strikes or, using wealth outside, organise petitions for protection against an unyielding court. The media would be attracted by the conflict of wills. These are problems which already attach to the use of custody for contempt of court: and their resolution in the circumstances of possible illegally obtained property would be dictated partly by the importance of the case and partly by the value of the property in question.

Thirdly there would always be a need to avoid the injustice of rich persons being able to produce an amount equivalent to the property in question and

the poorer person unable to produce an amount equal to funds taken and spent.

Finally the length of the incarceration could be a problem if it dragged on interminably. The time an accused is held in custody for not surrendering his property could extend beyond the limits of any sentence of imprisonment provided by law for the offence of which he is accused. This could be a matter left to the discretion of the courts. After all the obduracy of an accused could be an indication of his inability to protect the property once it comes under the control of the court: it may be an indication of the weakness of his case so that in custody he is merely serving time he would be likely to serve alongside the loss of the property he is now protecting. When the period in custody goes on for longer than any sentence provided the courts could weigh the interests of the accused against those of the victims of the alleged offence—and make a decision accordingly i.e. to continue the custody or to regard the period already held in custody as purging the contempt and making it reasonable to proceed with the case even though the property was not produced. There would still be other remedies if the accused is found guilty as shown below.

(b) *Restitution*

As shown remedies involving restitution already exist but they are difficult to enforce. Extension of sentence or denial of parole could be ways of persuading the offender to meet the restitution requirements. Sentences could be extended conditionally upon restitution not being paid where the illegally obtained resources are known to exist: or contempt of court orders could apply after a sentence has been served where the restitution has not been made though the means are known to be available.

But once the property to be restored has been identified it should be possible to legalise a seizure by the police if necessary for restoration to its rightful owner(s). Where this cannot be done it is generally because the property concerned has been conveyed to a third person—either by open sale or by simply putting the property or account in the name of another person.

Of course, there will be occasions in which such a third person might become liable to a charge of criminally receiving i.e. if he or she can be shown to have known that the property received was stolen or illegally obtained: this could well apply to a spouse or relative who might have been just holding the property for the offender. Yet, even with such criminal proceedings against third parties, the actual property is not always recovered. Where this is because a purchaser bought the property in good faith there are familiar and quite reasonable civil procedures for determining ownership: but these are never satisfactory unless the offender can be obliged to compensate the party which fails in such an action. After all it is his action which creates the dispute as to ownership: it is his action which generated the double claim: fairness would seem to require that he should be responsible for making good the loss he has sustained.

Whether the offender can work to provide this kind of compensation is now the concern of the restitution schemes already discussed above. One way to oblige an offender to pay off the compensation awarded could be by community work orders. Here if earnings cannot be collected to pay off the debt both spare time and labour can be invested by the offender in paying off his obligation. It would also keep him out of prison where this is advisable. A variation of this could be work outside whilst on a probation order. But when prison is unavoidable as a sentence logic as well as justice would seem to require that labour *inside* the prisons could be tied to this kind of compensation. Indeed the lengths of sentences could be reasonably adjusted to the time required to work off the compensation necessary. This is not quite as easy as it seems because if carried too far it elevates compensation to the central position in sentencing. This would not always work. For example a person sentenced for planting a bomb which did not explode in a public place, would, on a criterion of compensation alone, expect to receive a very light sentence. He would have caused little damage if any. On the other hand a corporate offender (who did not still have his ill gotten wealth) could be sentenced to work for the rest of his life and would still not be able to earn enough to compensate his victims. For such reasons compensation, whilst important, cannot be the sole criterion for determining the length of sentences. There is no reason however why it could not be given more attention than it has received to date.

Where an order for restitution or compensation has been made against an offender it should be possible for it to be registered for enforcement in other states so that an offender cannot easily avoid it by crossing borders. Similar provisions already exist within Commonwealth legislation¹⁸ but the net could be drawn closer by an extension of such legislation to countries where it does not currently apply. Sometimes restitution or compensation orders in criminal cases have not been included in provisions for the inter-state enforcement of civil judgments.

Lord Hailsham the Lord Chancellor, speaking to the U.K. Magistrates Association at Blenheim in 1979 said

“Incidentally I wonder whether enough attention is being paid to your powers to make appropriate and realistic orders for civil compensation . . . of course in all these cases of financial orders there is the problem of enforcement. I wonder whether Benches cannot make a fuller study of the methods of enforcement open to them”.

The Queensland Criminal Code contains various general provisions for the making of restitution orders. But until Section 685 A was inserted in the Criminal Code in 1977 (providing that restitution must be ordered within a limited time and the penalty for non-payment within that limited time is imprisonment) there was no power of restitution given to judges in criminal cases. Occasionally, but with

18 E.G. Cyprus: Maintenance Orders (Facilities for Enforcement) Law (Cap. 16).

doubtful legality, restitution was made a condition of a probation order.

Where the property from which restitution is expected to be paid is immobile it could be obligatorily mortgaged to the state. The deeds could be held or marked in such a way that it would not be possible for it to be alienated or otherwise mortgaged except by the state. Immobile property could be publicised in such a way that dealings in it would be difficult. Earnings could become subject to a penalty tax which could also be used to compensate victims. The movements of those having control of such property could be restricted by the state until the court was satisfied that they were not likely to dispose of property. Publicity given to such cases would make it more difficult for people to deal with such persons without knowledge that the goods were suspect i.e. without becoming liable to such charges as receiving or unlawful detention.

In the cases where the restitution has not been paid off though a sentence has been served it seems possible that there could be much more use made of the legal garnishing of monthly or weekly earnings. Rights to pensions or holidays could be postponed to the prior claims of victims in serious cases.

Where corporate offenders have bank accounts within reach of the authorities it should be possible to freeze accounts until restitution has been made or promised. The accounts could be unfrozen only to the amount required to be paid to victims—then completely unfrozen when the amount has actually been paid.

In general providing both offender and property are within the borders of one country there are possibilities of ensuring that the offender cannot enjoy the proceeds of his crime. Some of the remedies may be administrative rather than legal. There was a time in Cyprus for instance when an application for a passport was always referred to the Department of Social Welfare to ensure that wives and children—or other dependants were not being left a charge on the state. A passport could not be issued if the social welfare department was not satisfied that it would not soon be called upon to support dependants. A similar control of the movement of prisoners failing to pay required compensation or restitution would in effect limit the extent of use of illegally obtained property.

In some Commonwealth countries where anti-corruption agencies have been established, these organisations have been empowered to require suspected persons to account for assets which appear to be in excess of anything legitimately earned. The burden of proof is in such cases laid upon the accused. Similarly, it should be possible when trying to ensure that the culprit does not enjoy his illegal profits to require him to account for property held; this could be extended to relatives or associates suspected of holding property for him. To extend this, there are various ways of making sure that property other than liquid assets cannot be traded or used to generate further profit.

One of the problems of such controls has always been the extra work which the following up of such orders made for the police; but, as shown, if handled in a wider perspective the resources of probation, welfare, taxation, and other departments could be used. It may be expected that as the controls over property extend the offenders with the most illegally obtained property and therefore with the means to protect it legally will have the best advice on making representations or appeals. Such work could be entrusted to existing administrative tribunals or else a special court for dealing with cases of compensation, restitution and/or confiscation—and the orders restricting the movement or the trading connected with these.

International complications

With modern extensions of corporate crime and the drug traffic, it can no longer be expected that the illegally obtained property will always be within the borders of the country within which the suspect is arrested. Numbered bank accounts in foreign countries are now famous. It is frequently suggested that by some secret agreement with Switzerland the United States have found a way of tracing off-shore placings of profits by the organised criminal groups in the United States, but there is no confirmation of what may only be a rumour. Politics make it likely that long before a break-through is obtained on an exchange of information on the placing of profits from crime there will have to be first an exchange of information on national resources transferred abroad by the leaders of regimes that have been overthrown! It has to be acknowledged therefore that facilities are available to most of the larger operators in organised or corporate crime to transfer wrongfully obtained assets out of the jurisdiction of Commonwealth courts.

Extradition proceedings are usually available to recover the fugitive offender and the indications are that the 1966 Commonwealth Scheme for the Rendition of Fugitive Offenders is working reasonably well¹⁹. There have been additions to the number of returnable offences over the years—some of these being included as a consequence of international agreements²⁰. Professor Shearer suggests that the list of returnable offences in the Commonwealth Scheme could be improved with a generic item for all offences established under international conventions to which the requesting and requested parts of the Commonwealth are partners.

Yet there are still problems with extradition in the Commonwealth and even more when it is brought into a general international perspective. There are some serious offences not included, political issues intrude

¹⁹ See paper prepared for Barbados Conference of Commonwealth Law Ministers by Professor I.A. Shearer on this subject.

²⁰ E.G. Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1973.

and the procedures are often protracted and uncertain. Above all there are no extradition agreements at all between some countries—sometimes even when these are neighbouring countries. Much more problematic is the return of expatriated illegally obtained property. Therefore, when there are to be amendments to the Commonwealth Scheme on Fugitive Offenders it may be as well to consider the generalisation of the provisions of the Australian Extradition (Commonwealth Countries) Act of 1966 which allow the Attorney General to direct that any property considered to be proceeds of the crime or “articles associated with it” should be surrendered with the fugitive. If such provisions could also become part of extradition agreements with non-Commonwealth countries the net could be tightened—at least as regards property seized with the offender.

Significant here would be the interpretation of the words “found to be in possession of the proceeds of his extradition crime or articles associated with it”. Does this extend to funds held in banks, deeds of ownership of immovable property, the possession of stocks and bonds? As far as can be ascertained the precise boundaries have not yet been fully interpreted. If construed only to relate to property on the person of the offender when arrested this may not go far enough. If more widely interpreted this provision could be very valuable indeed as a way in which Commonwealth countries could follow the loot: and if, as suggested it became part of most extradition agreements it would greatly narrow the scope for evasion now available to offenders who are getting their illegal gains out of their own countries.

Other measures will be required however, some of them already discussed at the national level. If courts have a power within their own countries to freeze accounts, garnish earnings, hold in contempt or extend sentences until the illegal profits are disgorged such powers could be extended to improve the ways of dealing with extradition cases.

Success achieved by Commonwealth countries in tightening the net will drive future offenders to other countries both for their own protection and the protection of their illegal property. Therefore there is an ultimate need for United Nations conventions. These take time but the success of Commonwealth countries will make it possible eventually to extend the controls to other regional organisations e.g. Organisation of Africa Unity, Council of Europe, and the groupings of Asia and Pacific States. As these too prove the controls valuable, the prospect of a more exclusive U.N. convention will be enhanced.

Collective rather than individual measures

One of the problems encountered by governments attempting to deal with organised or corporate crime is that the legal systems have generally been devised to deal with specific offences committed by specific persons. This by definition has made it almost impossible for criminal justice systems to cope with the situation presented by organisations which can continue to operate despite charges brought against individual members. Corporations, whether legitimate or of organised criminals, have a life beyond that of any of their members and they can survive legal actions against a large number of their members.

It is important to remember that, despite the great publicity given to the praiseworthy attempts by the FBI to deal with gangsters in the United States—and despite the success that attended their efforts to imprison people like Al Capone for tax violations—this period of organised crime in the United States was the most significant. It was significant not because of the success of the authorities, but because of the success which attended the efforts made by the organised criminals to develop new and better systems of management and a better portfolio of legitimate, as well as illegitimate, investments. In fact during the time when it appeared that the authorities were successfully suppressing organised crime, it was really expanding.

For many years, therefore, it has been the concern of legislators, criminologists and specialists in this field to devise measures to deal with collective bodies. Some of the progress in this field has been within the civil law in dealing with corporate bodies, anti-trust legislation etc. but since 1977 the United States has broken new ground with its RICO legislation. A federal law designed to deal with “Racketeer Influenced and Corrupt Organisations” has been introduced, which allows a State to deal not only with individual contraventions of the law but with patterns of behaviour, so that all the members of a suspect organisation can be brought to trial. They can be tried collectively and their criminality can be viewed collectively. This legislation also provides for the court to order the proceeds of crime to be taken over by the court and disposed of. In this way already a very large entertainment establishment in Las Vegas has been confiscated and ordered to be sold.

The cases under this law are still very few and experience of its operation is still being gathered but clearly it is a form of approach to corporate offenders which needs to be given the most serious consideration by criminal justice authorities anywhere in the world.

HUMAN TISSUE TRANSPLANTS

Memorandum by the Commonwealth Secretariat

Modern developments in medical science enable the transplantation of different types of human tissue, from living and dead donors, and raise issues of a moral, ethical, religious and legal nature. The purpose of this paper is to review legislative measures in some Commonwealth jurisdictions designed to regulate these practices so that the public benefit is advanced while safeguards are preserved for the rights and beliefs of all the parties legitimately concerned in the decision which results in a transplant.

2. In the United Kingdom the Human Tissue Act was enacted in 1961, and repealed the Corneal Grafting Act, 1952. The 1961 Act, which is set out in Appendix 1, regulates all transplants from deceased persons for medical purposes. In cases where the deceased has expressed a request that his body should be so used, the person in lawful possession of the body may give the necessary authorisation, unless he has a reason to believe the request was later withdrawn. In other cases, after making "such reasonable enquiry as may be practicable" such a person may give permission if he has no reason to believe that the deceased had expressed an objection and not withdrawn it, or that any surviving spouse or relative objects to the body being so dealt with.

3. Various official and unofficial committees and organisations in Britain have published reports on the law of transplantation in recent years, and it is understood that the report of a government Working Party aimed at giving guidance to all concerned with transplants, and at reducing public anxiety, is soon to be published. The Working Party's Chairman was Lord Smith of Marlow, a former President of Royal College of Surgeons.

4. At various times between 1968 and 1979, Private Members' Bills have been introduced in the British House of Commons seeking to make new provision for human organ transplants but none have yet reached the statute book. As in the case of two 1974 Bills, a Private Member's Bill published last year sought to provide that all parts of the body of a deceased person should be available unless the deceased has expressed and recorded an objection during his lifetime (sometimes referred to as the "contracting out" approach).

5. The text of the 1979 Private Member's Transplant of Human Organs Bill is reproduced in Appendix 2. Under its provisions, a register of objections would be maintained and would be available on computer. A medical practitioner, at the request of another, would be able to authorise the removal of any part of a body for therapeutic or curative purposes unless the deceased person had registered his objection in the manner provided for.

6. During its 1970 Proceedings, the Uniform Law Conference of Canada adopted a Uniform Human Tissue Gift Act (first developed in 1965) which applies both to tissue from live and dead bodies. The Uniform Human Tissue Gift Act was re-examined during the Conference's 1971 proceedings. It is understood that these provisions have so far been enacted in eight of the Canadian jurisdictions—Alberta, British Columbia, Newfoundland, Northwest Territories, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan. The Québec Civil Code has been amended to contain similar provisions. As an example, the Human Tissue Gift Act 1971 of Ontario is set out in Appendix 3.

7. It will be seen that the Canadian approach makes paramount the right of an individual to dispose of his or her body where a consent has been given in the prescribed manner. No other authorisation is necessary. If a deceased person's consent has not been given, after the surviving spouse, the closest readily available relative from a list in descending order of relationship may give the necessary authorisation. If the deceased has no relative, or if no one from the prescribed list is available, the person lawfully in possession of the body (or, where relevant, the administrative head of the hospital) may give consent.

8. A perusal of the New Zealand Human Tissue Act 1964, reproduced in Appendix 4 will show that the United Kingdom provisions are followed to a considerable degree. It will be noted, however that unlike the position in Britain, the New Zealand Act explains who is to be regarded as the person in lawful possession of a body where death has occurred in a hospital or in public or penal institutions. This Act was amended to a minor degree by Act No.85 of 1968 as shown at the end of the Appendix.

9. The Bermudan Human Tissue Act 1976 (set out in Appendix 5) allows, in that order, a surviving spouse, an adult child, a parent, or an adult brother or sister, to give the necessary authority. Unlike the position in Canada, in the absence of this class of persons, there is no residual authority in any other person to give permission.

10. A major event in Australia, in 1977, was the publication of the Australian Law Reform Commission's Report on Human Tissue Transplants (ALRC 7). The Report made recommendations aimed at creating an efficient mechanism for the donation and use of all tissues (except fetal tissue) from living and dead persons for transplantation, and for the performance of non-coronial autopsies. The Report contained draft legislation in the form of a Bill for an Ordinance for the Australian Capital Territory.

11. The Report reviewed the law of the States of Australia, and traced developments in other parts of the Commonwealth of Nations, in European countries, in the U.S.A., South and Central America and South Africa. The Report included a table of cases from Australia, Britain, New Zealand and the U.S.A. discussed in the text; a table of legislation from over 30 jurisdictions; and an extensive bibliography.

12. The Commission rejected submissions for the introduction into the law of Australia of the "contracting out" approach. The Commission explained that there was a clear divergence of views on the subject, many taking very positive attitudes. It was plain that there was a strong body of opinion in Australia in favour of "contracting out". This had been apparent from the public at large and from the medical profession, from the written submissions and from the evidence given at public hearings. On the other hand, many people strongly opposed "contracting out". The idea of the human body being generally available after death as a source of parts for community use might be acceptable in the future. It might even be acceptable in the near future. However, the Commission concluded that it should not be recommended at this stage.

13. The Commission's principle recommendations can thus be summarised—

- i adults should be able to give their tissue on independent medical advice, after signing a written consent, which could be revoked at any time;
- ii minors (under 18) after receiving independent medical advice, and with the consent of a parent, should be able to donate regenerative tissue. As regards non-regenerate tissue, donations by minors should generally be prohibited unless all the following conditions are satisfied—
 - a) the recipient is in danger of dying,
 - b) medical advice is given to the donor regarding the nature and effect of the removal, and of the transplantation,
 - c) the donor and recipient belong to the same immediate family,
 - d) the donor must have sufficient mental capacity fully to appreciate the position, and must agree to the removal,
 - e) the parents must consent,
 - f) an ad hoc Committee (comprising a judge, a medical practitioner and social worker or psychologist) must unanimously decide that the removal is desirable, is in the interests of the donor, and should be permitted;
- iii persons lacking legal capacity for reasons other than minority, whether adult or not, should not be subjected to tissue removal;
- iv there should be simplified procedures for donation by persons dying in hospital. It should be obligatory to obtain authorisation from close relatives, but by improved procedures;
- v coroners should be empowered to give pre-death approval to tissue removal. Such consent may be

oral, or by telephone, to be later confirmed. The person who can authorise tissue removal from a deceased should not be able to do so until the coroner has consented, and until the other prescribed inquiries have been conducted and the appropriate responses obtained;

- vi the law should forbid payment of any kind of a person for any dead body or part of a dead body, or for human tissue removed in accordance with the recommendations of the Report from any living person or from any dead person, or removed for the purposes of transplantation or other therapy or for medical or scientific purposes;
- vii the proposed legislation should provide clear protection to medical practitioners and other persons involved in activities permitted by the recommended legislation. Such persons should not be liable in any proceedings whether civil or criminal, for any act done in pursuance of a consent, agreement or authority given under the legislation when done without negligence and in good faith;
- viii provision should be made for removal of tissues obtained during normal autopsies, for public therapy purposes;
- ix the proposed legislation should contain a definition of death for all purposes: death has occurred when—
 - a) irreversible cessation of all function of the brain of the person, or
 - b) irreversible cessation of circulation of blood in the body of the person;
- x in the case of "brain death", where it is desired to remove tissue for transplantation, death should be declared by two registered medical practitioners one of whom should be a neurologist or neurosurgeon. Neither should participate in any transplant involving tissue of the deceased.

14. The Transplantation and Anatomy Ordinance 1978 of the A.C.T. came into force in December, 1978 and is closely based on the draft prepared by the Australian Law Reform Commission. The Ordinance is set out in Appendix 6.

15. The Australian Law Reform Commission made a plea in its Report for a uniform approach in Australia to transplant legislation. It was desired by the medical profession engaged in transplantation and was, for numerous reasons, as desirable in Australia as had proved to be the case in Canada and the U.S.A. Apart from the possibility of organs being removed in one State and implanted in another, national programmes, such as the human pituitary programme, would benefit from the elimination of legal differences between States. The same comment was true of donor cards and other systems used by tissue donors.

16. The Government of Queensland accepted most of the Commission's recommendations and enacted the Transplantation and Anatomy Act 1979

(No. 74 of 1979). In its 1979 Annual Report, the Commission recorded its understanding that the Report was under consideration by the Governments of New South Wales and of the Northern Territory. A committee in South Australia had been asked to examine the recommendations. It is understood that the Report was referred by the Standing Committee of Attorney-General to state Ministers of Health, and that the law is under review in Victoria.

17. As regards the question of the time of death, it will be noted that the British and New Zealand Acts state that the medical practitioner who removes a part of a body must have satisfied himself that life is extinct. The Canadian Uniform Act requires that the fact of death must be determined by at least two physicians in accordance with accepted medical practice. The Bermuda enactment states that for the purposes of the Act, the death of a person takes place at the time at which irreversible cessation of that person's brain function occurs. The A.C.T. and Queensland statutes (following the recommendation of the Australian Law Reform Commission in the Report discussed above) state that a person has died when there has occurred irreversible cessation, either of all function of the brain, or of circulation of the blood.

18. In 1974 the Manitoba Law Reform Commission published a Report under the title "A Statutory Definition of Death" proposing a definition of death for all purposes based on the irreversible cessation of all brain functions. This definition was adopted by the Provincial legislature of Manitoba and is reflected in the Vital Statistics Act (R.S.M., ch.V-60).

19. Last year the Law Reform Commission of Canada issued Working Paper No. 23 under the title "Protection of Life: Criteria for the Determination of Death". The Paper discusses death both as a medical and legal phenomenon, and reviews the experience of the U.S.A., Britain, France, Switzerland, Australia and the province of Manitoba, in this area. The Paper includes extensive endnotes, a selected bibliography and selected definitions of death in other jurisdictions. When discussing possible solutions, the Commission expressed the view that the problem is not purely theoretical; on the contrary, it was of real practical importance, no less to the public and to society at large than to the lawyer and the medical and health professionals who frequently must confront it in their professional lives. Whatever solution proposed ought to meet certain specific requirements. It should be flexible, allowing for adaptation to new developments in law and medicine, and it should try to reflect the consensus of a large segment of public and professional viewpoints, even though the prospect of a unanimously acceptable solution can be discounted as unlikely.

20. The Commission felt that three approaches were possible—

- a) treating the time and criteria of death as a purely medical problem, and leaving their determination

to the exclusive jurisdiction of the medical profession;

- b) leaving to the case law the task of gradually developing coherent criteria as to time and determination of death;
- c) proceeding directly by way of legislation to define the criteria of death, and apply them in the adjudication of individual cases.

The Commission noted that their comparative review of experience in other jurisdictions had revealed that the legislative or regulatory solution seemed to have met with approval even in jurisdictions like the U.S.A. and Australia, or Manitoba, where the common law tradition might have favoured a case-by-case approach. Moreover the opposition to legislative intervention, in most cases, had been directed not against the principle itself but against its particular formulations. In other words, the discussion had now centered more around the content of the legislation than around the question of whether or not legislation was required. The Commission's tentative view was that a carefully drafted legislative intervention, designed to meet specific and clearly-defined objectives, was probably the best alternative. Its psychological and legal effects would be to dissipate fears shared by doctors, other medical personnel and the public. It would also eliminate the tensions between the insights of tradition and the imperatives of contemporary medicine. However, it would be wrong to opt for just any type of legislative intervention with an unspecified content. The parameters of the solution must be carefully set out according to the objectives and the general philosophy of the reform.

21. The Working Paper sets out the following objectives of the legislation the Commission presently had in mind—

- i it must avoid arbitrariness and give greater guidance to doctors, lawyers and the public, while remaining flexible enough to adapt to medical changes;
- ii it must not attempt to solve all the problems created by death, but only the problem of establishing criteria for its determinations;
- iii the one proposed piece of legislation must apply equally in all circumstances where a determination of death is at issue;
- iv it must recognise only the standard and criteria of death: it must not define the medical procedure to be used, nor the instruments or procedures by which death is to be determined;
- v it must recognise standards and criteria generally accepted by the Canadian public;
- vi to remain faithful to the popular concept, it must recognise that death is the death of an individual person, not of an organ or cells;
- vii it must not in practice lead to wrong or unacceptable situations;
- viii the proposed legislation must not determine the criteria of death by reference only, or mainly, to the practice of organ transplantation.

The Commission's tentative formulation of the legislative provision (which it hoped would be reflected in the law of all the Canadian jurisdictions following agreement between them) was in the following terms—

“A person is dead when an irreversible cessation of all that person's brain functions has occurred.

The cessation of brain functions can be determined by the prolonged absence of spontaneous cardiac and respiratory functions.

When the determination of the absence of cardiac and respiratory functions is made possible by the use of artificial means of support, the cessation of the brain functions may be determined by any means recognized by the ordinary standards of current medical practice.”

23. It is recognised that many Commonwealth jurisdictions have not yet had to confront the problems connected with human tissue transplants, but in some the sensitive issues involved are very much alive. Even where sophisticated medical techniques in human tissue transplantation have yet to develop locally, the moral, ethical and public policy issues surrounding commerce in human tissue might present difficulties which need to be faced. Ministers may wish to exchange ideas and experience in this area, and if it is their wish, the Secretariat could arrange for the dialogue to be continued, possibly through the medium of a workshop at which legal and medical experts from interested countries could benefit from each others thinking and experience. It may be that in certain areas of the Commonwealth, initiatives to promote legislation uniform in principle for the region could help to prevent unsatisfactory

practices from developing, and reduce the anguish and uncertainty that inadequately regulated transplants, and trade in human tissue, can produce.

24. The Government of Jamaica has suggested that this paper should be considered for inclusion in the Agenda.

Table of Legislation and Reports

Corneal Grafting Act 1952 (U.K.)	1
Human Tissue Act 1961 (U.K.)	1, 9-10
Transplantation of Human Organs Bill (U.K.)	1, 11-12
Uniform Human Tissue Gift Act (Canada)	2
Human Tissue Gift Act 1971 (Ontario)	2, 13-17
Human Tissue Act 1964 (New Zealand)	2, 14-25
Human Tissue Amendment Act 1968 (New Zealand)	2, 25-26
Human Tissue Act 1976 (Bermuda)	2, 27-29
Report: “Human Tissue Transplants” (Australia)	2
Transplantation and Anatomy Ordinance 1978 (A.C.T.)	4, 31-54
Transplantation and Anatomy Act 1979 (Queensland)	5
Report: “A Statutory Definition of Death” (Manitoba)	5
Vital Statistics Act (Manitoba)	5
Working Paper: “Protection of Life—Criteria for the Determination of Death (Canada)	5

APPENDIX 1

THE HUMAN TISSUE ACT 1961

(9 & 10 Eliz. 2 c. 54)

An Act to make provision with respect to the use of parts of bodies of deceased persons for therapeutic purposes and purposes of medical education and research and with respect to the circumstances in which post-mortem examinations may be carried out; and to permit the cremation of bodies removed for anatomical examination
[27th July 1961]

1. Removal of parts of bodies for medical purposes

(1) If any person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body or any specified part of his body be used after his death for therapeutic purposes or for purposes of medical education or research, the person lawfully in possession of his body after his death may, unless he has reason to believe that the request was subsequently withdrawn, authorise the removal from the body of any part or, as the case may be, the specified part, for use in accordance with the request.

(2) Without prejudice to the foregoing subsection, the person lawfully in possession of the body of a deceased person may authorise the removal of any part from the body for use for the said purposes if, having made such reasonable enquiry as may be practicable, he has no reason to believe—

- (a) that the deceased had expressed an objection to his body being so dealt with after his death, and had not withdrawn it; or
- (b) that the surviving spouse or any surviving relative of the deceased objects to the body being so dealt with.

(3) Subject to subsections (4) and (5) of this section, the removal and use of any part of a body in accordance with an authority given in pursuance of this section shall be lawful.

(4) No such removal shall be effected except by a fully registered medical practitioner, who must have satisfied himself by personal examination of the body that life is extinct.

(5) Where a person has reason to believe that an inquest may be required to be held on any body or that a post-mortem examination of any body may be required by the coroner, he shall not, except with the consent of the coroner,—

- (a) give an authority under this section in respect of the body; or
- (b) act on such an authority given by any other person.

(6) No authority shall be given under this section in respect of any body by a person entrusted with the body for the purpose only of its interment or cremation.

(7) In the case of a body lying in a hospital, nursing home or other institution, any authority under this section may be given on behalf of the person having the control and management thereof by any officer or person designated for that purpose by the first-mentioned person.

(8) Nothing in this section shall be construed as rendering unlawful any dealing with, or with any part of, the body of a deceased person which is lawful apart from this Act.

(9) (*Applies to Scotland.*)

2. Post-mortem examinations

(1) Without prejudice to section fifteen of the Anatomy Act, 1832 (which prevents that Act from being construed as applying to post-mortem examinations directed to be made by a competent legal authority), that Act shall not be construed as applying to any post-mortem examination carried out for the purpose of establishing or confirming the causes of death or of investigating the existence or nature of abnormal conditions.

(2) No post-mortem examination shall be carried out otherwise than by or in accordance with the instructions of a fully registered medical practitioner, and no post-mortem examination which is not directed or requested by the coroner or any other competent legal authority shall be carried out without the authority of the person lawfully in possession of the body; and subsections (2), (5), (6) and (7) of section one of this Act shall, with the necessary modifications, apply with respect to the giving of that authority.

3. Cremation of bodies after anatomical examination

The provision to be made and the certificate to be transmitted under section thirteen of the Anatomy Act, 1832, in respect of a body removed for anatomical examination may, instead of being provision for and a certificate of burial, as mentioned in that section, be provision for the cremation of the body in accordance with the Cremation Acts, 1902 and 1952, and a certificate of the cremation.

4. Short title, etc.

(1) This Act may be cited as the Human Tissue Act, 1961.

(2) The Corneal Grafting Act, 1952, is hereby repealed.

(3) This Act shall come into operation at the expiration of a period of two months beginning with the day on which it is passed.

(4) This Act does not extend to Northern Ireland.

APPENDIX 2

TRANSPLANT OF HUMAN ORGANS

A

B I L L

T O

Allow hospitals to take the organs, such as kidneys, of any patient, once clinical death has been established, other than those of a deceased person who has contracted out during his lifetime by registering, on a central computer, his desire not to donate organs. A.D. 1979

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:—

1.—(1) Subject to the provisions of subsections (2) to (6) of this section, a registered medical practitioner may, at the request of another such practitioner, authorise the removal and use for therapeutic or curative purposes of any part of the body of a person who has died while under his care, unless that person has before his death registered his objection under this Act to the use of his body, or that part of his body, for such purposes. Use of human organs for therapeutic or curative purposes.

(2) No authorisation shall be given, and no removal effected, under the foregoing subsection until the death of the person concerned (hereinafter referred to as "the donor") has been certified by two registered medical practitioners, neither of whom shall be the practitioner requesting the removal and one of whom shall be of not less than five years' standing as a registered practitioner.

(3) Any certification of death under the foregoing subsection shall be accompanied by notes recording the observations of the practitioners at the time of the death of the donor and the clinical action taken immediately prior to, and subsequent to, the death; and both the certificate and the notes shall be made available, if required, to a coroner or, in Scotland, to the procurator fiscal.

(4) No removal of a part of a body under this Act shall be effected except by a registered medical practitioner.

(5) Where there is reason to believe that an inquest may be required to be held on any body or that a post-mortem examination of any body may be required by the coroner, a practitioner shall not, except with the consent of the coroner,—

- (a) give an authorisation under this section in respect of the body, or
- (b) act on such an authorisation given by any other practitioner.

(6) In the application of this section to Scotland, for subsection (5) there shall be substituted the following subsection:—

“(5) Nothing in this section shall authorise the removal of any part from a body in any case where the procurator fiscal has objected to such removal.”

1961 c. 54.

(7) In section 1(1) of the Human Tissues Act 1961, the words “for therapeutic purposes or ” are hereby repealed.

Registration
of objections.

2.—(1) Registration of objections under this Act shall be effected by the Secretary of State on notifications made to him.

(2) Objection may be notified by a person only in respect of his own body or any specified part or parts thereof or, in the case of a person under sixteen years of age, by his parent or guardian; and the notification of any objection under this section may be varied or revoked by a subsequent notification made thereunder.

(3) The Secretary of State may from time to time by regulations made by statutory instrument—

(a) prescribe the form in which notification of objections under this Act is to be made, and

(b) make any other provision which he deems necessary for the proper performance of his functions under this section;

and any statutory instrument containing regulations made under this subsection shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) It shall be the duty of the Secretary of State to ensure that the information contained in the register established by him under this section is recorded on a computer and is available at all times for immediate transmission on request to registered medical practitioners.

(5) *Any expenses incurred by the Secretary of State in the performance of his functions under this section shall be payable out of money provided by Parliament.*

Short title,
commence-
ment and
extent.

3.—(1) This Act may be cited as the Transplant of Human Organs Act 1979.

(2) This Act shall come into force on such date as the Secretary of State may by order made by statutory instrument determine.

(3) This Act does not extend to Northern Ireland.

APPENDIX 3

The Human Tissue Gift Act, 1971

*Assented to July 28th, 1971
Legislature Dissolved September 13th, 1971*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. In this Act,

Interpre-
tation

- (a) "consent" means a consent given under this Act;
- (b) "physician" means a person registered under *The R.S.O. 1960, c. 234 Medical Act*;
- (c) "tissue" includes an organ, but does not include any skin, bone, blood, blood constituent or other tissue that is replaceable by natural processes of repair;
- (d) "transplant" as a noun means the removal of tissue from a human body, whether living or dead, and its implantation in a living human body, and in its other forms it has corresponding meanings;
- (e) "writing" for the purposes of Part II includes a will and any other testamentary instrument whether or not probate has been applied for or granted and whether or not the will or other testamentary instrument is valid.

PART I

INTER-VIVOS GIFTS FOR TRANSPLANTS

2. A transplant from one living human body to another living human body may be done in accordance with this Act, but not otherwise.

Transplants
under Act
are lawful

3.—(1) Any person who has attained the age of majority, is mentally competent to consent, and is able to make a free and informed decision may in a writing signed by him consent to the removal forthwith from his body of the tissue specified in the consent and its implantation in the body of another living person.

Consent for
transplant

(2) Notwithstanding subsection 1, a consent given there- under by a person who had not attained the age of majority, was not mentally competent to consent, or was not able to make a free and informed decision is valid for the purposes of this Act if the person who acted upon it had no reason to believe that the person who gave it had not attained the age of majority, was not mentally competent to consent, and was not able to make a free and informed decision, as the case may be.

Consent of
person
under age,
etc.

Consent is
full authority
to proceed

(3) A consent given under this section is full authority for any physician,

(a) to make any examination necessary to assure medical acceptability of the tissue specified therein; and

(b) to remove forthwith such tissue from the body of the person who gave the consent.

Stale
consent
void

(4) If for any reason the tissue specified in the consent is not removed in the circumstances to which the consent relates, the consent is void.

PART II

POST MORTEM GIFTS FOR TRANSPLANTS AND OTHER USES

Consent by
person for
use of his
body after
death

4.—(1) Any person who has attained the age of majority may consent,

(a) in a writing signed by him at any time; or

(b) orally in the presence of at least two witnesses during his last illness,

that his body or the part or parts thereof specified in the consent be used after his death for therapeutic purposes, medical education or scientific research.

Where donor
under age

(2) Notwithstanding subsection 1, a consent given by a person who had not attained the age of majority is valid for the purposes of this Act if the person who acted upon it had no reason to believe that the person who gave it had not attained the age of majority.

Consent is
full authority,
exception

(3) Upon the death of a person who has given a consent under this section, the consent is binding and is full authority for the use of the body or the removal and use of the specified part or parts for the purpose specified, except that no person shall act upon a consent given under this section if he has reason to believe that it was subsequently withdrawn.

Consent
by spouse,
etc., for
use of body
after
death

5.—(1) Where a person of any age who has not given a consent under section 4 dies, or in the opinion of a physician is incapable of giving a consent by reason of injury or disease and his death is imminent,

(a) his spouse of any age; or

(b) if none or if his spouse is not readily available, any one of his children who has attained the age of majority; or

- (c) if none or if none is readily available, either of his parents; or
- (d) if none or if neither is readily available, any one of his brothers or sisters who has attained the age of majority; or
- (e) if none or if none is readily available, any other of his next of kin who has attained the age of majority; or
- (f) if none or if none is readily available, the person lawfully in possession of the body other than, where he died in hospital, the administrative head of the hospital,

may consent,

- (g) in a writing signed by the spouse, relative or other person; or
- (h) orally by the spouse, relative or other person in the presence of at least two witnesses; or
- (i) by the telegraphic, recorded telephonic, or other recorded message of the spouse, relative or other person,

to the body or the part or parts thereof specified in the consent being used after death for therapeutic purposes, medical education or scientific research.

(2) No person shall give a consent under this section if he has reason to believe that the person who died or whose death is imminent would have objected thereto.

(3) Upon the death of a person in respect of whom a consent was given under this section the consent is binding and is, subject to section 6, full authority for the use of the body or for the removal and use of the specified part or parts for the purpose specified except that no person shall act on a consent given under this section if he has actual knowledge of an objection thereto by the person in respect of whom the consent was given or by a person of the same or closer relationship to the person in respect of whom the consent was given than the person who gave the consent.

(4) In subsection 1, "person lawfully in possession of the body" does not include,

- (a) the supervising coroner or a coroner in possession of the body for the purposes of *The Coroners Act*;

Consent
is full
authority,
exceptions

Person
lawfully in
possession
of body,
exceptions

R.S.O. 1960,
c. 69

- (b) the Public Trustee in possession of the body for the purpose of its burial under *The Crown Administration of Estates Act*;
- (c) an embalmer or funeral director in possession of the body for the purpose of its burial, cremation or other disposition; or
- (d) the superintendent of a crematorium in possession of the body for the purpose of its cremation.

Coroner's
direction

6. Where in the opinion of a physician, the death of a person is imminent by reason of injury or disease and the physician has reason to believe that section 7, 21 or 22 of *The Coroners Act* may apply when death does occur and a consent under this Part has been obtained for a post-mortem transplant of tissue from the body, a coroner having jurisdiction, notwithstanding that death has not yet occurred, may give such directions as he thinks proper respecting the removal of such tissue after the death of the person, and every such direction has the same force and effect as if it had been made after death under section 8 of *The Coroners Act*.

Determina-
tion of
death

7.—(1) For the purposes of a post-mortem transplant, the fact of death shall be determined by at least two physicians in accordance with accepted medical practice.

Prohibition

(2) No physician who has had any association with the proposed recipient that might influence his judgment shall take any part in the determination of the fact of death of the donor.

Idem

(3) No physician who took any part in the determination of the fact of death of the donor shall participate in any way in the transplant procedures.

Exception

(4) Nothing in this section in any way affects a physician in the removal of eyes for cornea transplants.

Where
specified
use fails

8. Where a gift under this Part cannot for any reason be used for any of the purposes specified in the consent, the subject-matter of the gift and the body to which it belongs shall be dealt with and disposed of as if no consent had been given.

PART III

GENERAL

Civil
liability

9. No action or other proceeding for damages lies against any person for any act done in good faith and without negligence in the exercise or intended exercise of any authority conferred by this Act.

10. No person shall buy, sell or otherwise deal in, Sale, etc., of tissue prohibited directly or indirectly, for a valuable consideration, any tissue for a transplant, or any body or part or parts thereof other than blood or a blood constituent, for therapeutic purposes, medical education or scientific research, and any such dealing is invalid as being contrary to public policy.

11.—(1) Except where legally required, no person shall Disclosure of information disclose or give to any other person any information or information document whereby the identity of any person,

(a) who has given or refused to give a consent ;

(b) with respect to whom a consent has been given ; or

(c) into whose body tissue has been, is being or may be transplanted,

may become known publicly.

(2) Where the information or document disclosed or given Exception pertains only to the person who disclosed or gave the information or document, subsection 1 does not apply.

12. Any dealing with a body or part or parts thereof that Lawful dealings not affected, exception was lawful before this Act came into force shall, except as provided in this Act, continue to be lawful.

13. Every person who knowingly contravenes any provision Offence of this Act is guilty of an offence and on summary conviction is liable to a fine of not more than \$1,000 or to imprisonment for a term of not more than six months, or to both.

14. Except as provided in section 6, nothing in this R.S.O. 1960, c. 69 not affected Act affects the operation of *The Coroners Act*.

15. A request made or an authorization given under Transitional provision *The Human Tissue Act, 1962-63* before this Act came into force may be acted upon in accordance with that Act 1962-63, c. 59 notwithstanding the repeal of that Act.

PART IV

MISCELLANEOUS

16. *The Human Tissue Act, 1962-63* and *The Human Tissue Amendment Act, 1967* are repealed. 1962-63, c. 59; 1967, c. 38, repealed

17. This Act comes into force on the day it receives Royal Commence-ment Assent.

18. This Act may be cited as *The Human Tissue Gift Act*, Short title 1971.

APPENDIX 4

THE HUMAN TISSUE ACT 1964



ANALYSIS

Title	6. Removal, burial, and cremation of bodies
1. Short Title and commencement	7. Schools of anatomy
2. Interpretation	8. Inspectors of schools of anatomy
3. Removal of human tissue for therapeutic purposes, etc.	9. Licences to practise anatomy
4. <i>Post mortem</i> examinations	10. Saving
5. Anatomical examinations	11. Decency to be observed
	12. Offences
	13. Repeals

1964, No. 19

An Act to consolidate certain enactments of the General Assembly relating to *post mortem* examinations, the practice of anatomy, and the removal of human tissue for therapeutic purposes and for purposes of medical education and research [16 October 1964]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Human Tissue Act 1964.

(2) This Act shall come into force on the first day of January, nineteen hundred and sixty-five.

2. Interpretation—(1) In this Act, unless the context otherwise requires,—

“Anatomical examination” means examination of a body or any part of a body for the purpose of the study of the science of anatomy:

“Body” means a dead human body; but does not include the body of a stillborn child:

“Inspector”, in relation to any school of anatomy, means a person appointed under section 8 of this Act to be an Inspector of that school of anatomy:

“Medical practitioner” means a person who is registered or deemed to be registered as a medical practitioner under the Medical Practitioners Act 1950; but does not include a person who is conditionally registered under that Act:

“Minister” means the Minister of Health:

“Practise anatomy” means teach the science of anatomy by performing an anatomical examination:

“School of anatomy” means a school of anatomy established under section 7 of this Act.

(2) Without limiting the rights, powers, or duties of any person entitled under any rule of law to the possession of any body, it is hereby declared that, for the purposes of this Act, the following persons shall be deemed to be persons lawfully in possession of bodies in the cases hereinafter specified, namely:

- (a) The Medical Superintendent or other medical officer for the time being in charge of any institution within the meaning of the Hospitals Act 1957, or the licensee of a licensed hospital within the meaning of Part V of that Act, in respect of any body lying in the institution or hospital:
- (b) The Medical Superintendent or other medical officer for the time being in charge of any public institution within the meaning of the Mental Health Act 1911, in respect of any body lying in the institution, being the body of an inmate:
- (c) The Superintendent of any penal institution, in respect of any body lying in the institution, being the body of an inmate.

Cf. 1908, No. 116, s. 24; 1954, No. 40, ss. 3, 4 (1)

3. Removal of human tissue for therapeutic purposes, etc.—

(1) If any person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body or any specified part of his body be used after his death for therapeutic purposes or for purposes of medical education or research, the person lawfully in possession of his body after his death may, unless he has reason to believe that the request was subsequently withdrawn, authorise the removal from the body of any part or, as the case may be, the specified part, for use in accordance with the request.

(2) Without limiting subsection (1) of this section, it is hereby declared that the person lawfully in possession of the body of a deceased person may authorise the removal of any part from the body for use for the said purposes if, having made such reasonable inquiry as may be practicable, he has no reason to believe—

- (a) That the deceased person had expressed an objection to his or her body being so dealt with after death, and had not withdrawn it; or
- (b) That the surviving spouse or any surviving relative of the deceased person objects to the body being so dealt with.

(3) Subject to subsections (4) and (5) of this section, the removal and use of any part of a body in accordance with an authority given in pursuance of this section shall be lawful.

(4) No such removal shall be effected except by a medical practitioner, who must have satisfied himself by personal examination of the body that life is extinct.

(5) Where a person has reason to believe that an inquest may be required to be held on any body or that a *post mortem* examination of any body may be required by the coroner, he shall not, except with the consent of the coroner,—

(a) Give an authority under this section in respect of the body; or

(b) Act on such an authority given by any other person.

(6) No authority shall be given under this section in respect of any body by a person entrusted with the body for the purpose only of its interment or cremation.

(7) Nothing in this section shall be construed as rendering unlawful any dealing with, or with any part of, the body of a deceased person which is lawful apart from this Act.

Cf. 1908, No. 116, ss. 24A, 24B; 1954, No. 40, s. 2; Human Tissue Act 1961, s. 1 (U.K.)

4. *Post mortem* examinations—(1) Nothing in sections 5 to 9 of this Act shall apply to any *post mortem* examination directed to be made by a coroner or any other competent legal authority, or to any *post mortem* examination carried out for the purpose of establishing or confirming the causes of death or investigating the existence or nature of abnormal conditions or for any of the purposes specified in section 3 of this Act.

(2) No *post mortem* examination shall be carried out otherwise than by or in accordance with the instructions of a medical practitioner; and no *post mortem* examination, other than one which is directed or requested by a coroner or any other competent legal authority, shall be carried out without the authority of the person lawfully in possession of the body; and subsections (2), (5), and (6) of section 3 of this Act shall, with the necessary modifications, apply with respect to the giving of that authority.

Cf. 1908, No. 116, ss. 24B, 37; 1954, No. 40, s. 2; Human Tissue Act 1961, s. 2 (U.K.)

5. Anatomical examinations—(1) If any person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body be used after his death for the purposes of anatomical examination, the person lawfully in possession of the body after death may authorise such an examination, and may permit the body to be removed to a school of anatomy accordingly, unless he has reason to believe that the request was subsequently withdrawn, or unless objection to the body being so dealt with is made by—

- (a) The surviving spouse of the deceased person; or
 - (b) If there is no surviving spouse, a person who is the nearest known relative, or one of the nearest known relatives, of the deceased person.
- (2) Without limiting subsection (1) of this section, it is hereby declared that the person lawfully in possession of the body of a deceased person may authorise the body to be used for the purposes of anatomical examination, and may permit the body to be removed to a school of anatomy accordingly, if, having made such reasonable inquiry as may be practicable, he has no reason to believe—
- (a) That the deceased person had expressed an objection to his or her body being so dealt with after death, and had not withdrawn it; or
 - (b) That the surviving spouse or any surviving relative of the deceased person objects to the body being so dealt with.
- (3) Subsections (5) and (6) of section 3 of this Act shall, with the necessary modifications, apply with respect to the giving of any authority under this section.

Cf. 1908, No. 116, ss. 31, 32

6. Removal, burial, and cremation of bodies—(1) Any person empowered by this Act to authorise the use of a body for anatomical examination shall, before causing the body to be removed to a school of anatomy, cause a written notice in duplicate to be sent to the medical practitioner in charge of that school of his intention so to do, and shall, so far as he is able, state in that notice the following particulars:

- (a) The name, age, and sex of the deceased person:
 - (b) The place, date, and cause of death:
 - (c) The religion of the deceased person.
- (2) Every body that is removed for anatomical examination under this Act shall, before it is so removed, be placed in a decent coffin or shell and shall be removed therein.
- (3) The medical practitioner in charge of any school of anatomy to which a body is removed for anatomical examination shall, within twenty-four hours of the time at which the body is received at the school of anatomy, cause to be sent to an Inspector notice in writing of the receipt of the body into the said school of anatomy.
- (4) In no case shall any body undergo anatomical examination until after thirty-six hours have elapsed from the time of death, nor until after twenty-four hours' notice has been given to an Inspector of the intention to make the examination.
- (5) All human remains resulting from anatomical examination shall be buried or cremated in accordance with the written instructions of an Inspector, who shall take into consideration any wishes that the deceased or his relatives may have expressed:

Provided that, with the permission of an Inspector, any part of the body may be retained indefinitely for further study.

(6) Notwithstanding anything in this Act or in any other enactment, the written instructions of an Inspector shall be sufficient authority for the cremation of any body that has been removed for anatomical examination or of any human remains resulting from such an examination.

(7) In the month of November in each year, the medical practitioner in charge of any school of anatomy shall cause to be sent to an Inspector a return specifying the name of every person whose body has undergone anatomical examination at the school of anatomy during the year and has been disposed of by burial or cremation under this section.

Cf. 1946, No. 40, s. 53

7. Schools of anatomy—(1) The Governor-General in Council may from time to time authorise the establishment of schools of anatomy where the study and practice of anatomy may be carried on in connection with any University or school of medicine, in such place or places and upon such conditions as he thinks fit, and may at any time revoke any such authority.

(2) It shall not be lawful for any person to perform an anatomical examination, or to receive or have in his possession any body for anatomical examination, at any place other than a school of anatomy.

(3) Nothing in this section shall prevent any person, who is licensed under this Act to practise anatomy and who obtains the permission of an Inspector in writing for that purpose and the permission of the governors, teachers, or proper authorities of the school at which he is licensed to practise anatomy, from removing any body or portion of a body to such place as the Inspector deems fit for the purpose of practising anatomy, upon such terms and conditions as the Inspector and authorities of the school, in their uncontrolled discretion, think fit.

Cf. 1908, No. 116, ss. 25, 34

8. Inspectors of schools of anatomy—(1) The Minister may from time to time, with the concurrence of the Minister in Charge of Police, appoint one or more members of the Police as an Inspector or Inspectors of any school of anatomy, and may direct in what manner Inspectors shall transact the duties of their office.

(2) Every Inspector shall, unless he sooner dies, continue in office until some other person is appointed in his place.

(3) Every Inspector of a school of anatomy shall make a quarterly return to the Minister of all bodies which, during the preceding quarter, have been removed for anatomical examination to the school, or that may have been removed to any other place under the provisions of section 7 of this Act, distinguishing the sex and, as far as is known at the time, the name and age of each person whose body was so removed as aforesaid.

(4) An Inspector may visit and inspect at any time the school of anatomy for which he is appointed an Inspector.

(5) There shall be payable to an Inspector, out of money appropriated by Parliament for the purpose, such remuneration as is fixed from time to time by the Minister of Finance.

(6) Every Inspector of any school of anatomy who was in office immediately before the commencement of this Act shall continue in office after the commencement of this Act as if he had been appointed by the Minister under this section.

Cf. 1908, No. 116, ss. 27, 28, 29, 30

9. Licences to practise anatomy—(1) Subject to the provisions of section 10 of this Act, it shall not be lawful for any person to practise anatomy, or to receive or have in his possession any body for anatomical examination, unless he is licensed under this section to practise anatomy.

(2) The Minister may grant a licence to practise anatomy, subject to such conditions as he sees fit to impose, to any medical practitioner who is employed to teach at a school of anatomy.

(3) Any licence granted under this section shall specify the school of anatomy at which the holder of the licence may practise anatomy.

(4) Any licence granted under this section shall continue in force until it is cancelled or surrendered:

Provided that any such licence may, if the Minister thinks fit, be granted for any specified period, and in any such case the licence may be renewed from time to time by the Minister, if he thinks fit, for any specified period.

(5) Any licence granted under this section may be cancelled by the Minister at any time by notice in writing to the holder of the licence.

(6) Any licence to practise anatomy that was subsisting immediately before the commencement of this Act shall continue in force after the commencement of this Act as if it had been granted by the Minister under this section.

Cf. 1908, No. 116, s. 26

10. Saving—Nothing in sections 5 to 9, or in section 12, of this Act shall be construed as prohibiting—

- (a) Any anatomical examination or the practice of anatomy by any person who is acting under the directions and supervision of a person licensed to practise anatomy and is carrying out the anatomical examination or the practice of anatomy at a school of anatomy or place at which the person so supervising is licensed to practise anatomy; or
- (b) The receipt or possession of a body on behalf of a person so licensed.

11. Decency to be observed—Any person performing a *post mortem* or anatomical examination or removing any part of a body pursuant to this Act shall do so in a manner that avoids unnecessary mutilation of the body which is being examined or from which any such removal is being effected, and shall conduct the examination or removal in an orderly, quiet, and decent manner.

Cf. 1908, No. 116, s. 35

12. Offences—Every person commits an offence and is liable on summary conviction to a fine not exceeding five hundred pounds, or to imprisonment for a term not exceeding three months, who,—

- (a) Not being a medical practitioner, performs any *post mortem* examination otherwise than in accordance with the instructions of a medical practitioner; or
- (b) Not being licensed under this Act to practise anatomy, practises anatomy, or, otherwise than on behalf of a person so licensed, receives or has in his possession any body for the purpose of anatomical examination; or
- (c) Performs an anatomical examination of a body at a place where or at a time when that examination is prohibited by this Act.

Cf. 1908, No. 116, s. 39

13. Repeals—The following enactments are hereby repealed:

- (a) The Medical Act 1908;
- (b) Section 53 of the Statutes Amendment Act 1946;
- (c) The Medical Amendment Act 1954.

An Act to amend the Human Tissue Act 1964

[13 December 1968]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Human Tissue Amendment Act 1968, and shall be read together with and deemed part of the Human Tissue Act 1964 (hereinafter referred to as the principal Act).

2. Interpretation—Section 2 of the principal Act is hereby amended by repealing the definition of the term “medical practitioner”, in subsection (1), and substituting the following definition:

“‘Medical practitioner’ means a person who is registered or deemed to be registered as a medical practitioner under the Medical Practitioners Act 1950, and, subject to section 4A of this Act, includes a person who is conditionally registered under that Act:”.

3. Restrictions on persons conditionally registered—The principal Act is hereby amended by inserting, after section 4, the following section:

“4A. For the purposes of sections 3 and 4 of this Act, but for no other purpose of this Act, a person who is conditionally registered under the Medical Practitioners Act 1950 shall be subject to the restrictions imposed by section 10 of the last-mentioned Act.”



BERMUDA

1976 : No. 11

THE HUMAN TISSUE ACT 1976

[Date of Assent 27th February, 1976]

[Operative Date 27th February, 1976]

WHEREAS it is expedient to make provision for the use of parts of the bodies of deceased persons for therapeutic purposes:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

1. For the purposes of this Act the death of a person takes place at the time at which irreversible cessation of that person's brain function occurs.

Meaning of death.

2. (1) Where —

(a) the death of a person occurs; and

(b) a certificate to that effect has been made and signed by two medical practitioners; and

(c) a valid direction has been made under section 3 or 4,

Use of body for medical purposes.

such direction shall, subject to subsections (2) and (3), be full authority in law for the use of the body of that person or for the removal and use of the specified part or parts thereof for the purposes specified in the direction.

(2) Where a direction under section 3 or 4 authorizes the removal of any specified part of the body of a dead person such removal and any subsequent transplantation of such part in

the body of any other person shall not be performed by a medical practitioner who signed the certificate mentioned in subsection (1) (b).

(3) A person shall not act upon a direction —

- (a) in the case of a direction under section 3, if he has reason to believe that the person who gave the direction withdrew it;
- (b) in the case of a direction under section 4 —
 - (i) if he has actual knowledge that another member of the same class of persons as the person who gave the direction objects thereto; or
 - (ii) if he has reason to believe that the dead person would, if living, have objected thereto; or
- (c) in either case, except with the consent of the coroner, if he has reason to believe that an inquest may be required to be held upon the body.

(4) Any person who contravenes subsection (2) or (3) shall be guilty of an offence and liable on summary conviction to a fine not exceeding \$500 or imprisonment for a term not exceeding 6 months.

Direction
for use of
body made
before death.

3. (1) A person 18 years of age or over may, —

- (a) in writing at any time; or
- (b) orally in the presence of at least two witnesses during his last illness,

direct that his body or any specified part thereof be used after his death for therapeutic purposes or for purposes of medical education or research.

(2) The Administrator of the King Edward VII Memorial Hospital shall maintain a register in which any person may enter a direction for the purposes of subsection (1) (a) and such register shall be conclusive evidence of the making of such direction.

(3) A direction given by a person under 18 years of age is valid for the purposes of this section if the person who acted upon it had no reason to believe that the person who gave the direction was under 18 years of age at the time he gave it.

Direction for
use of body
by members
of family
of dead
person.

4. Where a person other than a person who has made a direction under section 3 dies, —

- (a) his spouse; or

- (b) if none, any one of his children 21 years of age or over; or
- (c) if none, either of his parents; or
- (d) if none, any of his brothers or sisters 21 years of age or over,

may direct that the body or any specified part thereof may be used for therapeutic purposes or for purposes of medical education or research.

5. For the avoidance of doubt it is declared that any person who, acting in pursuance of a valid direction made under section 3 or 4, causes the termination of any bodily function of a person whose death has occurred for the purposes of this Act shall not thereby be deemed to have unlawfully killed that person for the purposes of the Criminal Code.

Modification
of the
Criminal
Code.

AUSTRALIAN CAPITAL TERRITORY

No. 44 of 1978

TRANSPLANTATION AND ANATOMY ORDINANCE 1978

TABLE OF PROVISIONS

PART I—PRELIMINARY

Section

1. Short title
2. Commencement
3. Repeal
4. Interpretation
5. Designated officers

PART II—DONATIONS OF TISSUE BY LIVING PERSONS

Division 1—Exclusion of Certain Tissue

6. Interpretation

Division 2—Donations by Adults

7. Blood transfusions not subject to this Division
8. Consent by adult living donor to removal of regenerative tissue
9. Consent by adult living donor to removal of non-regenerative tissue for transplantation
10. Medical practitioner may give certificate in relation to consent

Division 3—Donations from Children

11. Blood transfusions not subject to this Division
12. Reference to parent not to include guardian, &c.
13. Removal for transplantation of regenerative tissue from body of child
14. Removal for transplantation of non-regenerative tissue from body of child

Division 4—Effect of Consents and Authorities

15. Effect of consent under section 8
16. Effect of consent under section 9
17. Effect of consent under section 13
18. Effect of authority under section 14
19. Written consent not to be sufficient authority in certain circumstances

Division 5—Blood Transfusions

20. Consents by adults to removal of blood
21. Consents to removal of blood from children
22. Consent to be sufficient authority for removal of blood at certain places
23. Administration of blood transfusions to children without parental consent

Division 6—Revocation of Consent or Agreement

24. Revocation of consent
25. Child no longer in agreement with removal and transplantation

PART III—DONATIONS OF TISSUE AFTER DEATH

26. De facto spouses
27. Authority to remove tissue where body of deceased at a hospital
28. Authority to remove tissue where body of deceased not at a hospital
29. Consent by the Coroner
30. Certificate of specialist, &c., required in certain situations
31. Effect of authority under this Part

PART IV—POST-MORTEM EXAMINATIONS

- 32. Authority for post-mortem examination
- 33. Authority for post-mortem examination where body of deceased not at a hospital
- 34. Consent by the Coroner
- 35. Effect of authority under this Part

PART V—DONATIONS FOR ANATOMICAL PURPOSES

- 36. Interpretation
- 37. Authority for anatomy where body of deceased at a hospital
- 38. Authority for anatomy where body of deceased not at a hospital
- 39. Provisions applicable where deceased person consented to retention of his body for anatomy
- 40. Consent by the Coroner
- 41. Effect of authority under this Part

PART VI—SCHOOLS OF ANATOMY

- 42. Schools of anatomy
- 43. Regulations for the control, &c., of schools of anatomy

PART VII—PROHIBITION OF TRADING IN TISSUE

- 44. Certain contracts not to be entered into

PART VIII—DEFINITION OF DEATH

- 45. When death occurs

PART IX—MISCELLANEOUS

- 46. Ordinance does not prevent specified removals of tissue, &c.
- 47. Exclusion of liability of person acting in pursuance of consent or authority
- 48. Offences
- 49. Disclosure of information
- 50. Amendment of *Seat of Government (Administration) Ordinance 1930*
- 51. Regulations

AUSTRALIAN CAPITAL TERRITORY

No. 44 of 1978

AN ORDINANCE

To make provision for and in relation to the removal of human tissues for transplantation, for post-mortem examinations, for the definition of death, for the regulation of schools of anatomy, and for related purposes

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Ordinance under the *Seat of Government (Administration) Act* 1910.

Dated this thirteenth day of December 1978.

ZELMAN COWEN
Governor-General

By His Excellency's Command,

RALPH J. HUNT
Minister of State for Health

TRANSPLANTATION AND ANATOMY ORDINANCE 1978

PART I—PRELIMINARY

1. This Ordinance may be cited as the *Transplantation and Anatomy Ordinance* 1978.* Short title
2. This Ordinance shall come into operation on a date to be fixed by the Minister of State for the Capital Territory by notice published in the *Gazette*. Commence-
ment
3. (1) The *Blood Transfusions (Infants) Ordinance* 1970 and the *Trading in Blood (Prohibition) Ordinance* 1973 are repealed. Repeal
(2) The Anatomy Act, 1901 of the State of New South Wales shall cease to be in force in the Territory.
4. (1) In this Ordinance, unless the contrary intention appears— Interpret-
ation
“child” means a person who—
 - (a) has not attained the age of 18 years; and
 - (b) is not married;

- “Commission” has the same meaning as in the *Health Commission Ordinance 1975*;
- “Coroner” means a person who is a Coroner for the Territory;
- “designated officer”, in relation to a hospital, means a person appointed under section 5 to be a designated officer for that hospital;
- “medical practitioner” means a person who is registered or licensed under a law of a State or Territory relating to the registration or licensing of medical practitioners;
- “next of kin” means—
- (a) in relation to a deceased child—a person referred to in sub-paragraph (a) (i), (a) (ii) or (a) (iii) of the definition of “senior available next of kin”; and
 - (b) in relation to any other deceased person—a person referred to in sub-paragraph (b) (i), (b) (ii), (b) (iii) or (b) (iv) of that definition;
- “non-regenerative tissue” means tissue other than regenerative tissue;
- “regenerative tissue” means tissue that, after injury or removal, is replaced in the body of a living person by natural processes of growth or repair;
- “senior available next of kin” means—
- (a) in relation to a deceased child—
 - (i) where a parent of the child is available—a parent of the child;
 - (ii) where a parent of the child is not available—a brother or sister of the child who has attained the age of 18 years and who is available; or
 - (iii) where no person referred to in sub-paragraph (i) or (ii) is available—a person who was the guardian of the child immediately before the death of the child and who is available; and
 - (b) in relation to any other deceased person—
 - (i) where the person, immediately before his death, was married and the person who was then his spouse is available—the person who was his spouse;
 - (ii) where the person, immediately before his death, was not married or, if he was married, his spouse is not available—a son or daughter of the person who has attained the age of 18 years and who is available;
 - (iii) where no person referred to in sub-paragraph (i) or (ii) is available but a parent of the person is available—that parent; or

- (iv) where no person referred to in subparagraph (i), (ii) or (iii) is available—a brother or sister of the person who has attained the age of 18 years and is available;

“tissue” includes an organ, or part, of a human body or a substance extracted from, or from a part of, the human body.

(2) A reference in this Ordinance to the transplantation of tissue shall be read as including a reference to the transplantation of any part of the tissue and to the transplantation of a substance obtained from the tissue.

5. (1) The Chief Medical Administrator of a hospital conducted by the Commission may, by instrument in writing, appoint such persons, being medical practitioners, as he considers necessary to be, for the purposes of this Ordinance, designated officers for that hospital.

Designated
officers

(2) The persons or body having the control and management of a hospital other than a hospital conducted by the Commission may, by instrument in writing, appoint such persons, being medical practitioners, as those persons or that body consider necessary to be, for the purposes of this Ordinance, designated officers for that hospital.

PART II—DONATIONS OF TISSUE BY LIVING PERSONS

Division 1—Exclusion of Certain Tissue

6. In this Part, a reference to tissue shall not be read as including a reference to fetal tissue, spermatozoa or ova.

Interpret-
ation

Division 2—Donations by Adults

7. Nothing in this Division prevents the removal in accordance with Division 5 of blood from the body of a person.

Blood
transfusions
not subject
to this
Division

8. A person may give his consent in writing to the removal from his body of specified regenerative tissue (other than blood)—

Consent by
adult living
donor to
removal of
regenerative
issue

- (a) for the purpose of the transplantation of the tissue to the body of another living person; or
- (b) for use for other therapeutic purposes or for medical or scientific purposes.

Consent by adult living donor to removal of non-regenerative tissue for transplantation

9. (1) A person may give his consent in writing to the removal from his body, at any time after the expiration of 24 hours from the time at which the consent is given, of specified non-regenerative tissue for the purpose of the transplantation of the tissue to the body of another living person.

(2) A consent given under sub-section (1) shall specify the time at which the consent is given.

Medical practitioner may give certificate in relation to consent

10. A medical practitioner may certify in writing—

- (a) that the consent in writing of a person, the terms of which consent are set out in the certificate, was given in his presence;
- (b) that he explained to the person before the consent was given the nature and effect of the removal from the body of that person of the tissue specified in the consent; and
- (c) that he is satisfied—
 - (i) that, at the time the consent was given, the person had attained the age of 18 years;
 - (ii) that, at that time, the person was of sound mind; and
 - (iii) that the consent was freely given.

Division 3—Donations from Children

Blood transfusions not subject to this Division

11. Nothing in this Division prevents the removal in accordance with Division 5 of blood from the body of a child.

References to parent not to include guardian, &c.

12. In this Division, a reference to the parent of a child shall not be read as including a reference to the guardian of a child or to another person standing in *loco parentis* to the child.

Removal for transplantation of regenerative tissue from body of child

13. (1) A person who is a parent of a child may give his consent in writing to the removal from the body of the child of specified regenerative tissue for the purpose of the transplantation of the tissue to the body of another member of the family of the child or to the body of a relative of the child.

(2) A medical practitioner may certify in writing—

- (a) that the consent in writing of a person who is a parent of a child, the terms of which consent are set out in the certificate, was given in his presence;
- (b) that he explained to the person and to the child before the consent was given the nature and effect of the removal from the body of that child of the tissue specified in the consent and the nature of the transplantation of that tissue; and
- (c) that he is satisfied that, at the time the consent was given, the child—
 - (i) understood the nature and effect of the removal of the tissue and the nature of the transplantation; and
 - (ii) was in agreement with the proposed removal and transplantation of tissue.

14. (1) A person who is a parent of a child may give his consent in writing to the removal from the body of the child, at any time after the expiration of 24 hours from the time at which the consent is given, of specified non-regenerative tissue for the purpose of the transplantation of the tissue to the body of another member of the family of the child. Removal for trans-plantation of non-regenerative tissue from body of child

(2) A consent given under sub-section (1) shall specify the time at which the consent is given.

(3) A medical practitioner may certify in writing—

(a) that the consents in writing of both persons who are the parents of a child, the terms of which consents are set out in the certificate, were given in his presence;

(b) that, before the consents were given—

(i) he advised those persons and the child that a person who was a member of the family of the child was in danger of dying unless certain non-regenerative tissue was transplanted to the body of that person from the body of another person; and

(ii) he explained to those persons and the child the nature and effect of the removal from the body of the child of the tissue specified in the consent and the nature of the transplantation of that tissue;

and

(c) that he is satisfied that, at the time the consent was given, the child—

(i) understood the nature and effect of the removal of the tissue and the nature of the transplantation; and

(ii) was in agreement with the proposed removal and transplantation of tissue.

(4) Where each of the parents of a child gives a written consent under sub-section (1) and a medical practitioner gives a certificate in accordance with sub-section (3) in relation to those consents, the medical practitioner who gives that certificate shall refer the matter to the committee appointed in accordance with sub-section (5).

(5) The Minister shall, by instrument in writing, appoint 3 persons of whom—

(a) one person shall be a Judge of the Supreme Court;

(b) one person shall be a medical practitioner; and

(c) one person shall be a social worker or a psychologist, to be a committee for the purposes of this section.

(6) Where only one parent of a child is available and that parent gives a written consent under sub-section (1), a medical practitioner who gives a certificate in relation to that consent that is restricted in all respects to that parent and the child but is otherwise in accordance with sub-section (3) shall refer the matter to the committee appointed in accordance with sub-section (5).

(7) Where a medical practitioner, in accordance with this section, refers a matter to the committee appointed for the purposes of this section, the committee may, if each of the members of the committee is of the opinion that it is desirable in all of the circumstances of the case that the tissue referred to in the consent or consents, as the case may be, be removed from the body of the child for transplantation to the body of the other person therein referred to, authorize, by instrument in writing, the removal of that tissue for the purpose of transplantation to the body of that other person.

Division 4—Effect of Consents and Authorities

Effect of
consent
under
section 8

15. Subject to section 19, a document that purports to be a consent given in accordance with section 8 is, where a certificate has been given in accordance with section 10 in relation to that consent, sufficient authority for a medical practitioner, other than the medical practitioner who gave the certificate, to remove the regenerative tissue specified in the consent for the purpose or the use, as the case may be, specified in the consent.

Effect of
consent
under
section 9

16. Subject to section 19, a document that purports to be a consent given in accordance with section 9 is, where a certificate has been given in accordance with section 10 in relation to that consent, sufficient authority for a medical practitioner, other than the medical practitioner who gave the certificate, to remove, at any time after the expiration of 24 hours from the time specified in the consent to be the time at which the consent was given, the non-regenerative tissue specified in the consent for the purpose of the transplantation of the tissue to the body of another living person.

Effect of
consent
under
section 13

17. Subject to section 19, a document that purports to be a consent given in accordance with sub-section 13 (1) is, where a certificate has been given in accordance with sub-section 13 (2) in relation to that consent, sufficient authority for a medical practitioner, other than the medical practitioner who gave the certificate, to remove the regenerative tissue specified in the consent for the purpose specified in the consent.

Effect of
authority
under
section 14

18. (1) Subject to sub-section (2), an authority given in accordance with section 14 by the committee established for the purposes of that section is sufficient authority for a medical practitioner, other than the medical practitioner who gave a certificate in accordance with that section, to remove, at any time after the expiration of 24 hours from the time at which the latest relevant consent under sub-section 14 (1) was given, the non-regenerative tissue specified in the authority for the purpose of transplantation to the body of the other person referred to in the authority.

(2) Sub-section (1) does not apply in relation to a medical practitioner—

(a) who has been informed—

- (i) that a consent given under sub-section 14 (1) that is relevant in relation to the authority has been revoked; or
- (ii) that the child referred to in the consent is no longer in agreement with the removal and transplantation of the tissue specified in the authority; or

- (b) who knows or has reasonable grounds for suspecting that the certificate given in accordance with section 14 that is relevant in relation to the authority contains a false statement.

19. A document that purports to be a consent given in accordance with section 8 or 9 or with sub-section 13 (1) is not sufficient authority for a medical practitioner to remove tissue if—

Written consent not to be sufficient authority in certain circumstances

- (a) the medical practitioner has been informed that the consent has been revoked;
- (b) the medical practitioner knows or has reasonable grounds for suspecting that a certificate given for the purpose of section 10 or sub-section 13 (2), as the case may be, in relation to that document contains a false statement; or
- (c) in the case of a document that purports to be a consent given in accordance with sub-section 13 (1)—the medical practitioner has been informed that the child is no longer in agreement with the removal and transplantation of the tissue.

Division 5—Blood Transfusions

20. A person, other than a child, who is of sound mind may consent to the removal of blood from his body—

Consents by adults to removal of blood

- (a) for transfusion to another person; or
- (b) for the purpose of the use of the blood or of any of its constituents for other therapeutic purposes or for medical or scientific purposes.

21. The parent of a child may consent to the removal of blood from the body of the child for a purpose referred to in section 20 if—

Consents to removal of blood from children

- (a) a medical practitioner advises that the removal is not likely to be prejudicial to the health of the child; and
- (b) the child agrees to the removal.

22. A consent duly given under section 20 or 21 is sufficient authority for the removal of blood from the body of the person who has given the consent, or from the body of the child of the person who has given the consent, as the case requires—

Consent to be sufficient authority for removal of blood at certain places

- (a) at a hospital; or
- (b) at premises, or in a vehicle, used by the Australian Red Cross Society, or by another body approved by the Minister for the purpose of this Division, for the removal of blood from the bodies of persons.

23. (1) In this section—

“blood transfusion” means the transfusion of human blood or any of the constituents of human blood;

“child” means a person who has not attained the age of 18 years.

(2) The operation of removing all or part of the blood of a person and replacing it with blood taken from another person shall, for the purposes of this section, be deemed to be a blood transfusion.

(3) Subject to sub-section (4), a medical practitioner may administer a blood transfusion to a child without the consent of a parent of the child or a person having authority to consent to the administration of the transfusion if—

(a) that medical practitioner and at least one other medical practitioner are of the opinion that the child is in danger of dying and that the administration of a blood transfusion to the child is the best means of preventing the death of the child; and

(b) the first-mentioned medical practitioner has satisfied himself that the blood to be transfused is compatible with the blood of the child.

(4) A medical practitioner is not entitled to administer a blood transfusion to a child in pursuance of sub-section (3) unless—

(a) a parent of the child, or a person having authority to consent to the administration of the transfusion, upon being asked to consent to the administration of the transfusion, has failed to give his consent; or

(b) the medical practitioner is of the opinion that, in the circumstances, it is not practicable to delay the administration of the transfusion until the consent of a parent of the child or a person having authority to consent to the administration of the transfusion can be obtained.

(5) Where a blood transfusion is administered to a child in accordance with this section, the transfusion shall, for all purposes, be deemed to have been administered with the consent of a parent of the child or a person having authority to consent to the administration of the transfusion.

(6) Nothing in this section relieves a medical practitioner from liability in respect of the administration of a blood transfusion to a child, being a liability to which he would have been subject if the transfusion had been administered with the consent of a parent of the child or a person having authority to consent to the administration of the transfusion.

Division 6—Revocation of Consent or Agreement

24. (1) A reference in this section, in relation to a consent given for the purposes of this Ordinance, to the donor shall be read—

(a) in a case in which the consent is given in respect of a child—as a reference to the child; and

(b) in any other case—as a reference to the person who gave the consent.

(2) A person who gives a consent for the purposes of this Ordinance may at any time thereafter revoke that consent by indicating, either orally or in writing—

(a) where the donor, in relation to that consent, is a patient in a hospital—

(i) to a designated officer for that hospital;

(ii) to a medical practitioner who is attending the donor in a professional capacity; or

(iii) to a nurse or nursing aid employed at that hospital; and

(b) where the donor is not a patient in a hospital—to a medical practitioner who is attending the donor in a professional capacity,

that the consent is revoked.

(3) Where—

(a) the donor is a patient in a hospital; and

(b) the person who gave the consent for the purposes of this Ordinance indicates to a person referred to in sub-paragraph (2) (a) (ii) or (iii) that the consent is revoked,

that person shall inform a designated officer for that hospital forthwith of the revocation of the consent.

(4) Where a person revokes his consent in accordance with sub-section (2)—

(a) if the donor is a patient in a hospital at the time of the revocation—the designated officer for the hospital to whom the revocation is communicated in accordance with sub-section (2) or (3); or

(b) if the donor is not a patient in a hospital at that time—the medical practitioner to whom the revocation is communicated,

shall, if it appears to him, after making such inquiries (if any) as are reasonable in the circumstances, that a medical practitioner is proposing to rely on the consent in connection with the removal of tissue from the body of the donor, inform that medical practitioner forthwith that the consent has been revoked.

(5) Where a consent is revoked, a person who has in his possession the instrument of consent shall, upon being informed by a designated officer for a hospital or by the medical practitioner to whom the revocation is communicated that the consent has been revoked, surrender—

(a) that instrument; and

(b) if a certificate given in accordance with section 10 or with sub-section 13 (2) or 14 (3) is in his possession, being a certificate relating to the consent—that certificate,

to the person who gave the consent.

Child no longer in agreement with removal and transplantation

25. (1) Where a medical practitioner has given a certificate in accordance with sub-section 13 (2) or 14 (3) and the child in relation to whom the certificate has been given informs—

(a) if the child is a patient in a hospital—

(i) a designated officer for that hospital;

(ii) a medical practitioner who is attending the child in a professional capacity; or

(iii) a nurse or nursing aid employed at that hospital;

and

(b) if the child is not a patient in a hospital—a medical practitioner who is attending the child in a professional capacity, that he is no longer in agreement with the proposed removal and transplantation of tissue, the succeeding provisions of this section have effect.

(2) Where—

(a) the child is a patient in a hospital; and

(b) the person whom he so informs is a person referred to in sub-paragraph (1) (a) (ii) or (iii),

that person shall inform a designated officer for that hospital forthwith that the child is no longer in agreement with the proposed removal and transplantation of tissue.

(3) The designated officer for the hospital or, where the child is not a patient in a hospital, the medical practitioner who is attending the child in a professional capacity shall, if it appears to him, after making such inquiries (if any) as are reasonable in the circumstances, that a medical practitioner is proposing to remove the tissue from the body of the child, inform that medical practitioner forthwith that the child is no longer in agreement with the proposed removal and transplantation of tissue.

(4) A person who is informed that the child is no longer in agreement with the proposed removal and transplantation of tissue shall, if he has in his possession the instrument of consent that relates to the removal and transplantation of the tissue, surrender—

(a) that instrument; and

(b) if the certificate given in accordance with sub-section 13 (2) or 14 (3) is in his possession—that certificate,

to the person who gave the consent.

PART III—DONATIONS OF TISSUE AFTER DEATH

De facto spouses

26. For the purposes of this Part, where a deceased person is survived by a person who, although not married to the deceased person, was at the time of the death of the deceased person living with the deceased person as that person's husband or wife, as the case may be, on a permanent and *bona fide* domestic basis, that surviving person shall be taken—

(a) to have been married to the deceased person; and

(b) to have been the spouse of the deceased person immediately before his death.

27. (1) Subject to this Part, where it appears to a designated officer for a hospital, after making such inquiries as are reasonable in the circumstances, that a deceased person who has died in the hospital or whose dead body has been brought into the hospital—

Authority to
remove
tissue where
body of
deceased
at a
hospital

(a) had, during his lifetime, expressed the wish for, or consented to, the removal after his death of tissue from his body—

(i) for the purpose of the transplantation of the tissue to the body of a living person; or

(ii) for the purpose of the use of the tissue for other therapeutic purposes or for medical or scientific purposes; and

(b) had not withdrawn the wish or revoked the consent, the designated officer may, by instrument in writing, authorize the removal of tissue from the body of the deceased person for that purpose.

(2) Subject to this Part, where it appears to a designated officer for a hospital, after making such inquiries as are reasonable in the circumstances in relation to a deceased person who has died in the hospital or whose dead body has been brought into the hospital, that—

(a) the designated officer is not authorized by sub-section (1) to give an authority in respect of that person;

(b) the deceased person had not, during his lifetime, expressed an objection to the removal of tissue from his body; and

(c) the senior available next of kin of the deceased person has not objected to the removal of tissue from the body of the deceased person,

the designated officer may, by instrument in writing, authorize the removal of tissue from the body of the deceased person for any of the purposes referred to in paragraph (1) (a).

(3) Where a designated officer for a hospital, after making such inquiries as are reasonable in the circumstances, is unable to ascertain the existence or whereabouts of the next of kin of the deceased person, sub-section (2) applies as if paragraph (c) of that sub-section were omitted.

(4) The senior available next of kin of a person may make it known to a designated officer at any time when the person is unconscious before death that he has no objection to the removal, after the death of the person, of tissue from the body of the person for a purpose referred to in sub-section (1), but the designated officer shall not act on such an indication if the person recovers consciousness.

(5) Where there are 2 or more persons having a description referred to in a sub-paragraph of paragraph (a) or (b) of the definition of "senior available next of kin" in section 4, an objection by any one of those persons has effect for the purposes of this section notwithstanding any indication to the contrary by the other or any other of those persons.

Authority
to remove
tissue where
body of
deceased
not at a
hospital

28. (1) Subject to this Part, where the body of a deceased person is at a place other than a hospital, the senior available next of kin of the deceased person may, by instrument in writing, authorize the removal of tissue from the body of the deceased person—

- (a) for the purpose of the transplantation of the tissue to the body of a living person; or
- (b) for the purpose of the use of the tissue for other therapeutic purposes or for medical or scientific purposes.

(2) Where it appears to the senior available next of kin of the deceased person, after making such inquiries (if any) as are reasonable in the circumstances, that—

- (a) the deceased person had, during his lifetime, expressed an objection to the removal of tissue from his body and had not withdrawn that objection; or
 - (b) another next of kin of the same or a higher order of the classes in paragraph (a) or (b) of the definition of “senior available next of kin” in section 4 has an objection to the removal of tissue from the body of the deceased person,
- the senior available next of kin shall not, under sub-section (1), authorize the removal of tissue from the body of the deceased person.

(3) Where a deceased person, during his lifetime, expressed the wish for, or consented to, the removal after his death of tissue from his body for a purpose referred to in sub-section (1) and the wish had not been withdrawn or the consent revoked, the removal of tissue from the body of the deceased person in accordance with the wish or consent is, by force of this sub-section, hereby authorized.

Consent by
the
Coroner

29. (1) This section applies to a deceased person—

- (a) who has died in a manner or in circumstances referred to in sub-section 11 (1) (other than paragraph 11 (1) (f)) of the *Coroners Ordinance* 1956;
- (b) in respect of whom a medical practitioner has not given a certificate as to the cause of death; or
- (c) in respect of whose death the Coroner is required by the Attorney-General to hold an inquest.

(2) A designated officer for a hospital or a senior available next of kin, as the case may be, shall not authorize the removal of tissue from the body of a deceased person to whom this section applies unless the Coroner has given his consent to the removal of the tissue.

(3) Sub-section 28 (3) does not apply in relation to a deceased person to whom this section applies unless the Coroner has given his consent to the removal of tissue from the body of the deceased person.

(4) The Coroner may give a direction, either before or after the death of a person to whom this section applies, that his consent to the removal of tissue from the body of the person after the death of the person is not required and, in that event, sub-sections (2) and (3) do not apply to or in relation to the removal of tissue from the body of the person.

(5) A consent or direction by the Coroner under this section may be expressed to be subject to such conditions as are specified in the consent or the direction.

(6) A consent or direction may be given orally by the Coroner, and if so given, shall be confirmed in writing.

30. (1) Where—

- (a) a person has died within the meaning of section 45; and
- (b) at the time at which he died or at any time thereafter his respiration and the circulation of his blood were being maintained by artificial means,

Certificate
of
specialist,
&c.,
required in
certain
situations

a designated officer for a hospital shall not give an authority under this Part in respect of that deceased person unless 2 medical practitioners, each of whom has been for a period of not less than 5 years a medical practitioner and one of whom is a specialist neurologist or neurosurgeon or has such other qualifications as are prescribed, have each certified in writing—

- (c) that he carried out a clinical examination of the person while the respiration and the circulation of the blood of that person were being maintained by artificial means; and
- (d) that, in his opinion, at the time of that examination, irreversible cessation of all function of the brain of the person had already occurred.

Penalty: \$1,000 or imprisonment for 6 months, or both.

(2) For the purposes of sub-section (1), any period during which a person who is a medical practitioner practised as a medical practitioner, however described, under the law in force in a place outside Australia shall be taken into account in calculating the period of 5 years referred to in that sub-section.

31. (1) An authority under this Part is sufficient authority for a medical practitioner other than—

Effect of
authority
under this
Part

- (a) a medical practitioner referred to in sub-section 30 (1); and
- (b) in a case to which section 27 applies, the designated officer for the hospital who gave the authority,

to remove tissue from the body of the deceased person referred to in the authority for the purpose referred to in the authority.

(2) A contravention by a designated officer of sub-section 30 (1) in relation to the giving of an authority does not affect the validity of the authority.

PART IV—POST-MORTEM EXAMINATIONS

Authority
for post-
mortem
examination

32. (1) Subject to section 34, where it appears to a designated officer for a hospital, after making such inquiries as are reasonable in the circumstances, that a deceased person who has died in the hospital or whose dead body has been brought into the hospital—

(a) had, during his lifetime, expressed the wish for, or consented to, a post-mortem examination of his body for the purpose of investigating the cause of his death; and

(b) had not withdrawn the wish or revoked the consent,
the designated officer may, by instrument in writing, authorize a post-mortem examination of the body of the deceased person for that purpose.

(2) Subject to section 34, where it appears to a designated officer for a hospital, after making such inquiries as are reasonable in the circumstances in relation to a deceased person who has died in the hospital or whose dead body has been brought into the hospital, that—

(a) the designated officer is not authorized by sub-section (1) to give an authority in respect of that person;

(b) the deceased person had not, during his lifetime, expressed an objection to the post-mortem examination of his body; and

(c) the senior available next of kin of the deceased person has not objected to a post-mortem examination of the body of the deceased person,

the designated officer may, by instrument in writing, authorize a post-mortem examination of the body of the deceased person for the purpose of investigating the cause of the death of that person.

(3) Where a designated officer for a hospital, after making such inquiries as are reasonable in the circumstances, is unable to ascertain the existence or whereabouts of the next of kin of the deceased person, sub-section (2) applies as if paragraph (c) of that sub-section were omitted.

(4) The senior available next of kin of a person may make it known to a designated officer at any time when the person is unconscious before death that he has no objection to a post-mortem examination of the body of the person, but the designated officer shall not act on such an indication if the person recovers consciousness.

(5) Where there are 2 or more persons having a description referred to in a sub-paragraph of paragraph (a) or (b) of the definition of “senior available next of kin” in section 4, an objection by any one of those persons has effect for the purposes of this section notwithstanding any indication to the contrary by the other or any other of those persons.

Authority
for post-
mortem
examination
where body
of deceased
not at a
hospital

33. (1) Subject to this Part, where the body of a deceased person is at a place other than a hospital, the senior available next of kin of the deceased person may, by instrument in writing, authorize a post-mortem examination of the body of the deceased person for the purpose of investigating the cause of the death of that person.

(2) Where it appears to the senior available next of kin of the deceased person, after making such inquiries (if any) as are reasonable in the circumstances, that—

- (a) the deceased person had, during his lifetime, expressed an objection to a post-mortem examination of his body and had not withdrawn that objection; or
- (b) another next of kin of the same or a higher order of the classes in paragraph (a) or (b) of the definition of “senior available next of kin” in section 4 has an objection to the post-mortem examination of the body of the deceased person,

the senior available next of kin shall not, under sub-section (1), authorize the post-mortem examination of the body of the deceased person.

(3) Where a deceased person, during his lifetime, expressed the wish for, or consented to, a post-mortem examination of his body and the wish had not been withdrawn or the consent revoked, a post-mortem examination of the body of the deceased person in accordance with the wish or consent is, by force of this sub-section, hereby authorized.

34. (1) This section applies to a deceased person—

- (a) who has died in a manner or in circumstances referred to in sub-section 11 (1) (other than paragraph 11 (1) (f)) of the *Coroners Ordinance* 1956;
- (b) in respect of whom a medical practitioner has not given a certificate as to the cause of death; or
- (c) in respect of whose death the Coroner is required by the Attorney-General to hold an inquest.

Consent by
the
Coroner

(2) The designated officer for a hospital or a senior available next of kin, as the case may be, shall not authorize a post-mortem examination of the body of a deceased person to whom this section applies unless the Coroner has given his consent to the examination.

(3) Sub-section 33 (3) does not apply in relation to a deceased person to whom this section applies unless the Coroner has given his consent to the post-mortem examination of the body of the deceased person.

(4) The Coroner may give a direction either before or after the death of a deceased person to whom this section applies that his consent to a post-mortem examination of the body of the person is not required and, in that event, sub-sections (2) and (3) do not apply to or in relation to a post-mortem examination of the body of the deceased person.

(5) A consent or direction by the Coroner under this section may be expressed to be subject to such conditions as are specified in the consent or the direction.

(6) A consent or direction may be given orally by the Coroner and, if so given, shall be confirmed in writing.

35. (1) An authority under this Part is sufficient authority for a medical practitioner (other than, in a case to which section 32 applies, the designated officer for the hospital who gave the authority)—

Effect of
authority
under this
Part

- (a) to conduct such examination of the body of the deceased person as is necessary for the purpose of investigating the cause of the death of the person; and
- (b) to remove from the body of the person such tissue as is necessary for the purpose of the post-mortem examination.

(2) An authority under this Part is sufficient authority for the use, for therapeutic, medical or scientific purposes, of tissue removed from the body of a deceased person for the purpose of a post-mortem examination.

(3) An order by the Coroner under the *Coroners Ordinance* 1956 directing a post-mortem examination is, subject to any order to the contrary by the Coroner, authority for the use, for therapeutic, medical or scientific purposes, of tissue removed from the body of the deceased person for the purpose of the post-mortem examination.

PART V—DONATIONS FOR ANATOMICAL PURPOSES

Interpretation

36. In this Part, “ school of anatomy ” means—

- (a) a school of anatomy established under a law of the Commonwealth;
- (b) a school of anatomy the conduct of which is authorized under this Ordinance;
- (c) a place that is, by virtue of sub-section 42 (4), to be deemed to be a school of anatomy for the purposes of this Ordinance and the regulations; or
- (d) a school of anatomy that is licensed under a law of a State.

Authority for anatomy where body of deceased at a hospital

37. (1) Subject to section 39, where it appears to a designated officer for a hospital, after making such inquiries as are reasonable in the circumstances in relation to a deceased person who has died in the hospital or whose dead body has been brought into the hospital, that—

- (a) the deceased person had not, during his lifetime, expressed an objection to the retention after his death of his body—
 - (i) for the purpose of anatomical examination; or
 - (ii) for the purpose of the use of his body for the study and teaching of the anatomy of the human body;
 and

- (b) the senior available next of kin of the deceased person has no objection to the retention of the body of the deceased person for a purpose referred to in paragraph (a),

the designated officer may, by instrument in writing, authorize the retention and use of the body of the deceased person at a school of anatomy for any of the purposes referred to in paragraph (a).

(2) Where a designated officer for a hospital, after making such inquiries as are reasonable in the circumstances, is unable to ascertain the existence or whereabouts of the next of kin of the deceased person, sub-section (1) applies as if paragraph (b) of that sub-section were omitted.

(3) The senior available next of kin of a person may make it known to a designated officer at any time when the person is unconscious before death that he has no objection to the retention after the death of the person of the body of the person for a purpose referred to in sub-section (1), but the designated officer shall not act on such an indication if the person recovers consciousness.

(4) Where there are 2 or more persons having a description referred to in a sub-paragraph of paragraph (a) or (b) of the definition of "senior available next of kin" in section 4, an objection by any one of those persons has effect for the purposes of this section notwithstanding any indication to the contrary by the other or any other of those persons.

38. (1) Subject to this Part, where the body of a deceased person is at a place other than a hospital, the senior available next of kin of the deceased person may, by instrument in writing, authorize the retention and use of the body of the deceased person at a school of anatomy—

Authority
for anatomy
where body
of deceased
not at a
hospital

- (a) for the purpose of anatomical examination; or
- (b) for the purpose of the use of the body for the study and teaching of the anatomy of the human body.

(2) Where it appears to the senior available next of kin of the deceased person, after making such inquiries (if any) as are reasonable in the circumstances, that—

- (a) the deceased person had, during his lifetime, expressed an objection to the retention of his body for a purpose referred to in sub-section (1) and had not withdrawn that objection; or
- (b) another next of kin of the same or a higher order of the classes in paragraph (a) or (b) of the definition of "senior available next of kin" in section 4 has an objection to the retention of the body of the deceased person for that purpose,

the senior available next of kin shall not, under sub-section (1), authorize the retention and use of the body of the deceased person for that purpose at a school of anatomy.

39. Where a deceased person, during his lifetime, expressed the wish for, or consented to, the use of his body after his death for a purpose referred to in sub-section 37 (1) and the wish had not been withdrawn or the consent revoked, the removal of the body of the deceased person to a school of anatomy and the use of the body at such a school for a purpose specified in sub-section 37 (1) is hereby authorized.

Provisions
applicable
where
deceased
person
consented to
retention of
his body for
anatomy

40. (1) This section applies to a deceased person—

- (a) who has died in a manner or in circumstances referred to in sub-section 11 (1) (other than paragraph 11 (1) (f)) of the *Coroners Ordinance* 1956;

Consent
by the
Coroner

- (b) in respect of whom a medical practitioner has not given a certificate as to the cause of death; or
- (c) in respect of whose death the Coroner is required by the Attorney-General to hold an inquest.

(2) The designated officer for a hospital or a senior available next of kin shall not, in relation to the body of a deceased person to whom this section applies, give an authority under sub-section 37 (1) or 38 (1), as the case may be, except with the consent of the Coroner.

(3) Section 39 does not apply in relation to a deceased person to whom this section applies unless the Coroner has given his permission for the body of the deceased person to be dealt with in accordance with that section.

(4) The Coroner may give a direction either before or after the death of a deceased person to whom this section applies that his consent or permission in relation to the removal or use of the body of the person after the death of the person is not required and, in that event, sub-sections (2) and (3) do not apply to or in relation to the body of the person.

(5) A consent or direction by the Coroner under this section may be expressed to be subject to such conditions as are specified in the consent or the direction.

(6) A consent or direction may be given orally by the Coroner, and if so given, shall be confirmed in writing.

Effect of
authority
under this
Part

41. An authority under this Part is, for the purposes of the law of the Territory, sufficient authority for the removal of the body of the deceased person to a school of anatomy and for its retention and use at such a school for a purpose specified in sub-section 37 (1).

PART VI—SCHOOLS OF ANATOMY

Schools of
anatomy

42. (1) The Minister may, by notice published in the *Gazette*, authorize the conduct within a specified educational institution of a school of anatomy for the teaching and study of anatomy and for the carrying on of the practice of anatomy.

(2) A notice under sub-section (1) may specify that the school of anatomy, the conduct of which is so authorized, shall be concerned only with the teaching and study of the anatomy of such part of the human body as is specified in the notice.

(3) The Minister may, by notice published in the *Gazette*, authorize the carrying out of anatomical examinations and the teaching and study of the anatomy of the whole or a specified part of the human body at a place, not being a place within an educational institution, specified in the notice.

(4) A place specified in a notice under sub-section (3) shall be deemed for the purposes of this Ordinance and the regulations to be a school of anatomy.

43. (1) The regulations may make provision for and in relation to—
- Regulations for the control, &c., of schools of anatomy
- (a) the manner in which bodies may be transported to a school of anatomy;
 - (b) the conditions subject to which anatomical examinations and the teaching and study of anatomy and the practice of anatomy may be carried out;
 - (c) the furnishing of returns and other information by the person in charge of a school of anatomy;
 - (d) the precautions to be taken in regard to the receipt, custody and subsequent interment or cremation of bodies;
 - (e) the inspection of schools of anatomy; and
 - (f) the regulation and control of schools of anatomy.

(2) Regulations under this Ordinance making provision for or in relation to a matter specified in paragraph (1) (b), (c), (e) or (f) shall not be expressed to apply to or in relation to a school of anatomy other than one established in accordance with an authority given under section 42.

PART VII—PROHIBITION OF TRADING IN TISSUE

44. (1) Subject to this section, a person shall not enter into a contract or arrangement under which a person agrees, for valuable consideration, whether given or to be given to himself or to another person—

Certain contracts not to be entered into

- (a) to the sale or supply of tissue from his body or from the body of another person, whether before or after his death or the death of the other person, as the case may be; or
- (b) to the post-mortem examination or anatomical examination of his body after his death or of the body of another person after the death of the other person.

Penalty: \$500 or imprisonment for 3 months, or both.

(2) Sub-section (1) does not apply to or in relation to the sale or supply of tissue other than blood or any of its constituents if the tissue has been subjected to processing or treatment and the sale or supply is made for use, in accordance with the directions of a medical practitioner, for therapeutic or scientific purposes.

(3) Sub-section (1) does not apply to or in relation to a contract or arrangement providing only for the reimbursement of any expenses necessarily incurred by a person in relation to the removal of tissue in accordance with this Ordinance.

(4) Where he considers it desirable by reason of special circumstances so to do, the Minister may, by instrument in writing, approve the entering into of a contract or arrangement that would, but for the approval, be void by virtue of sub-section (5) and nothing in sub-section (1) or (5) applies to and in relation to a contract or agreement entered into in accordance with an approval under this sub-section.

(5) A contract or arrangement entered into in contravention of this section is void.

PART VIII—DEFINITION OF DEATH

When death occurs

45. For the purposes of the law of the Territory, a person has died when there has occurred—

- (a) irreversible cessation of all function of the brain of the person; or
- (b) irreversible cessation of circulation of blood in the body of the person.

PART IX—MISCELLANEOUS

Ordinance does not prevent specified removals of tissue, &c.

46. (1) Nothing in this Ordinance applies to or in relation to—

- (a) the removal of tissue from the body of a living person in the course of a procedure or operation carried out, in the interests of the health of the person, by a medical practitioner with the consent, express or implied, given by or on behalf of the person or in circumstances necessary for the preservation of the life of the person;
- (b) the use of tissue so removed;
- (c) the embalming of the body of a deceased person; or
- (d) the preparation, including the restoration of any disfigurement or mutilation, of the body of a deceased person for the purpose of interment or cremation.

(2) In paragraphs (1) (a) and (1) (b), “tissue” has the same meaning as in Part II.

Exclusion of liability of person acting in pursuance of consent or authority

47. (1) Subject to sub-section (2), where—

- (a) a person carries out a procedure; and
- (b) a consent or authority given under this Ordinance is sufficient authority under this Ordinance for that person to carry out that procedure,

that person is not liable to any other person in respect of anything done or omitted to be done by that first-mentioned person in the carrying out of that procedure.

(2) Nothing in this section relieves a person from liability for negligence in respect of anything done or omitted to be done by him in the carrying out of a procedure.

Offences

48. (1) A person shall not remove tissue from the body of a person, whether living or dead, except in accordance with a consent or authority that is, under this Ordinance, sufficient authority for the removal of the tissue by that person.

Penalty: \$1,000 or imprisonment for 6 months, or both.

(2) A person shall not conduct a post-mortem examination of the body of a deceased person except in accordance with an authority that is, under this Ordinance, sufficient authority for that person to conduct the post-mortem examination.

Penalty: \$1,000 or imprisonment for 6 months, or both.

(3) A person shall not—

- (a) remove the body of a deceased person to a school of anatomy; or
- (b) use the body of a deceased person for a purpose specified in sub-section 37 (1),

except in accordance with an authority that is, under this Ordinance, sufficient authority for such removal or use of the body for that purpose.

Penalty: \$1,000 or imprisonment for 6 months, or both.

(4) A person who—

- (a) gives an authority under this Ordinance without having made the inquiries that he is required by this Ordinance to make;
- (b) makes a false statement in a certificate given for the purposes of this Ordinance; or
- (c) contravenes or fails to comply with a provision of Division 6 of Part II,

is guilty of an offence and is punishable upon conviction by a fine not exceeding \$1,000 or imprisonment for a term not exceeding 6 months, or both such fine and imprisonment.

(5) Nothing in sub-section (1) or (2) applies to or in relation to—

- (a) anything done in pursuance of an order by the Coroner under the *Coroners Ordinance* 1956; or
- (b) any other act authorized by law.

49. (1) Subject to this section, a person to whom this section applies shall not disclose or give to any other person any information or document whereby the identity of a person or a deceased person— Disclosure of information

- (a) from whose body tissue other than blood has been removed for the purpose of transplantation or for the purpose of the use of the tissue for other therapeutic purposes or for medical or scientific purposes;
- (b) with respect to whom or with respect to whose body a consent, other than a consent under section 20, or authority has been given under this Ordinance; or
- (c) into whose body tissue other than blood has been, is being, or may be, transplanted,

may become publicly known.

Penalty: \$500 or imprisonment for 3 months, or both.

(2) Subject to this section, a person to whom this section applies shall not disclose or give to any other person any information or document whereby the identity of a child from whose body blood has been removed for a purpose referred to in section 20 may become publicly known.

Penalty: \$500 or imprisonment for 3 months, or both.

(3) This section applies—

- (a) where a consent has been given in accordance with this Ordinance—to a medical practitioner who gave a certificate in relation to the consent;

- (b) where an authority has been given in accordance with this Ordinance by a designated officer for a hospital—to the designated officer;
- (c) where tissue has been removed from the body of a person or a deceased person—the medical practitioner who removed the tissue and, if the tissue was removed at a hospital, each person who was employed at the hospital at the time of the removal of the tissue or has since been employed at the hospital;
- (d) where tissue has been transplanted into the body of a person—to the medical practitioner who performed the transplantation and, if the tissue was transplanted at a hospital, each person who was employed at the hospital at the time of the transplantation or has since been employed at the hospital; and
- (e) where it is proposed that tissue will be transplanted into the body of a person—to the medical practitioner who is to perform the transplantation and, if the tissue is to be transplanted at a hospital, each person who is employed at the hospital or who becomes so employed.

(4) Sub-sections (1) and (2) do not apply to or in relation to information disclosed—

- (a) in pursuance of an order of a Court or when otherwise required by law;
- (b) for the purposes of hospital administration or *bona fide* medical research;
- (c) with the consent of the person to whom the information relates; or
- (d) when the circumstances in which the disclosure is made are such that the disclosure is or would be privileged.

Amendment
of
Seat of
Government
(Adminis-
tration)
Ordinance
1930

50. The Second Schedule to the *Seat of Government (Administration) Ordinance* 1930 is amended by inserting in Part 2, after the words—

“ *Termination of Pregnancy Ordinance* 1978 ”,
the words—

“ *Transplantation and Anatomy Ordinance* 1978 ”.

Regulations

51. The Minister may make regulations, not inconsistent with this Ordinance, prescribing all matters that are required or permitted to be prescribed by this Ordinance or are necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance and in particular for prescribing penalties not exceeding a fine of \$250 for offences against the regulations.

APPEALS AGAINST ACQUITTALS AND SENTENCES

Memorandum by the Commonwealth Secretariat

There is a wide variety of practice in the Commonwealth relating to appeals to higher courts by the Crown or the State against acquittals and sentences. The purpose of this paper is shortly to review the position in a representative number of Commonwealth countries.

2. In most jurisdictions the Attorney-General or the Public Prosecutor may challenge a decision of a lower court resulting in an acquittal, in a higher court. In some, the complainant is given this right, often only after receiving the sanction of the Attorney-General. This may be a direct appeal, an application for review or revision, or by means of a case stated procedure. Sometimes such an appeal is restricted to a matter of law, but more usually the right is at large.

3. In a majority of jurisdictions, too, the Attorney-General or the Public Prosecutor may apply, in one form or another, to a higher court for a review of a sentence or order imposed or made by a subordinate court.

4. However, as regards appeals against acquittals and sentences after trials on indictment or information, far fewer jurisdictions permit an appeal by the Crown or the State. Where a not guilty verdict by a jury is involved, traditionally a jury's verdict could not be impugned or tainted.

5. Even in those jurisdictions in which the jury's not guilty verdict is sacrosanct, as it affects the accused, some allow the Attorney-General to refer a point of law following an acquittal on indictment, to the Court of Appeal. This practice, in various forms, is to be found, for example, in England and Wales, Hong Kong, New South Wales, Queensland and Western Australia. In all these jurisdictions it is expressly provided that the appeal has no effect on the earlier acquittal.

6. Canada, Hong Kong, New South Wales, Queensland, Western Australia, Singapore and Sri Lanka are all examples of jurisdictions which permit the Crown or the State to appeal to the appellate court against a sentence imposed after a trial on indictment, sometimes only with the leave of that court.

7. There are a number of jurisdictions, of which the following are examples, where there is a right of appeal by the Crown or the State following an acquittal on indictment or information: Tasmania, Singapore, Sri Lanka. The Criminal Procedure Code of India (and the Codes derived from it) also allows appeals against acquittals. In Tasmania the appeal must be on a point of law alone; in Singapore, on a question of fact or of law, or on a question of mixed law and fact; in Sri Lanka, on a question of law alone, except that the appeal may be on a question of

fact alone, or on a question of mixed law and fact, with the leave of the Court of Appeal, after a trial without a jury. In Tasmania, too, leave to appeal is required.

8. Ever since the 1930's, the Canadian Criminal Code has allowed the Attorney-General to appeal to the Court of Appeal against an acquittal on indictment, on a point of law. Until the enactment of the Criminal Law Amendment Act 1975, the appellate court had power to substitute its own verdict for that of a jury. This power was termed "a major departure from common law principles" by Pigeon J. in *Morgentaler v. The Queen*, (1976) 1 S.C.R. 616, but the learned judge, with four of his brothers, upheld the right of the Québec Court of Appeal to substitute a conviction in the place of the jury's acquittal, under the law as it stood before the 1975 amendment.

9. Chief Justice Bora Laskin was one of the three dissenting judges in the *Morgentaler case*, and he had this to say on the power of an appellate court to substitute a conviction in a case resulting in an acquittal—

"Formally, the powers of a provincial appellate Court under s.613(4)(b) of the Criminal Code are broad enough to authorize it to do what it did. However, I have been unable to find any reported Canadian case where an appellate Court, in setting aside a jury's verdict of acquittal, has entered a conviction on the very offence charged and of which the accused has been acquitted by a jury, and has not been content to order a new trial with accompanying directions. Counsel for the respective parties were unable to produce any such case, and I am not particularly surprised that they could not. Where a case is left to the jury on evidence that may be found to support a defence to the offence charged, and the accused is acquitted, the fact that the trial Judge may have erred in charging the jury on the law would ordinarily result in a direction for a new trial. If it be the case at the trial that there is, in the opinion of the trial Judge, no evidence to go to the jury to support a required defence the trial Judge would so charge, but would leave it to the jury to bring in a verdict of guilty. Correlatively, if the trial Judge is of the opinion that there is no evidence to go to the jury in support of the charge, it would be for the jury to bring in a directed verdict of acquittal. It must be an unusual case, indeed, in which an appellate Court, which has not seen the witnesses, has not observed their demeanour and has not heard their evidence adduced before a jury, should essay to pass on its sufficiency, either as to a defence or in support of a charge, and thereupon to substitute its opinion for that of the jury and to enter a conviction (rather than ordering a new trial) where the jury has acquitted. Where the jury has convicted, appellate Courts have, from time to time, substituted their opinion that an acquittal should be directed, and this has been done even by this Court."

10. The effect of the Criminal Law Amendment Act 1975 was to maintain the right of the Attorney-

General to appeal against an acquittal, but to remove from an appellate court the power to enter a verdict of guilty, where the verdict appealed against was that of a court composed of a judge and jury. Power to order a new trial in all cases is maintained, as is jurisdiction to enter a verdict of guilty in respect of non-jury trials.

11. It is not surprising that where some 70 jurisdictions are involved, differences in approach to the

constitutional and public interest issues involved are to be found. However, Ministers may wish to discuss the merits and demerits of provisions which allow or prohibit appeals against acquittals or sentences following trials on indictment or information, in the light of the practical working of such provisions in their own jurisdictions.

12. The Government of Jamaica has suggested that this subject should be considered for inclusion in the Agenda.

REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum by the Government of Nauru

Designation and reciprocity

1. Nauru, which in accordance with the 1966 Commonwealth Scheme, enacted the Extradition of Fugitive Offenders Act 1973, is one of the Commonwealth countries which has used designation procedures selectively (cf. para 10 of Professor Shearer's Paper).

2. By terms of the 1973 Act, Nauru cannot make (s.4(5)) an unrestricted "designation order" in respect of a foreign country unless the foreign country has made or agreed to make "substantially similar provision" for reciprocity in relation to relevant offences. It is a matter open to some question as to whether a Commonwealth country which has not enacted legislation under the 1966 scheme has made "substantially similar provision" if it continues to rely on the "increasingly archaic Fugitive Offenders Act 1881 (Imp.)". (Professor Shearer's description—see para. 3(a)).

3. Further, because of the terms of s.4(5) of the Nauru Act, Nauru must be satisfied that the foreign country either has designated or will agree to designate Nauru under its own "substantially similar" legislation. It is not possible for Nauru, in terms of its own law, to make a "blanket designation" of Commonwealth countries, as has been done by some other countries.

4. The definition of "foreign country" in s.2(1) of the Nauru Act is not limited to Commonwealth countries but extends to all countries of the world.

5. Nauru has not refused designation under its Act to any Commonwealth country which has requested it; nor is it likely to do so in the future provided the conditions of s.4(5) of the Nauru Act are met. Designation Orders have been made under s.4(5) of the Nauru Act in relation to the United Kingdom, Gilbert Islands (now Kiribati), Tuvalu, Fiji, Australia and Sri Lanka. Reciprocal designation with Western Samoa is under negotiation.

6. It has been Nauru's position that it would itself seek reciprocal designation under the 1966 Scheme with those Commonwealth countries which are in, or fringe, the Pacific Basin but would consider any approach from any Commonwealth country outside that area.

7. The proviso to s.4(5) of the Nauru Act enables "restricted designation order" to be made where a foreign country's legislation does not include provision for return in respect of all "relevant offences."

8. Nauru's whole approach to designation of other Commonwealth countries under its 1973 Act has been on the basis of reciprocity; it has not been

prepared to designate a country if reciprocal rights for return of fugitive offenders are not available to Nauru in that country.

9. Nauru would not be likely to agree to extend, by amendment, the operation of its Act to tax and other fiscal offences. Nauru might be prepared to amend the 1973 Act to cover "offences established under international conventions to which both Nauru and the foreign country requesting return are parties" (cf. para. 11 of Prof. Shearer's Paper).

"Double criminality"

10. Section 5(1)(b) of the Nauru Act is in *pari materia* to s.3(1)(c) of the United Kingdom Act: *R. v. Brixton Prison ex parte Gardner* [1968] 2 Q.B. 399 and *R. v. Brixton Prison ex parte Rush* [1969] 1 All E.R. 316 would be followed by the Courts of Nauru.

11. It is suggested that the so-called "double criminality rule" runs contrary to the principles of the 1966 Scheme and that all Commonwealth "1966 scheme legislation" which contains provisions in *pari materia* to s.3(1)(c) of the United Kingdom Act should be amended to read, in the relative provision, "facts . . . on which the request is grounded." This would, as Prof. Shearer says, remove the difficulties, posed by *Gardner's case*. It would not remove that difficulty, constituted by *Rush's case*. If it were desired to remove that difficulty, it is suggested that (c) of s.3(1)(c) should be repealed and s.3(1)(a) should be amended by the deletion of the semicolon at the end of it and the addition of the following:

"and even if the act or omission constituting the offence would not constitute an offence against the law of the United Kingdom; and . . ."

11. While the Transfer of Offenders (cf. para. 26 of Prof. Shearer's Review) is outside the scope of his Paper, Nauru would welcome discussion at the 1980 meeting of Commonwealth Law Ministers on this topic.

12. Equally, Nauru would welcome discussion on the possibility of extending the 1966 Scheme to terrorist activities.

Fugitive's health and personal circumstances

13. Nauru would not, in general terms, favour the amendment to clause 9 of the 1966 Scheme proposed in para. 30 of Prof. Shearer's Paper. The amendment is felt to be too wide in scope for it would enable every fugitive to argue "personal circumstances"—e.g. (i) that his family would not be able to afford to visit him if he was imprisoned in the requesting country, (ii) that his wife was pregnant, (iii) that he was intending to apply for citizenship of the requested country and his return would break the uninterrupted period of residence required in the requested country.

While it may be appropriate to provide that the fugitive whose state of health was or would be affected might not be returned to the requesting country, it should, it is suggested, be dependant on the authorities in the requested country being satisfied that grave harm to the health of the fugitive would, on the balance of possibilities, be suffered if he were returned and that such grave harm would be significantly greater than if he were to stand trial in the requested country for that offence. Further, it is suggested, such provision is bested linked to an obligation of the requested country itself to try the fugitive.

Costs

14. In the two cases where Nauru has requested the return of a fugitive, Nauru has been assisted by the requested country providing and meeting the cost of legal representation; in both such cases Nauru has agreed to reciprocate should it, at a future date, be the requested country.

Consent Orders

15. It would appear sensible to include provision for Consent Orders for return.

REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum by the Government of Australia

Introduction

This memorandum contains the preliminary views, in brief, of the Government of Australia on Professor Shearer's draft Discussion Paper.

Reciprocal application of legislation

2. Australian practice in designating Commonwealth countries to which the Australian Extradition (Commonwealth Countries) Act 1966 applies has not been limited to independent countries within the Commonwealth. The Australian list has in the past included a number of dependent territories of the United Kingdom, where separate designation is desirable, e.g. the Colony of Hong Kong.

3. Australia has not hitherto considered it desirable to apply the Australian Act subject to conditions, adaptations or modifications to Member Countries who have not implemented the Scheme. Most of the principles set out in the Scheme are concerned with the procedures etc. governing the consideration of requests for extradition by the requested country, and Australia does not consider that their merit depends on Australian requests being subject to similar procedures. On the other hand, the requesting country's obligations under Australian legislation, e.g. in relation to the specialty rule, can be satisfied by either an agreement or an undertaking if they have not enacted "London Scheme" legislation.

Returnable offences

4. The reference in para. 12 of the Discussion Paper to the Australian additions could be extended by emphasising that they were necessary to give affect to Australia's obligations to Commonwealth countries which are parties to one or other of the Conventions. Moreover, as they are not limited in their application to parties to the Conventions, a Commonwealth country that is not a party can also secure extradition from Australia in certain circumstances where it exercises criminal jurisdiction over the acts referred to in the Conventions.

5. While Australia would have no objection to the suggestion that offences established under International Conventions to which the requested and requesting countries are parties, be included as para. C of Annex 1 of the Scheme for the sake of completeness, it should be appreciated that the obligation to make such offences extraditable would already exist by being a party of the Convention.

6. While Australia sees merit in the suggestion that Annex 1 of the Scheme be further amended by including the offences which are returnable under the laws of both the requested and the requesting Commonwealth countries, that would only partly solve the problem of a list of extraditable offences which is

by no means complete. An alternative approach would be to depart from the "enumerative list" method altogether, and in its place simply provide that an offence is extraditable if it is punishable under the laws of both the requesting and the requested Commonwealth country by imprisonment or other deprivation of liberty for a specified minimum period. It would still be possible to include a list of offences if that was desired, but the list would only be indicative, and not conclusive, of the offences for which extradition may be granted. Offences which traditionally fall outside the scope of extradition arrangements, such as fiscal offences, could be excluded by agreement or, failing that, by unilateral action if that was desired. The double criminality rule would ensure that extradition is limited to what may be described as "ordinary" criminal offences.

Double criminality

7. It would appear that the exposition of *Gardner's* case is incorrect on one point. At the time that case was decided, which was before the Theft Act 1968 came into force (1 January 1969), the law in the United Kingdom required that a false pretence must relate to an existing fact and not to a statement about intention. This deficiency was rectified by the creation of the offence of obtaining property by deception [s.15(1) of the Theft Act 1968].

Citizenship of fugitive

8. Australia endorses Professor Shearer's view that, where extradition is refused on the ground of nationality, the requested State should itself be in a position to exercise jurisdiction over the fugitive. Further, this jurisdiction should, in Australia's view, extend to fugitives who have been convicted, as well as accused, of offences in the requesting State.

9. However, a prosecution in the requested country will often be prohibitively expensive unless provision is made by the requesting country for depositions taken in the requesting country to be admissible in evidence as an alternative to witnesses travelling to the requested country to give oral testimony.

Appeals by requesting Government

10. It is certainly true that in Australia there is no appeal in the strict sense from the decision of a magistrate discharging a fugitive, and the only way that such a decision can be reviewed, if at all, is by way of the Prerogative writs. However, while extradition proceedings are similar to committal proceedings, previous consideration of the question whether the Prerogative writs lie to a magistrate conducting extradition proceedings has been coloured by

the controversy in Australia as to the availability of those writs to a magistrate hearing committal proceedings [see, for example, *Connor v. Sandey and others* (1976) 2 N.S.W.L.R. 570].

11. Whether there should be a right of appeal in the sense that there is a rehearing on the merits, is amat-

ter that requires careful consideration. However, it is clearly desirable that the requesting country should have a right of review.

12. A further matter which could be considered in this context is the availability of appeal from *habeas corpus* proceedings.

THE TRANSFER OF CONVICTED OFFENDERS FROM AND TO COMMONWEALTH JURISDICTIONS

Memorandum by the Government of Australia

This memorandum briefly gives Australia's preliminary views on Mr. Webb's Discussion Paper, LMM(80)5.

2. The last sentence of para. 18 of the paper suggests that legislation exists in Australia under which prisoners may be removed between the States, and between the States and the Territories under the authority of the Government of the Commonwealth of Australia. The only legislation in Australia that currently deals with the transfer of convicted prisoners, is the Removal of Prisoners (Territories) Act 1923-1968 and the Removal of Prisoners (A.C.T.) Act 1968, both enactments of the Federal Parliament. Under the former, prisoners may be transferred from a Territory under the authority of the Commonwealth (except the Australian Capital Territory) to a State. The latter Act provides for the transfer to New South Wales of persons sentenced by the courts of the Australian Capital Territory. The need for this legislation stems from the lack of adequate prison facilities in those Territories.

3. The Acts do not, however, provide for the reciprocal transfer to the Territories of persons

sentenced in the States. Nor is there State legislation providing for the transfer of prisoners between the States.

4. Discussions are, however, in train between Commonwealth and State Attorneys-General with a view to producing reciprocal legislation to provide for the transfer between the Australian States and Territories of sentenced persons for rehabilitation purposes and for the purpose of facing charges. While considerable agreement has been reached on points of principle, it is not possible to predict when the necessary legislation will be enacted.

5. Although Australia had preliminary negotiations with a Canadian delegation in late 1978, progress on the negotiation of arrangements for the transfer of prisoners between Australia and other countries will depend, for practical purposes, on the progress of the arrangements for the inter-State transfer of prisoners. The Federal Government has no prisons and its prisoners are detained in institutions operated by State Governments.

COMPUTERIZATION OF LEGAL MATERIALS

Memorandum by the Government of Canada

Introduction

The ability of the computer to store vast quantities of data and to search such data in a matter of seconds to retrieve specified information from it makes it an extremely attractive tool for the lawyer involved in drafting legislation, policy formulation or the day by day practice of law. Although experiments using the computer in the legal area date back to the late 50s, it is only within the last ten years that computers have come to be used by lawyers on a regular basis.

Considerable development has taken place in this area in the United States and Europe, but of the Commonwealth countries, Canada has probably gone the farthest in implementing operational systems. This paper will concentrate on the developments which have taken place in Canada, this being considered more useful for Commonwealth countries because of the similarity of legislation and legislative procedure and the common legal system. Also the Canadian material, particularly the statutes and regulations, may themselves be of interest to other Commonwealth countries.

Basic principles

Before looking more closely at computer applications in the legal area it is necessary to be familiar with certain basic principles and terminology associated with the computer. Firstly, the computer can only process information which is in "machine readable form". This simply means that information in normal printed form must be converted before it can be used by the computer. At present, conversion normally involves a typing or keying operation followed by the normal proofreading and correcting that is involved in a process of this kind. Thus, there is a cost which increases in proportion to the volume of material involved. Such costs may be offset, however, if there is other justification for converting the material. If, for example, it is to be printed and computerized typesetting is available, then the conversion to produce the computer data base for printing would replace the keying process that would be involved in traditional type-setting. The data base can also be used for information retrieval, which becomes a by-product of the printing process. Again, if the computer is used during the drafting of a document which has subsequently to be printed e.g. legislation, further keying for printing will not be necessary either, realizing greater savings. This will be discussed later.

A computer system can be looked at as consisting of three basic elements, the machine itself (referred to as the hardware), the instructions to the machine which directs it in performing any particular functions (referred to as the software or programme) and the data base which consists of the information stored in "machine readable form". Once a data base has been created and a particular use defined, a govern-

ment may decide to place its data in one of its own computers if it already has, or is prepared to purchase or develop, the necessary computer software. Or it may go to a private company which has or is prepared to operate the appropriate software and so on. There are many factors involved in this decision, some of which will be illustrated later in this paper when the Canadian situation is examined.

In addition to the above an increasingly important element of a modern computer system is telecommunications. It is now quite common for the computer to be hundreds or even thousands of miles from the user but yet seem to be in the next office. This is made possible because of the quality of telecommunications now available. Until recently, in many countries high cost still limited use. However, within the last two years, we have seen the implementation in Canada, the U.S. and some European countries of a new data communications service which has substantially reduced such costs. At the present time the Canadian service which is called Datapac has interconnection agreements with the United States (including Hawaii) and the United Kingdom, and is negotiating agreements with a number of countries including Australia, New Zealand and the Caribbean Islands.

Remote computing of this kind is done on what is referred to as a terminal which usually consists of a T.V. screen to which a typewriter keyboard is attached. The user communicates by typing on the keyboard, the message and response being displayed on the T.V. screen.

Application in Canada

General

Computers are being used in the legal area in Canada by both the federal and provincial governments and in the private sector. Uses and planned uses include retrieval of information relating to statutory and regulatory material, case law material, legal opinions, land titles, personal property security interest, the provision of assistance in the drafting of legislation and regulations, the preparation of standard contracts, leases, wills and similar documents, as well as law firm accounting systems, and lawyers' time records systems. Other more specialized applications include litigation support systems, which assist lawyers involved in cases where vast quantities of documents are involved, and case management information systems for Crown prosecutors. In a related area computers are also finding their way into the court system for scheduling and keeping track of cases and other administrative applications.

This paper will limit its discussion to the use of computers in relation to statutes and regulatory

material, together with other information which may be of particular interest to government and to organizations such as law reform commissions which have a responsibility for developing or making proposals in regard to new legislation.

Drafting of New Legislation

The basic process of drafting statutes and regulations normally involves a significant amount of typing, re-typing, proofreading, re-proofreading, and cutting and pasting resulting at the end in a manuscript which is sent to the printer who proceeds through a further keying, proofreading, correcting and re-proofreading cycle before proofs are finally produced. Apart from the repetitious nature of these mechanical processes, there is almost invariably a fixed period of time within which the overall work including the creative development of the legislation must take place. Thus, the longer the mechanical processes the shorter the time there is left for the creative work.

About ten years ago the Department of Justice in Ottawa began working with the computer to apply its capabilities to the drafting process. The first objective was to reduce the amount of keying, proofreading and correcting that was involved, thereby reducing the amount of time required for mechanical processing. This would then provide more time for creative work, reduce some of the monotony normally involved and also reduce errors. The approach taken was to make use of what is called a computerized text editing system into which the draft legislation is typed by the drafter's secretary as it is being prepared. This system permits the secretary to store the new legislation in the computer through a terminal located in the office, to call the material back on a printer located in the office or close by, and to add to, delete or change any area of the material without affecting other areas. After all editorial work is completed an instruction can be issued by the secretary to the computer ordering the computer to type-set the material and request the government printer to prepare proofs.

The second objective in computerising was to be able to provide to the drafter other types of computer support once the bill is in machine readable form. Thus, for instance, the drafter working with a very large bill, may wish to search it to determine where particular expressions have been employed or to request the computer to prepare and print what is referred to as a key word in context (KWIC) index which will show where any word has been used in the draft and the context within which it has been used.

The drafter may also use the computer to retrieve information from existing legal material to assist in preparing the draft. Thus, the drafter may wish to determine where a particular expression has been used before in any federal statute, whether and if so how a particular word has been defined and so on. The same research may also be carried out on the statutes of other jurisdictions or a search of case reports carried out to determine whether any court has interpreted a particular word or phrase.

The system is still under development by Justice and improvements are still being made but its value has been demonstrated particularly in handling large pieces of Legislation.

Revision and Consolidation of Statutes and Regulations

The Statutes of Canada are revised every ten to fifteen years so as to include all changes that have taken place since the revision. The Revised Statutes thereby produced then become the authoritative statement of the law as of that time. In the past a significant amount of time has been required to incorporate the many changes which had taken place since the previous revision and the type-setting, proofreading and correction process involved in re-printing the statutes. In 1970 when the last revision took place a computer data base was developed from which the Revised Statutes of 1970 were printed using computerized photocomposition (a process whereby the type-setting is done by the computer using a photographic method). Since that time all new legislation has been prepared on the computer so that when passed by Parliament it could be used directly to update the computer data base of Revised Statutes. As a result, it will be possible to accomplish the next revision of the statutes in relatively short order since the time required for the consolidation and printing process will be greatly reduced.

It is also customary to consolidate the federal regulations at somewhat less frequent intervals, the most recent consolidation being published in 1979 and consisting of 18 volumes and totalling approximately 17 thousand pages. These were produced in the same way as the Revised Statutes 1970 by computerized photocomposition, the resulting data base being updated as new regulations are passed. As with the Statutes future consolidations will benefit from this process.

The Government also publishes from time to time what are referred to as office consolidations of statutes and regulations incorporating all amendments made up to the time of publication. While these have no legal sanction, they are widely used within Government and by the profession. As a result of the development of the two data bases referred to above, such consolidations can be produced much more quickly and easily with corresponding cost savings. However, this appears to have resulted in greater demands for such consolidations.

Printing of Court Reports

The Reports of the Supreme Court and the Federal Courts of Canada are both printed using a computer process thereby generating a computer data base of these materials. Although the Reports of the Federal Court (which was set up in 1971) have always been prepared by computer, and thus a complete data base exists, the Reports of the Supreme Court were not printed by a computer until 1975 and thus the bulk dating back over a hundred years, were not included. It was decided however, that a complete data base of at least the headnotes of these reports was desirable for information retrieval purposes and so the earlier

materials have all been added to the computer data base.

Information Retrieval

Present computer retrieval systems operating in the legal area work on the principle that information can be located in a data base through the selection by the user of words which are likely to occur in conjunction with the information being sought. The user by means of a computer terminal selects the words which he considers appropriate and the data base he wishes to search. He can choose individual words, combinations of words or phrases and include alternative words. Thus if a user wishes to locate all cases in the Dominion Law Reports over the last twenty-five years where the courts have been asked to vary a maintenance order because of a change in the circumstances of the husband, the user would select the D.L.R. data base and then select appropriate search words such as MAINTENANCE—ORDER—CHANGE—CIRCUMSTANCES—HUSBAND and ask the computer to locate all cases the headnotes of which contain all these words and arrange them in order so as to provide the most recent case first.

In this case the computer would respond that five headnotes contained all of these words and display the most recent for the user to study. If the search had been made of the statutes instead of a case report base then the full text of each selection of the statutes containing all words would have been shown. At this stage of development the user's experience with the system, his knowledge of the subject area, and his ability to choose appropriate words are important factors in the quality of the result he will get.

Obviously, basic to a retrieval system and a major determining factor in its utility are the data bases which it contains or to which it has access. While the preparation and printing of the federal statutes, regulations, Supreme Court and Federal Court Reports are performed on a Government computer, information retrieval is done on a computer outside the Government which is accessible by anyone. This decision was made for a number of reasons the most important of which are the Government's wish to make its legal materials as accessible as possible and its need to have access to other legal materials, such as statutes of provinces, private report series, etc. which are available in the same system.

Thus the Department of Justice pays the cost of storing the federal legal materials within the retrieving system and a charge for retrieving information from the system. At present this gives the Department access to the statutes of two provinces which are stored in the same system (others will shortly be added) and several series of privately-published case reports. Searches are carried out, using computer terminals located in the Department of Justice, either by lawyers themselves or by a small central research unit. Users come from all branches of the Department.

A second aspect of the sharing of information rather than the development of separate information systems is the cost implications, since there are con-

tinuing significant costs in the storage of information within the computer and its updating. There is obviously a balance which has to be struck between the cost of using (including communicating with) one central computer and the cost of storing information in several different local ones.

An interesting feature of this particular retrieval service is that most of its data bases are not owned by the company which owns the computer and operates the retrieval service but are owned by its users. These users are responsible for ensuring that their own data base is kept up to date, a process which in many instances can only be done effectively by them. Thus, for instance while it is a major task for the Department of Justice to keep the whole data base of federal regulations up to date it would be virtually impossible for anyone else to do this. The concept of the organization with the best ability to update a data base being responsible for that data base is an important one and should be carefully considered by any country contemplating a system of this kind.

Educating the profession

Despite the developments in Canada that have been described, and the involvement of governments and government lawyers, there has been a resistance by the private practitioner to become involved with information retrieval. Certainly extensive use is made of computers for accounting, time-keeping and document drafting but here, of course, the benefits are more tangible. However, as a result of the efforts of the Canadian Law Information Council (CLIC) (a non-profit organization which has representatives and receives funding from the federal and provincial governments, the law societies and bar associations etc.) the majority of law schools in Canada now offer courses on computerized legal information retrieval. To encourage this CLIC has provided these schools with computer terminals and the funds to permit searches to be carried out. In its first year of operation approximately two thousand students took the course and it is expected that a larger number will take part in the current year. When a group of this size, familiar with the retrieval system and knowledgeable as to its capability, begins to practice law this will surely have a significant impact on the profession's response.

A Commonwealth Legal Data Bank

General

Given the developments in technology and communications which have already been described, and the generally accepted benefits which can be achieved by learning from the mistakes or successes of others, it is not unrealistic to consider the possibility of developing a centralized bank of commonwealth legal materials or alternatively a network of computers interconnected in such a way that information could readily be exchanged. The factors which have to be considered in choosing any particular option have already been discussed under the heading of Information Retrieval but the basic equation involves communications costs for remote access on the one hand, and storage and operations costs for a local or

in-house computer on the other. The result could be in some cases the use of in-house equipment, in others the use of remote terminals connected to someone else's computer. This in itself does not present a problem provided that adequate planning takes place. Thus a country may decide to store its information in a computer system such as the one used by the Canadian Government, and either carry out searches itself using remote terminals (provided the communications cost can be justified) or alternatively request the host country to perform searches for it and provide the results by mail in printout form.

One thing that is highly desirable is that where a network of computers is involved employing more than one retrieval system the user should not have to learn a whole new set of procedures each time he wishes to have access to a data base which happens to be stored in a different computer. This problem can be resolved within current technology provided it is planned for at the outset.

Law Reform Materials

Over the past decade there has been a very significant increase in the amount of research taking place in the area of law reform together with a proliferation of commissions whose task is to investigate and make recommendations in this area. At the same time there has been a staggering increase in the amount of information being produced and published on the subject. However, if the results of such labours are to be used in the most efficient and effective way, it is essential that they be readily available not only to people in the jurisdiction in which they are produced but also to anyone who has an interest in the subject.

Clearly, it is most unfortunate to say the least if research which is being carried out by, for example, one Commonwealth country is repeated over and over again by agencies in other Commonwealth countries simply because they are unaware that the work is being done. Even if the final conclusions of the research are not applicable for cultural or other reasons, working papers and the reasons for such conclusions would certainly be invaluable.

At the present time there is no central reservoir of information on which a country can draw to determine what is being done or has recently been completed anywhere in the Commonwealth. Clearly, in the long-term this material could form part of the kind of integrated information network described above but in the short-term other solutions might be possible.

A relatively simple and inexpensive solution might be for each Commonwealth country to prepare at regular intervals a short description of law reform activities recently completed, currently under way or planned for the future. This could be stored in a computer which was already being used for legal information retrieval. It could be accessed directly by a country by means of a computer terminal in that country or by writing or telephoning to a government or agency which had access to the computer to

request that a particular search be carried out and results telephoned or mailed. The information could be updated at regular interval on the basis of instructions received from each of the organizations involved.

When a user discovered that another jurisdiction had written a report or carried out a study on a subject which was of interest to him he could then write to that jurisdiction and request that the appropriate material be forwarded to him. Alternatively, all such materials could be supplied from a central source although the administration of this would be more difficult.

Elements to be Determined for Law Reform Bank

Before it is possible to embark upon a project of this kind it would be necessary to address the following issues:

1. What type of information should be included in the bank? Should it be all materials whether published or not—full text or abstracts—etc.? If abstract who would prepare them?
2. Who would be responsible for the conversion of the data into machine-readable form both in terms of the cost and the work?
3. How frequently would the bank be updated and who would pay the cost of such updating?
4. Who would pay the storage cost of such information (which would of course increase in proportion to the volume of material stored)?
5. Would the host government or agency be prepared to find resources necessary to ensure that the whole operation moved forward satisfactorily, possibly underwrite certain computer software costs which might be involved, and provide the necessary resources to support the ongoing retrieval process?
6. How would the cost of searches including such things as personnel costs of the host government be met?
7. How rapidly would responses to search requests have to be provided?

Finally, it should be understood that the type of information that can be supplied will relate directly to the quality of the information which is included in the system. The adage "garbage in garbage out" is particularly applicable here.

Conclusion

There is no doubt whatsoever that the computer will play an increasing role in every aspect of our lives. In an area such as the law, where so much dependance is placed upon the written word and records of what has taken place in the past, the impact of the computer is certain to be profound. Law ministers may therefore wish to consider whether Commonwealth countries should work together to plan a system that could provide optimum benefits to all in the enhancement of our legal systems through the use of computer technology.

THE INTERNATIONAL ABDUCTION OF CHILDREN BY A PARENT OR GUARDIAN

Memorandum by the Commonwealth Secretariat and a
paper prepared by J. M. Eekelaar, LL.B., B.C.L., M.A.,
Fellow of Pembroke College, Oxford

Law Ministers will recall that at their Winnipeg Meeting, the problem of parental abduction of children from the parent with lawful custody was discussed. It was seen as one of immense social importance requiring concrete and early action to achieve greater co-operation in the enforcement of custody orders. Ministers emphasised that their concern was for the welfare of the children involved and felt that the existence of Commonwealth arrangements could reduce the number of unhappy incidents all too common in their jurisdictions.

2. The Commonwealth Secretariat invited Mr. J. M. Eekelaar, a Fellow of Pembroke College, Oxford to review the position and make recommendations for the consideration of Ministers at their Barbados Meeting, and his paper is attached.

3. In his paper Mr. Eekelaar reviews the legal principles which have developed within the Commonwealth in response to this problem. Although his review principally embraces decisions of Commonwealth courts, he makes reference to the legislative measures taken in some jurisdictions to redress injustice and minimise distress in this area. After a brief discussion of developments in the U.S.A., Mr. Eekelaar reviews attempts made at the international level to secure agreement between states on appropriate measures to be taken to enhance co-operation in these cases.

4. Mr. Eekelaar then examines and compares the two principal international instruments designed to deal with the problem of "parental kidnapping" (the European Convention adopted by the Council of Ministers last year, and the Preliminary Draft Convention adopted by the Special Commission of the Hague Conference on Private International Law during the same year).

5. Mr. Eekelaar concludes that in many respects The Hague document is superior to the European Convention, and offers substantial advantages to Commonwealth countries over the latter Convention. He urges that Commonwealth countries disposed to take steps to combat the problem of international child abduction should take an interest in the final drawing up of The Hague Convention when it is further considered at a Plenary Session of the Conference late in 1980. He suggests that, ultimately, Commonwealth countries should make that Convention the basis of an international system to protect children from the ordeals presently encountered.

6. Law Ministers may wish to discuss the matter in the light of Mr. Eekelaar's review and recommendations and decide how it should be taken further. If The Hague approach commends itself, in principle, to a number of Ministers, they might wish to consider how best to influence the deliberations of the Plenary Sessions later this year for the benefit of the Commonwealth and international community.

THE INTERNATIONAL ABDUCTION OF CHILDREN BY A PARENT OR GUARDIAN

By J. M. Eekelaar, LL.B., B.C.L., M.A., Fellow of Pembroke College, Oxford; Research Fellow, Centre for Socio-Legal Studies, Wolfson College, Oxford; Vice-President, The International Society on Family Law

Contents

INTRODUCTION	199	Abduction or retention after commencement of proceedings but before decision after full hearing	212
THE ENGLISH EXPERIENCE	199	Abduction where there has been no final decision nor had proceedings been commenced at the time of the abduction	212
THE COMMONWEALTH EXPERIENCE	203	Habitual residence	113
THE U.S. UNIFORM ACT	204	Time limits	213
REFLECTIONS ON THE COMMON LAW APPROACHES	205	Prevention	214
Where there is a foreign order	205	Alternate custody	214
Where proceedings in a foreign court are in progress at time of abduction or retention	206	THE EUROPEAN AND THE HAGUE CONVENTIONS COMPARED	214
Where there have been no proceedings in a foreign court at the time of abduction or retention	206	The duty of Central Authorities	214
Particular factors taken into account	207	The nationality principle	215
Inconvenience and expense to the innocent party	207	The requirement of a decision	215
Distance	207	Time limits	216
Prediction of decision of foreign court	207	Grounds for refusal	216
Availability of evidence	208	Reservations	218
Deterrence	208	THE HAGUE DOCUMENT: A COMMONWEALTH PROSPECTIVE	218
OBSERVATIONS ON UNITED STATES AND CANADIAN PROVISIONS	208	SUMMARY	219
Uniform Child Custody Jurisdiction Act	208	ANNEX A: Preliminary Draft Convention on the Civil Aspects of International Child Abduction (Hague Conference on Private International Law)	224
Extra-Provincial enforcement of Custody Orders Act	208	ANNEX B: European Convention on the Recognition and Enforcement of Decisions Concerning Custody and on Restoration of Custody of Children	228
THE LAW COMMISSIONS' WORKING PAPER	208		
INTERNATIONAL DEVELOPMENTS	209		
ASSESSMENT	210		
Abduction or retention contrary to existing order (other than interim)	210		

THE INTERNATIONAL ABDUCTION OF CHILDREN BY A PARENT OR GUARDIAN

By J. M. Eekelaar, LL.B., B.C.L., M.A., Fellow of Pembroke College, Oxford; Research Fellow, Centre for Socio-Legal Studies, Wolfson College, Oxford; Vice-President, The International Society on Family Law

Introduction

It might be useful, in formulating a "Commonwealth" view of the inter-jurisdictional problems raised by the abduction of children by a parent or guardian across international frontiers, first to examine the ways in which this difficulty has presented itself to Commonwealth courts and the kinds of solutions they, as reported in the law reports, have sought. The examination will in the first instance be a chronological one and it will be followed by an attempt to isolate and analyse specific sets of problems which have occurred. The next step will be to compare the stance generally adopted by Commonwealth courts and (where relevant) legislation with that taken in the United States and the approaches of those international agreements which are relevant. Finally, an attempt will be made to evaluate possible approaches to the problem.

The English experience

2.1 We commence our account with a review of the course which the English courts have taken. They must be seen in a context where the basic assumption about the ability of the English courts to exercise jurisdiction in child cases is that they may do this with respect to any child who is physically present within the country.¹

2.2 This is not the only assumption, although for the present purposes it is perhaps the most important because it determines the form that the question takes in England, and other Commonwealth countries which follow this rule² when the case of an abducted child comes before the court. The question that is asked is not whether the court *has* jurisdiction to deal with the case but whether the jurisdiction *should be exercised* in such a way that the court investigates the merits of the case in detail or whether it should make what is sometimes called a "peremptory" order for return of the child, i.e. without a full investigation of the competing claims.

2.3 So far as the modern problem is concerned³ the story, as reflected in the reported cases, commences with a case in 1940⁴ concerning an Englishwoman who married a Belgian and subsequently returned to England with the child of the marriage

which had been born in Belgium in 1928 and had lived there since its birth. It is not clear from the report how long after the child's birth this happened, but in 1937, without notifying the mother, the father commenced divorce proceedings in Belgium and the Belgian court made an *ex parte* interlocutory order that she return the child to the father. This was served on her in 1938, over a year after it was made and, indeed, in the following year she was fined in her absence by the Belgian court for failing to comply with it. The father then instituted wardship proceedings in England with the demand that the mother be ordered to return the child to him. Morton J. regarded himself as being bound by section 1 of the Guardianship of Infants Act 1925 (now the Guardianship of Minors Act 1971, s. 1) to make an assessment of the child's best interests and to base his decision on that assessment as the "first and paramount consideration, whether orders may have been made by the courts of any other country." He was prepared to pay some attention to the Belgian order, but there was no evidence that the Belgian court had taken into account the child's interests and in any case the child had now been in England for two years. He decided that the child should remain in England, at least "for the time being", and seemed to anticipate that the Belgian court would eventually go into all the merits itself when finally disposing of the divorce proceedings.

2.4 The case is of importance because it provided the basis of much discussion in the next significant case, *McKee v. McKee*⁵, a decision of the Privy Council on appeal from the Supreme Court of Canada. This case has exerted a very powerful influence over the approach of Commonwealth courts to this problem, but it also reflected a diversity of judicial opinion which was to recur in later cases. In itself it serves as a telling example of the inadequacies of the legal system when confronted by this problem, especially when those inadequacies are exploited by parents and lawyers to their (or their client's) advantage without much apparent concern for the interests of the child. It is perhaps not irrelevant that in *McKee* the father was himself a lawyer. The legal proceedings had started as far back as 1942 when, in divorce proceedings, the Superior Court of California gave custody to the father. In 1945 this was modified by transferring custody to the mother, with access to the father. The father's exploitation of the appeal system in California gave him two more years with the child. When he had lost his final appeal, he surreptitiously removed the child to Ontario where, in 1947, the mother sought the custody of the child in habeas corpus proceedings. After an eleven day hearing, Wells J. decided that the child's best interests

1 *Re P. (G.E.)*, [1965] Ch. 568.

2 New Zealand: Guardianship Act 1968, s. 5(1); Australia: Family Law Act 1975, s. 39(4)(c).

3 It is not entirely new. Conflicts between English and Scottish courts caused difficulty in the nineteenth century: see for example, *Stuart v. Moore* (1861) H.L.C. 440.

4 *In re B's Settlement, B. v. B.* [1940] Ch. 54, hereafter referred to as *re B* (1940).

5 [1951] A.C. 352, hereafter referred to as *McKee*.

would be served by leaving him in Ontario and the Ontario Court of Appeal, after a six day hearing, agreed (Robertson C. J. O. dissenting). The Supreme Court of Canada reversed this by a 4–3 majority. The judgment of Cartwright J., for the majority, is a significant statement of what was later to emerge, in the mid-sixties, as a dominant view. He said:

....no case to which we were referred is authority for the proposition....that where, as in the case at bar, an infant and both of his parents are citizens of a foreign state in which they all are domiciled and have always resided, when the question of such infant's custody had been fully litigated in the courts of such state, and those courts after full and careful hearings have reached a decision that one of the parties is to have custody, the other party upon such decision being given, by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the Court whose jurisdiction he himself invoked and in breach of his own agreement which had been ratified by such Court, becomes entitled as of right to have the whole question re-tried in our Courts and to have them reach a new and independent judgment as to what is best for the infant."⁶

Cartwright J. distinguished *Re B.* (1940) on the grounds that in that case the mother was a British national, *bona fide* resident in England and that, in any case, the Belgian order was only interlocutory.

2.5 The Judicial Committee of the Privy Council reversed the Supreme Court of Canada. Lord Simonds stated that "it is clear that it was the duty of Wells J. to determine the issue before him by reference to the familiar principles which are applicable in regard to the custody of infants...." (i.e. that the welfare of the child is paramount) and that failure to do this was to deprive the child of the protection to which he was entitled as a resident within the Crown's protection. "Once it is conceded that the court of Ontario has jurisdiction to entertain the question of custody....the consequence cannot be escaped that it must form an independent judgment on the question, though in so doing it will give proper weight to the foreign judgment." He conceded that a case might arise where it could be decided that it was in the child's best interests that the court "should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry" but this is described as a "drastic course".

2.6 It was not until 1965 that the problem is again reported, and this seems to have been the beginning of a rash of such cases, for in the mid-sixties the judges often commented on the growing frequency of the problem.⁷ In *Re Kernot, K. v. K.*⁸ an Englishman had married an Italian woman in Italy in 1961 and in the following year brought the child to England and instituted wardship proceedings. Plowman J. had

ordered the child to be returned to the mother in Italy and this had had the effect of bringing the parties together again for a short period. But in October 1963 they separated again and an agreement was incorporated into an Italian court order that the husband should have custody and the wife rights of access. Shortly afterwards the husband again brought the child to England. The mother followed and instituted wardship proceedings, seeking care and control and permission to take the child back to Italy. Buckley J. gave a number of reasons for holding that he should conduct a full investigation into the merits of the case. One was that it seemed that, as the father was a United Kingdom national, the Italian courts would apply English law to the case and Buckley J. thought he could do this rather better than an Italian court could. However, the argument which must have had overriding consideration was that the mother had invoked the court's paternal jurisdiction and this was one which "one would think, apart from authority, the court ought to be very slow to leave to be exercised by any other tribunal." This develops the logic of the *McKee* judgment (to which the judge referred) that the court cannot escape its duty to form an independent judgment about the child's interests. Deference to a foreign decision is seen as a *delegation* of that duty which cannot be allowed except in the most drastic circumstances.⁹

2.7 The following year saw the first attempt of an English court to derogate from the *McKee* principle.¹⁰ Like *McKee*, it was a case where the father was an American attorney. He married a Scottish lady in the United States and five years after their second child was born they separated under an agreement according to which she was granted custody of the children but agreed not to remove them from a named district in New York without the father's consent. In subsequent variation proceedings a New York court added the rider that this restriction should not include vacation trips. Then the mother took the children to England, apparently with a view to persuading her second husband to follow her there, but she did not inform the father. He obtained a New York order for the return of the children which, on the mother's failure to comply, was converted into an order granting him exclusive custody. The mother now instituted wardship proceedings in England to protect her position and the father countered by seeking an order for the immediate return of the children. Cross J. said that common-sense showed that

"...these children are American children and their home has always been in the United States. The action of their mother in bringing them to this country...without their father's consent or any order of the American court, in the hope that she might be able to set up home here and in effect cut them off from their father entirely was in my mind most reprehensible....Now for the court to go

6 [1950] 3 D.L.R. 577 at 582–3.

7 See *In re H. (infants)*, [1966] 1 W.L.R. 381, 389; *re E. (D) (An Infant)*, [1967] Ch. 287, 289; *in re T (Infants)*, [1968] Ch. 704, 714; *Re A (infants)*, [1970] 3 All E.R. 184, 186.

8 [1965] Ch. 217, hereafter referred to as *Kernot* (1965).

9 Buckley J. seemed to contemplate this possibility only if the child were physically outside the jurisdiction and there was no, or only very tenuous connection, between England and the child and its parents.

10 *In re H. (infants)* [1966] 1 W.L.R. 381 hereafter referred to as *In re H* (1966).

into the merits of this case will inevitably result in a great advantage to the mother and a great disadvantage to the father.¹¹

He concluded by saying:

“In infancy cases the welfare of the infant is, of course, the chief consideration; but it is far from being the only consideration. When, in what I may call for short a kidnapping case, the judge has to decide whether to send the child back whence he came or allow the case to be fought out to the end over here, he has to weigh various considerations which may to some extent conflict with one another. On one side there is the public policy aspect, the question of comity and forum conveniens. Again, on the same side, there is the question of the injustice which may be done to the wronged parent if the court delays matters and allows the kidnapped child to take root in this country. On the other side, the court has to be satisfied, before it send the children back, that the children will come to no harm.”¹²

Cross J. distinguished *re B.* (1940) on the ground that the Belgian hearing had not been a full one; he distinguished *McKee* by saying that the reason why the Supreme Court had erred in that case was because it held that the trial judge had no right at all to go into the merits. It was a question of discretion and, if the trial judge chose to make the investigation, this could not be said to have been wrong. Finally, he found *Kernot* (1965) to be different because the father there had been a United Kingdom national, the Italian court would have applied English law and in any case the Italian court had given the father custody. None of these points of difference seems convincing, however, for, as has been pointed out, those earlier cases had rested primarily on a conception of the near non-delegable duty of the English court when exercising its paternal jurisdiction to place the child's interests as the paramount consideration and to be satisfied on that score. He ordered the children to be returned to New York. On the appeal from Cross J., Willmer L. J. put the two sides of the argument very clearly—the “common sense” view that the children's future should be decided in the country “where they belong” and the view that the court should not abdicate its responsibility towards its wards. However, he did not think that that responsibility always required a full investigation, and if *McKee* had decided that, he would not follow it. A Privy Council decision is not binding on English courts. But he accepted Cross J.'s reasons for distinguishing it.

2.8 Cross J. restated his “new” principle, which I will refer to as the “Cross” principle, in the following form in *re E(D) (An Infant)*.¹³

“... a judge should, as I see it, pay regard to the orders of the proper foreign court unless he is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child.”

This statement marked what turned out to be the high water mark of the reaction against *McKee*. Even in the case in which it was made, which was a flagrant case of abduction by a grandfather (assisted by a

lawyer) and deception of a New Mexico judge whom Cross J. recognised as being the “one person in the world in a position to make (the decision) with full knowledge of all the relevant facts”, he held that nevertheless the children should not be returned. But this was a very unusual case in involving the death of the mother and the judge was satisfied that to return the children would be disastrous for them. In *re T. (Infants)*¹⁴ the “Cross” principle was extended. An Englishwoman had gone to Canada and had met and married a Canadian there. While the husband was on a short holiday, she returned to England with the two children. The husband took six months leave and came over to England where, to protect her position, the wife instituted wardship proceedings. The husband attempted to take the children back to Canada with him but was stopped at the airport by members of the wife's family. Pennycuik J., however, made an order giving him leave to take the children back with him and the mother appealed on the ground that he had failed to consider whether it was in their best interests to be with the husband or the wife. It will be observed that, in this case, there had been no proceedings in Canada but the Court of Appeal did not consider this a significant difference from the earlier cases. Both Harman and Russell L. JJ. seemed to think that the court had in fact heard all the evidence that was available, but it is clear that they did not regard the function of the proceedings as being to discover which parent it was better for the children to live with. The point of a case of this kind, said Harman L. J., “is that these children belong in Canada and, other things being equal, there they should go.” Thus the position at this stage seemed to be that, even if there were no order of the foreign court, if the children properly “belonged” to a foreign jurisdiction, the English courts should order their return there unless this would harm them. It should be added, however, that there was a strong parallel motive in that case and this was that the court considered that it was only if the children remained in Canada that they could maintain a relationship with their father and this assumption about their interests strongly influenced the decision.¹⁵

2.9 The new principle received further support in *re G. (an infant)*,¹⁶ even though this was not a case of abduction at all. The parties had married and lived in England but the husband retained his Scottish domicile and he returned to Scotland after the marriage broke up. There he instituted divorce proceedings and the Scottish court granted him custody, although this may have been done more because the mother was ignoring these proceedings than out of consideration of the child's welfare. The father instituted proceedings seeking an English order in the same terms as the Scottish. Buckley J. showed his deference to *McKee* and *re B.* (1940) by saying that they showed that the foreign order was not binding and that the child's welfare was paramount. Nevertheless, he

11 [1966] 1 W.L.R. 381, 389.

12 *Ibid.*, at p. 393.

13 [1967] Ch. 287, 289, hereafter referred to as *re E.(D)* (1967).

14 [1968] Ch. 704, hereafter referred to as *re T.* (1968).

15 See para. 5.6 below.

16 [1969] 2 All E.R. 1135, hereafter referred to as *re G.* (1969).

pointed out that, because Scotland was the country of the parties' matrimonial domicile, the Scottish and not the English courts had divorce jurisdiction and the English court should defer to the divorce court. "I think," he said, "that, as between two courts of co-ordinate jurisdiction, one in this country and the other in Scotland, *prima facie* the right course is for the matter to be investigated in the Scottish court which had seisin of the matter before these proceedings began and which has made the order I have mentioned." He emphasised that he did not have sufficient evidence to make a final determination of the "merits" relating to the child's welfare, but he did feel satisfied that the child would not suffer "any serious emotional or physical disadvantages" by being left with the father.

2.10 A qualification to the emerging principle was introduced in *Re A (infants)*.¹⁷ Here the parents, both English, had gone to Jersey soon after their marriage, and two children had been born there. When marital difficulties arose, the father took the children to stay with his parents in England. It had been agreed between the parents that he should do this, but also that he should return them to Jersey after a short time. This the husband did not do and the wife tried, unsuccessfully, to take them back with the help of "three detectives". Wardship proceedings were instituted by both parties, the mother arguing that this was a case where a peremptory order for the return of the children should be made. The Court of Appeal disagreed. This was not a "kidnapping" case, said Harman L. J., since there had been no removal of the children by stealth and it was "not as if the father has, so to speak, by fraud induced the mother to agree that they should come over here and had then suddenly sprung on her the idea that they would not go back." He appeared to accept the new principle for "genuine" kidnapping cases, but for this situation he fell back on the principle that the children fell within the protective jurisdiction of the court. It may be observed at this stage that a refusal to consider this type of case as falling within the same category of cases as those already considered would exclude from the ambit of the abduction problem all those cases where a child visits another jurisdiction under terms of an access order and the visited parent refuses to return the child. This, as the United States experience has shown, is a very significant part of the problem.

2.11 In *re TA (infants)*¹⁸ Rees J. re-affirmed the new principle as being that where children, ordinarily resident abroad, had been removed to England by force, stealth or fraud, the court would order their return unless positively satisfied that to do so would cause real danger to their mental, physical or moral well-being. Yet one may wonder at its application in the case. The parties were Maltese and, after fifteen years of marriage there, they separated and a Maltese court awarded custody of the four girls to the father. The mother took them to England and the hearing of the wardship proceedings took place only four

months after their arrival. Yet the judge decided that they should stay in England in the care and control of the mother. The judge commented adversely on the husband's moral behaviour and observed that the children were extremely hostile towards him, having "settled happily at school and life in England". No attention was paid, as it had been in *re T.* (1968), to the question of maintaining contact with the father and, more significantly, the Maltese order was ignored. The English court appeared fairly clearly to be substituting its own view of the husband's behaviour and the children's welfare for that of the Maltese court.

2.12 *Re L (minors) (wardship: jurisdiction)*¹⁹ saw a decisive return to the *McKee* approach in a judgment delivered by Buckley L. J. who, nine years earlier, had followed it in *Kernot*. An Englishwoman who had married a German in Germany and lived there with him had become unhappy with her marriage and, without informing her husband, brought the two children to England and settled them in schools here where she intended to stay. Her husband traced her and, a year after their arrival, Cumming-Bruce J. directed their return to Germany. A stay of execution of this judgment was refused because the husband undertook to return the children to England should the order be reversed on appeal. The appeal was dismissed but in the course of his judgment Buckley L. J. criticised the reasoning of Cumming-Bruce J. That judge had said that on balance it would have been better for the children to be in England but that, as it was a kidnapping case, different considerations applied and the children should be returned to their "natural surroundings" unless this would be harmful to them, which, in this case, it would not. Buckley L. J. thought that this reasoning was inconsistent with the House of Lords decision in 1970 of *J. v. C.*²⁰ which asserted in general terms the paramountcy of the welfare principle in the exercise of the wardship jurisdiction even if the contest over the child was between a parent and someone who was a stranger in blood to the child. Even if there had been a foreign order "an English court is nonetheless bound in duty to protect the child's welfare without being bound to enforce the foreign order or to follow it."²¹ This is reminiscent of the judge's unwillingness, expressed in *Kernot*, to rely upon a foreign court's assessment of the child's welfare because this would be an improper delegation of the English court's duty. Nevertheless, he did say that there might be cases which, if brought to the court expeditiously on the child's arrival in England, should result in the child's immediate return because a judge might decide that the removal of the child from its surroundings was so disruptive that a prolongation of its stay in England, even to enable a full investigation to be made, would be contrary to its interests. This, he thought, was the true basis of *In re H.* (1966) and was a sustainable ground for the decision of Cumming-Bruce J. There is, of course, a decisive shift from the "Cross" principle under which children are returned to the

17 [1970] 3 All E.R. 184, hereafter referred to as *Re A* (1970).

18 (1972) 116 Sol. Jo. 78, hereafter referred to as *re TA* (1972).

19 [1974] 1 All E.R. 913, hereafter referred to as *re L.* (1974).

20 [1970] A.C. 668.

21 [1974] 1 All E.R. 913, 925.

foreign country either (i) because that would comply with the order of the foreign court or (ii) because it is more appropriate *that the issue be determined* in that forum.

2.13 In this state of the authorities it is not surprising that the position taken in the mid-seventies was uncertain. In *Re M-R (a minor)*²² the husband had taken the children to England without the wife's agreement but in an attempt to induce her to follow him there. She then obtained an *ex parte* interim custody order in her favour. Lord Salmon is reported as saying that a court could make a "peremptory" order for the return of the child "if it considered it to be in the best interests of the child" (which reflects Buckley L. J.'s exposition in *Re L*) but concluding that he could make the peremptory order if satisfied that this would cause no harm to the child (the "Cross" view). In *re K (Infants)*²³ the trial judge had made a "peremptory" order for the return of four children to Canada, fifteen months after her arrival in England. The court assumed she had kept them in England without her husband's consent. He subsequently instituted divorce proceedings in Canada. The Court of Appeal allowed the mother's appeal. Stamp L. J. said that a "peremptory" order might often be appropriate and he appeared to approve the "Cross" principle, although he thought the trial judge had been wrong to order the return of these children because there was evidence that the return was "fraught with dangers" for them. Ormrod L. J. went further and, echoing Buckley L. J. in *re L*, said that the "Cross" principle might require reconsideration in the light of *J. v. C*.

2.14 Eventually Ormrod L. J. had the opportunity to review the whole situation. This was in *Re C. (minors) (wardship; jurisdiction)*.²⁴ As in *re E(D)* (1967) the case involved an abduction (this time by the father) in breach of an interim custody order of a California court and while that court was in the process of investigating the merits. Within a month of their arrival in England there was a wardship hearing and the trial judge, having heard much evidence, decided that the children should remain in England. The appeal, which was heard a week later, was dismissed. Ormrod L. J. described Buckley L. J.'s judgment in *Re L* (1974) as being the *locus classicus* as to how English courts should approach the problem. He expressly rejected the trial judge's interpretation of that judgment, which was that he should make a peremptory order for return of the children unless satisfied that there was some obvious physical or moral danger to the children in that course. This was a "serious" misdirection. The proper approach was the one applicable to all decisions concerning child custody—that of the children's best interests. He therefore examined all the circumstances, one of which was evidence that it was "highly likely" that the California court would have in any case granted custody to the father because California law preferred a parent in a dispute between a parent and

stranger in blood unless an award to the parent would be "detrimental" to the child. Relying, *inter alia*, on that information and the view of the divorce court welfare officer, who had paid a brief visit to the father and his new wife, he concluded that the children's interests would be better served by them staying in England than by returning them to California where the court was likely, at the end of the day, to award them to the father, with the result that they would come back to England again.

The Commonwealth experience

3.1 The experience of Commonwealth countries has been of a similar conflict of judicial response. In New Zealand, for example, in *Re B. (Infants)*²⁵ the Court of Appeal held that it was required by the terms of the Guardianship Act 1968, section 23(1), to resolve custody disputes in accordance with the welfare principle and that it would, therefore, have to be satisfied on the merits of the case relating to the child's welfare, ignoring possible questions of international comity. In that case the children had been removed from Australia to New Zealand but at a time when there was no Australian order in force. Although an interim order was later made in Australia, no question of recognising any final order arose. But in *C. v. C.*²⁶ the father had taken the child to New Zealand in breach of a Canadian order made after full investigation. Speight J. followed the decision in *Re B* (1971: N.Z.) and decided, on the merits, that the mother should have custody. But he was nevertheless prepared to derive "substantial assistance" from the decision of the Canadian court. He commented on the extreme hardship which had been caused to the mother who had to follow the absconding father to New Zealand and to undertake proceedings there, and to mitigate this he ordered the father to pay her travel expenses. In *E. v. F.*²⁷ the child was in New Zealand with his father under access arrangements contained in an English custody order. While there he apparently decided he preferred to stay in New Zealand, despite the requirement that he return to England. The father sought the guidance of the court. Mahon J. expressed misgivings about a policy which required him to investigate the merits of the case when it was proposed to depart from the arrangements in a foreign custody order, but did so nevertheless. Yet the arrangements had been made when the child was a good deal younger and it is quite possible that an English court would have deferred to his strong preference to remain in New Zealand, in which case it would have been extravagant to have transferred the hearing, and the child, to England for the matter to be determined.

25 [1971] N.Z.L.R. 143, hereafter referred to as *Re B* (1971: N.Z.); see D. J. S. Laing, "The Status of Foreign Custody Orders in New Zealand", 7 V.U.W.L.R. 351..

26 [1973] 1 N.Z.L.R. 129, hereafter referred to as *C. v. C.* (1973: N.Z.).

27 [1974] 2 N.Z.L.R. 435, hereafter referred to as *E. v. F.* (1974: N.Z.).

22 (1975) 5 Family Law 55.

23 (1976) 6 Family Law 150.

24 [1978] 2 All E.R. 230, hereafter referred to as *re C* (1978).

3.2 In Australia, the Family Law Act 1975 made provision for the registration of foreign custody orders. It is enacted that where an "overseas custody order", which is an order made in a "prescribed overseas country" is registered in a court under the Act, the Australian court shall not, "where it becomes aware of the order" exercise jurisdiction in proceedings for custody of or access to the child unless *either* every party concerned has consented to this *or* it is satisfied that there are substantial grounds for believing that the welfare of the child will be adversely affected if the court does not exercise jurisdiction. Furthermore, even if it does exercise jurisdiction, it shall not make any custody or access order unless satisfied that either the child's welfare will be adversely affected if the order is not made or that there has been a change of circumstances of the child justifying the order.²⁸ The New Zealand Guardianship Amendment Act 1979 enacts corresponding provisions in New Zealand so that, effectively, there now exist arrangements for the reciprocal recognition and enforcement of custody orders between Australia and New Zealand. Of course such provisions are unlikely to be invoked in cases of secret abduction, for there the difficulty is that one of the parents has acted in irregular fashion. Nevertheless, in *In the Marriage of P. and B.*²⁹ McGovern J. held that the Australian provisions could provide an analogy as to how a court should approach a case where a child is subject to an *unregistered* overseas order. In such a case, it was held, the court should not interfere unless by consent of the parties or on satisfaction that the child's welfare required this. Instead, the court should act in the interests of comity and, provided it was satisfied that no harm would come to the child by it, the child should be returned if the foreign court was the forum *conveniens*. Although another judge has taken a different view,³⁰ the Full Court in an unreported case³¹ supports Goldstein J.'s approach.

3.3 In Canada, the decision in *McKee* was binding on all courts. Commenting on the course of decisions since that case, Christine Davies has observed that more recently the courts have tended to stress "that the welfare of the child is better served if he is to be returned to his place of ordinary residence and custody determined there."³² But if the child has developed roots in the province in which the case is brought or if the court is fearful for its welfare if the child is returned, the court will investigate the merits. Nevertheless differences of judicial opinion could still be found, as in *Oakes v. Oakes*³³ and *Re Stalder and Wood*.³⁴ The situation is complicated by the

possibility that custody orders may be made both under provincial child welfare law provisions or under the federal Divorce Act. An order under the latter jurisdiction has effect throughout Canada and supersedes a provincial order. This means that the weight to be given to an extra-provincial order may depend on the nature of both the existing and the previous proceedings. For example, if the present proceedings are within the divorce jurisdiction, a court may be less hesitant to make an order if the competing order was a provincial one, and if the present proceedings are under the provincial jurisdiction the court may be powerless to make an order in the face of an existing order under the divorce jurisdiction, although the point is controversial.³⁵

3.4 These factors made the enactment of clarifying legislation urgent in Canada and this has been provided in the form of the Extra-Provincial Enforcement of Custody Orders Act drawn up by the Uniform Law Conference in 1974 and enacted in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Prince Edward Island and Saskatchewan (Nova Scotia adopting a variant of it). The statute does not apply to orders made under the divorce jurisdiction. Its scope is limited to cases where there is an existing custody order in effect and its principle is that a local court should give effect to this order if made in any foreign "province, state or country" as if the court itself had made the order unless satisfied that the child did not, *at the time when the order was made*, "have a real and substantial connection" with the province, state or country where the order was made. But the court may depart from that order, and vary it according to its own judgment, if it is satisfied that at the time the application before it the child no longer has the "real and substantial connection" with the foreign province, state or country and now has such connection with the jurisdiction of the forum. There is an emergency jurisdiction allowing the court to disregard the rules set out above if it is satisfied that the child would suffer "serious harm" if an existing custody order was complied with.

The U.S. Uniform Act

4.1 The final approach to be summarised is that of the United States Uniform Child Custody Jurisdiction Act. Reference to this is justified by the fact that it was the first and most significant attempt to rationalise an approach to this problem within the common law legal systems. The Act has been written about extensively.³⁶ Its provisions have been adopted in 26 states. It is necessary therefore only to sketch out its main features. The Act is confined to relationships

28 Family Law Act 1975, s. 68.

29 (1978) A.L.M.P. 3491 31 F.L.R.; (1978) F.C.C. 77, 315.

30 *In the Marriage of Kress*, (1976-7) 13 A.L.R. 309, where Goldstein J. took the view that section 64(1)(a) of the Act, which establishes the welfare principle as paramount in custody proceedings, required a full investigation.

31 *In the Marriage of Khamis*, 1978: discussed in Attachment A to the Australian Reply to the Hague Questionnaire.

32 Christine Davies, "Interprovincial Custody", 56 Can. B.R. 17, 23 (1978).

33 (1975) 56 D.L.R. (3d) 737 (App. Div. N.B.).

34 (1975) 54 D.L.R. (3d) 157 (C.A., Man.).

35 See Christine Davies, *loc. cit.*

36 See Brigitte M. Bodenheimer, "Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modification", 65 Cal. L.R. 978 (1977); "The International Kidnapping of Children: the United States Approach", 9 Family Law Quarterly 83 (1977); and literature cited therein. Richard Stern, "Stemming the Proliferation of Parental Kidnapping: New York's Adoption of the UCCJA" 45 Brooklyn L.R. 89.

between the states of the United States, although it may be applied by analogy in an international case.³⁷ Unlike the Canadian Act, it is not confined to situations where there is an out-of-state decree. This is because it approaches the problem in the classic manner of the conflict of laws by attempting to create uniform jurisdictional rules. Thus the forum may only exercise jurisdiction if these rules are complied with. The rules are complex and make use of two key concepts. One is the concept of the "home state". This is the state in which *the child* "immediately preceding the time involved lived with his parents, a parent, or a person acting as a parent, for at least six months" (or since birth if the child is under six months). Thus a court may exercise jurisdiction if it is a court of a state which is the "home state" of the child at the time the proceedings start or had been the home state within six months of that time if the child is absent "because of his removal or retention by a person claiming his custody or for other reasons" provided that a parent or person acting as such continues to live in the home state. The other key concept is that of a "significant connection" with the court's state, although this term, unlike "home state", is undefined. This provides an alternative ground for exercising jurisdiction and the court may do so if it thinks it is in the best interests of the child to exercise jurisdiction because "(i) the child and his parents, or the child and at least one contestant, have a significant connection with this state" and (ii) "there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships." Subject to two provisos set out below, the upshot of this is that, if some other state and not that of the forum is the child's home state and no significant connection between the child and a contestant and the forum's state can be found which enables substantial evidence to be brought before the forum, the court should decline to hear the case. This is so whether or not there exists any out-of-state order. The two provisos allow the court to exercise jurisdiction despite failure to satisfy the above if (i) the child is physically present and "it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent" or it appears that no other state would have jurisdiction under substantially similar jurisdictional rules or another state has declined to exercise jurisdiction on the ground that the present forum is most convenient. But even where the court may have jurisdiction in terms of the rules, two circumstances are spelt out in which the court may nevertheless decline jurisdiction. One is where the court finds that it is not the convenient forum and another court is more appropriate; the other is where the petitioner for an initial decree has wrongfully taken the child out of another state "or has engaged in similar reprehensible conduct".³⁸ These are, of course, discretionary provisions and the Act directs the court's attention to the welfare of the

child and the desirability of communicating with the out-of-state court.³⁹

4.2 The Act has explicit provisions relating to the recognition of an out-of-state custody order. This *shall* be recognised if the other court has exercised jurisdiction under statutory provisions which substantially accord with those of the Act or in factual circumstances meeting these standards. The home court may modify the order only if the other court no longer has jurisdiction in accordance with the standards of the Act and if it itself now has jurisdiction. But if it does exercise jurisdiction under these terms, it must give due consideration to the transcript and other records of the previous proceedings.

Reflections on the common law approaches

5.1 It is of course difficult to construct a coherent set of principles from cases from such diverse jurisdictions and across forty years. Nevertheless, the outlines of some kind of pattern can perhaps be discerned, in retrospect. I will divide the cases very broadly between those where a foreign order exists when the case comes to hearing and where there is no such order, although more refined sub-divisions will have to be made.

Where there is a foreign order

5.2 These cases include those where an order existed at the time of the abduction from the foreign jurisdiction or the improper retention of the child in the present jurisdiction and those where an order has been made in the foreign court *after* the abduction or retention. In both cases the essential question is the same: should the decision of the foreign court be reopened? The abducting or retaining party will argue that the abduction or retention has itself changed the circumstance and (perhaps) that other new factors have arisen. To this, the "Cross" principle replies that, unless these new events raise a strong *prima facie* case that compliance with the foreign order will harm the child, the court should follow the foreign order. In *McKee* (where the foreign order had been made before the abduction), Lord Simonds said that the court must form its "independent judgment" on the whole question of the child's welfare, but it could give "proper" weight to the foreign judgment. The tension between this approach and the "Cross" principle depends on the weight which it is proper to attach to the foreign judgment. It can be resolved by holding that the "proper" weight is to regard it as providing compelling evidence as to what is best for the child, to be departed from only in exceptional circumstances. This, it will be remembered, was the way in which Speight J. in *C. v. C.* (1973: N.Z.)

37 See *Shalit v. Shalit*, (1978) 8 Family Law 2.

38 This also applies if a petitioner seeks to have an earlier decree modified and he or she has wrongfully taken or retained the child or violated any provision of the existing order.

39 Perhaps strangely, the interest of the child is not referred to in the provision allowing a court to decline jurisdiction on an application for an initial decree for reprehensible conduct: the court may decline "if this is just and proper under the circumstances". The child's interests are referred to in the case of an application for a modification decree by a person guilty of impropriety and in connection with the *forum non conveniens* rule.

moved away from the *McKee*-based approach of *Re B.* (1971: N.Z.) and in the direction of the "Cross" principle.

5.3 It is possible that this approach could be described as truly reflecting the judicial practice examined above were it not for one major factor. This is that, in some cases, there must have been a strong suspicion that the foreign order itself was not based upon the welfare principle. The order of the Maltese court in *re TA* (1972) on the face of it, seems to be based more on notions of patriarchal right than children's welfare. In *In the Marriage of Khamis* [see note 31], Watson J. in the Family Court of Australia pointed out that an order which was not based on the child's welfare would have little significance in Australia. In *C. v. C.* (1973: N.Z.) one reason why Speight J. was prepared to place great weight on the Canadian decision was because he knew the Canadian courts followed the welfare principle. This, it is suggested, may be a central problem in establishing some kind of principle similar to the "Cross" principle at an international level. While it may be reasonable to assume that states or provinces within a federal system will apply broadly similar notions of the welfare principle in custody determinations, and therefore to require state or provincial courts to accord great value to such determinations as indicators of the child's interests, this may not be so between foreign countries.

5.4 Where the foreign order is interim only, it cannot be expected to be based on a full assessment of the child's interests. It will normally be an attempt to "hold" the situation pending inquiry. Sometimes, however, it seems that the order represents a pre-conceived idea of where a child should be, as in *re B* (1940) where it is hard to see any obvious *prima facie* reason why the interim order should have been in favour of the father. On other occasions, the order appears to have been made to punish the abducting parent, as in *re H.* (1966). In *re Kernot* (1965) there had been no judicial assessment of the child's interests at all; the order simply incorporated the parties agreement. In such cases, it is easy to understand judicial reluctance to "abdicate" their function of determining those interests in favour of the foreign judgment.⁴⁰

Where proceedings in a foreign court are in process at time of abduction or retention

5.5 This category will include cases where a child is removed (or retained) while proceedings are in train but no order has yet been made, but also includes cases where although there was no order (even of an interim nature) when the abduction or retention occurred, such an order may have subsequently been obtained in the foreign court. In these situations there is a strong inclination to order the child to be returned to the jurisdiction of the court which is already seized of the matter. This happened in *re G.*

(1969) where Buckley J., who in other cases followed the *McKee* approach, ordered the child into the jurisdiction (Scotland) in which divorce proceedings had (properly) been instituted. This might be thought a particularly strong example because there had been no abduction of the child at all; the father simply returned to Scotland when his marriage broke up; the child had never been there. Yet the Scottish court was considered the *forum conveniens* and the child delivered into its jurisdiction in the absence of evidence that this would cause it serious harm. It seems possible that the Court of Appeal might have acted in a similar manner in *Re K (Infants)*,⁴¹ where Canadian divorce proceedings had been instituted some time after the children had been brought to England, if the Court had not been convinced that it would have been dangerous to return the children. It seems that similar considerations underlay the decisions of Cross J. in *In re H.* (1966). There had been a good deal of litigation concerning access arrangements in New York prior to the removal of the children and it could be said that those matters were not completely settled there. Indeed, there was much conflicting evidence from American psychiatrists which remained to be assessed by the New York court. It is also clear that, were he not convinced that the circumstances were exceptional, Cross J. would have returned the children to New Mexico in *re E(D)* (1967) as the matter had been put under way in the New Mexico court and should be completed there. However, it must be said that *Re C.* (1978) is contrary to this practice, but this was largely because the court was convinced that the California court would, when it had finished its deliberations on the merits, have decided to order the children to return to England.

Where there have been no proceedings in a foreign court at the time of the abduction or retention

5.6 These cases have proved to have been very difficult and it seems that the dominant reaction has been to approach the solution through a practical assessment in each case as to what was best to do for the children. In *re T.* (1968) it will be recalled, the Court of Appeal took the view that there was no essential difference between cases where a child was removed in breach of an order of a foreign court and where he was removed surreptitiously even where there had been no such proceedings at that time. If the children "belonged" to a foreign country, that is where they should go if issues concerning their custody arose for determination. However, certain other factors were present in that case which should qualify this approach. In fact it seems that the court did hear extensive evidence, perhaps all that was available, and the court formed a strong view, clearly based on its assessment of the children's welfare, that they should be put in a position where they could retain their ties with their father. This could only be achieved by their return to Canada. In *re A* (1970) the court refused to order the return of the children to Jersey, where the father had failed to return them despite his original agreement to do so. It is true that

⁴⁰ See the observations of MacDonald J. in *Walker v. Walker*, 1974 3 W.W.R. 48 (S.C., B.C.), where he came to an independent judgment differing from a California order because the order had not been preceded by a full hearing; see also Watson J. in *In the Marriage of Khamis* (1978) (above note 31).

⁴¹ (1976) 6 Family Law 150.

Harman L. J. thought that this was not a case of acting "by stealth", but it remains that the father did "change his mind". It might be wondered whether the court would have adopted the same attitude if the children had visited him under access arrangements embodied in a Jersey court order and he had acted in breach of it even though he had not intended to do so when the children came to him. *Re L* (1974) was a strong affirmation of the court's duty to decide the case on the merits and it, too, was a case where the children had been removed from abroad before any proceedings were instituted there. The decision that the children should go back to Germany was based on an assessment of their welfare. So also the decision in *Re B*. (1971:N.Z.) that the court should decide the merits was made in a context where the children had been removed from the foreign country (Australia) before proceedings had been instituted there. The mother had simply returned to New Zealand (her native country) with the children, contending her married life had become intolerable, and she and the children had been there for a year when the hearing took place. Similarly, in *Norman v. Norman* (No. 1),⁴² where a father had taken the children from their school in Switzerland and brought them out to Australia in an effort to persuade his wife to follow him there from England, Smithers J. decided, both on the basis of the children's interests and on forum conveniens, that the issue should be decided in Australia even though the wife had subsequently obtained an ex parte order in England for their return there. Among other things, he took into account the chances of a family reconciliation if the wife were to come out to Australia.

Of course some cases seem to have a different emphasis,⁴³ but it can perhaps be suggested that the courts seem to be more ready to examine the merits if the abduction or retention did not violate an existing order nor result from an attempt to evade proceedings already instituted.

Particular factors taken into account

5.7 Where a court is investigating the merits of the issue, all factors relevant to that issue may of course be examined. But there are special factors taken into account which are relevant to international abduction cases. Some of these are considered here:

Inconvenience and expense to the innocent party

5.8 There can be little doubt that this consideration has weighed heavily with courts which have wished to restore abducted children to their country of origin. A striking illustration of the hardships that can be caused to that parent is found in *Re E(D)* (1967) where the mother endured great hardships in following and secretly observing her children. Similarly, in *In re T* (1968) the Canadian father had been put to great difficulty (e.g. having to obtain six months leave) in coming to England and contesting proceedings there, and, as has been observed,

Speight J. was greatly concerned about the hardship caused to the Canadian mother in *C. v. C.* (1973:N.Z.). These difficulties can perhaps in some cases partly be met by ordering the abductor to recompense the innocent party (as in *C. v. C.*).⁴⁴ But in *In re H.* (1966) Cross J. was greatly concerned about a more fundamental disadvantage suffered by the innocent party: viz. the fact that his or her chances of being awarded diminish the longer the child is away from them and develops roots in its new environment. This prejudice can, of course, be avoided only by an order for the return of the child.

Distance

5.9 In his article on the New Zealand approach, D. J. S. Laing finds one ground for supporting that approach as against that of Cross J. the fact that, owing to its geographical location, the problem does not arise so frequently in that country. This factor could also influence the readiness of a court to order the return of the child. This in itself could be a very expensive undertaking, perhaps even beyond the means of the parties. It could also be very disruptive to the child, a factor which may have influenced the decision of Smithers J. to hear the merits in Australia in *Norman v. Norman* (1968: Aus). It is not a point which seems to have concerned the English courts very much, but in *Re C.* (1978), which marked a return to the *McKee* approach, it is probable that the factor of distance, coupled with the impression formed by the court that the California court would simply return the children to England, again played an important part in determining the court to hear the merits in England. The practical consequences of such travelling and disruption might be thought much more severe than if the competing jurisdictions were, for example, England and Scotland, and it is possible that this might be an unconscious factor distinguishing the outcome of a case like *Re C.* (1978) and that in a case like *re G.* (1969).

Prediction of decision of foreign court

5.10 We have seen that already in *re Kernot*, (1965) the English court took it upon itself to decide an issue because, among other reasons, it thought that the Italian court would simply apply English law. Most strikingly, in *Re C.* (1978) a strong factor in determining the English court to decide the merits was its understanding that the California court was very likely to make an order that the children should be with their father, who was in England. Furthermore, although this point did not seem to concern the judge in *E. v. F.* (1974: N.Z.), the chance that an English court might have returned the child to New Zealand would seem to have provided a further reason for the issue being determined in New Zealand. These are, it seems, legitimate considerations, for indeed it would be futile to transfer the parties, witnesses and children to a jurisdiction which might itself decline jurisdiction or simply transfer the children back. This argues very strongly for some degree of co-operation between courts so that it can be discovered whether

42 (1968) 12 F.L.R. 29, hereafter referred to as *Norman* (1968): Aus.).

43 For example *Re M-R (A minor)*, (1975) 5 Family Law 55; *Re K (Infants)*, (1976) 6 Family Law 150.

44 Power to make such an order against an abductor has been put on a statutory footing in New Zealand: Guardianship Amendment Act 1979, s. 2, inserting a new Section 22G into the Guardianship Act 1968.

some of the assumptions made by the forum court about its attitudes are in fact correct.

Availability of evidence

5.11 Undoubtedly the courts have placed a good deal of weight upon the question of which court is likely to have the best evidence before it to determine the children's welfare. In *Norman*, (1968: Aus) for example, where the ability of the husband to cope with his new job would be an important factor, the judge observed that evidence on this could best be given in Australia. This factor also seemed a reason in *Re L*. (1974) for preferring the case to be heard in Germany and why, were it not for the exceptional nature of the case, Cross J. would have ordered the return of the children in *re E(D)* (1967).

Deterrence

5.12 This is a very obvious reason for making "peremptory" orders for the return of children, and it is articulated by Cartwright J. in *McKee* and Cross J. in *re H*. (1966) and Harman L. J. in *In re T* (1968).

Observations on United States and Canadian provisions

Uniform Child Custody Jurisdiction Act

5.13 As Brigitte M. Bodenheimer has pointed out⁴⁵ the working of the Uniform Act has been made difficult by three practices. One is the willingness of some courts still to transfer custody from one parent to the other, not on the basis of the child's interests, but as a punishment against the abductor. Are such orders to be recognised under the Act? Although the Act itself has no provision excluding them, she submits that its "underlying policies" permit refusal to recognise them.⁴⁶ As was pointed out above, the fact that a foreign order had the appearance of being a penal order might have been a reason for refusal of English courts to defer it. If provisions are to be agreed on the recognition and enforcement of foreign custody orders, there needs to be some assurance that the foreign court has acted on principles acceptable to the forum.

5.14 The other difficulties mentioned by Bodenheimer are those which arise where the original order divided custody between the parents—that is, where custody is to alternate between them. These of course are compromises (and one wonders how far they are founded on a view of the child's interests) and may become frustrated by the movement of a parent. In such circumstances the original order can hardly be enforced: indeed, as Bodenheimer says, the original decision really left the question undetermined, and the forum will have to make its own decision on the merits. Also a problem were cases where the original order has undergone "excessive modification." Although this might be

dubious practice, Bodenheimer thinks that the modifications should still be recognised under the Uniform Act, otherwise the second forum would be acting in an appellate capacity. Excessive modification might possibly have been the root cause of the difficulties that led to the abduction in *McKee*. However, if foreign orders are to be accorded any recognition, and there is assurance that the foreign court is acting according to the children's interests, it would seem to be necessary to recognise and enforce all subsequent adjustments by the foreign court. This would be the case under the Uniform Act.

5.15 Questions of distance and prediction of the decision of the "foreign" court do not play any explicit role in the Uniform Act. Apart from the emergency jurisdiction and that which is exercisable if no other state has jurisdiction, the forum will not have jurisdiction to hear the case unless the ground rules are satisfied. These require the forum to be in the child's "home state" or the child and a contestant to have a "significant connection" with the state. It may be that the concept of "significant connection" is sufficiently wide so that, on the facts present in cases such as *Re C*. (1978), and *Norman v. Norman* (1968:Aus), that is, if practical considerations (such as distance and prediction of outcome) argue in favour of assumption of jurisdiction, this establishes a "significant connection", and allows the case to be heard. Availability of evidence in the forum is referred to as a necessary condition over and above the significant connection test to enable jurisdiction to be assumed under this head. Better availability of evidence in another state is referred to as one reason why a court, although qualifying under the jurisdiction rules to hear the case, may, in its discretion, decline to do so.

Extra-Provincial Enforcement of Custody Orders Act

5.16 As stated above, this enactment is confined to the enforcement by the forum of foreign orders made by a court of a "province, state or country" with a real and substantial connection with that jurisdiction. No provision is made for difficulties that may arise in the case of penal or indeterminate orders, problems of distance or dangers of excessive movement of children. Nor does the Act extend to abductions where there is no custody order in force.

The Law Commissions' Working Paper

6.1 The English and Scottish Law Commissions have published a Working Paper, with tentative conclusions, concerning the problem of conflicts in custody matters within the United Kingdom.⁴⁷ The publication deals with two major concerns: establishing a common basis for the exercise of jurisdiction in custody matters throughout the United Kingdom and providing for a system of recognition,

⁴⁵ *loc. cit.* note 36 above.

⁴⁶ See *Brooks v. Brooks* 530 P. 2d. 547 (1975), where the Court of Appeal in Oregon refused to recognise a Montana decree which was made "without any evidence of the circumstances of the children" simply as a "punitive" measure.

⁴⁷ The Law Commission, Working Paper No. 68; The Scottish Law Commission, Memorandum No. 23: *Custody of Children: Jurisdiction and Enforcement within the United Kingdom* (H.M.S.O.) (1976).

within the United Kingdom, of U.K. custody orders. The cause of the problem is that as between Scotland (and to a much lesser extent, Northern Ireland) and England and Wales, jurisdictional rules on this matter vary and the jurisdiction of the courts is confined to their own country.

6.2 The Commissions believe that the establishment of common jurisdictional rules will go a long way to resolving the difficulties. They suggest, in the first place, that proceedings for divorce, nullity or separation should have pre-eminent status so that, where such proceedings are pending, no other U.K. court should exercise jurisdiction in "independent" custody proceedings (this includes wardship proceedings) "if, and only if, the child in question is habitually resident in that country at the date of the commencement of the proceedings". The concept of "habitual residence" is clarified by a presumption of habitual residence in the country where the child has resided "cumulatively for the longest period in the year immediately preceding the commencement of the proceedings" but no account will be taken of a period of residence during the previous year which has been obtained by the change of the child's residence without lawful authority. The Commissions were undecided as to whether jurisdiction should be conferred by the consent of the parties. Emergency jurisdiction based on mere physical presence would be allowed if this was necessary "for the protection of the child."

6.3 The Commissions propose a general scheme for the recognition and enforcement of custody orders within the U.K. This would involve the registration of the order in the supreme court of another part of the U.K. which should be enforced by that court unless there is a later and competing order of another U.K. court. This scheme would apply to interim orders.

6.4 Certain other ideas are put forward by the Commissions, notably in relation to preventive action, which will be considered later. It is not the purpose of this paper to offer detailed consideration of the Commissions' ideas, but simply to consider their possible adaptation in an international context. In this respect, one major difference between the circumstances facing the Commissions and the international picture is that, within the U.K., all courts are enjoined to give the child's interests paramount consideration in questions relating to its custody. This is seen as a significant point by the Law Commissions.⁴⁸ The Commissions set out a number of objectives which they consider jurisdictional rules should seek to attain. They should attempt to ascertain a forum "with which the child and, preferably, other persons concerned, have the closest long-term connections"; the forum should also be convenient for them, which means not only that it should be reasonably accessible, but that the relevant evidence should be available without undue difficulty; the rules should be clear and such that the decision should be recognised abroad; they should discourage

forum shopping.⁴⁹ To these objectives there can be little objection. But within the context of a small, culturally homogeneous geographical unit, like the United Kingdom, they may be more easily attained than in an international context. If, for example, an English court declines jurisdiction on the ground that the child's habitual residence is Scotland, to transfer the hearing to Scotland (which may or may not require the transfer of the child there: a child may retain his habitual residence there while remaining at school in England) is a relatively easy matter. So also, the recognition of an interim order in another jurisdiction may involve the return of the child from Scotland to England or *vice versa*, and this is comparatively simple. Nor would it be very disruptive should the final determination require the return again of the child to the jurisdiction from which he had recently been sent back. Finally, the machinery for registering orders within the United Kingdom is likely to work more expeditiously than any procedure that is likely to be devised in registering overseas orders and co-operation between courts will be more easily achieved.

International developments

7.1 These have been well documented, in particular by the Preliminary Document prepared by C. A. Dyer for the Permanent Bureau of the Hague Conference⁵⁰ and the Memorandum presented by the Government of Canada to the Meeting of the Commonwealth Law Ministers in Winnipeg in August 1977. These developments can be chronologically summarized:

1960: 48th Conference of the International Law Association at Hamburg adopted a draft Convention on the Recognition of Orders on the Custody of Infants. It considered primary jurisdiction should be placed on the courts of the country in which the child is ordinarily resident. If there is no order in that country, subsidiary jurisdiction is conferred on the courts of the country of the child's nationality or where divorce and related proceedings affecting the child are pending. The draft Convention had provision for recognition and enforcement of custody orders. The Convention has never been ratified.

1961: Convention of 5 October concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Children. This has been ratified by seven European countries.⁵¹ The Convention is notable for the primacy accorded to the provisions of the state of a child's nationality. Hence, although the "judicial or administrative" authorities of his "habitual residence" are allowed, under Article 1, to take measures for the protection of his person or property (in this is understood to

48 Law Commissions, *op. cit.* paras. 1.7, 1.9 and 2.28.

49 Law Commissions, *op. cit.* para. 3.36.

50 C. A. Dyer, *Questionnaire and Report on International Child Abduction by One Parent* (1978), hereafter referred to as the Dyer Report.

51 Federal Republic of Germany, Austria, France, Luxembourg, the Netherlands, Portugal, Sweden. It is set out in (1961) 10 I.C.L.Q. 53.

include custody orders), this is subject to “a relationship subjecting the infant to authority, which arises directly from the domestic law of the state of the infant’s nationality” and it is the latter relationship which must be recognised by contracting states. It is true that the “authorities” in the state of the child’s habitual residence may take measures for his protection if he is threatened by serious danger to his person or property, but these need not be recognised by other contracting states.⁵² Furthermore, while it is provided that measures taken by the authorities of the state of habitual residence remain in force if habitual residence is changed until the authorities in the new state of habitual residence replace them after consultation with the former habitual residence, it is expressly provided that if the child was previously under the protection of the state of his nationality, the measures of that state shall remain in force in the state of the new habitual residence.⁵³

It is clear that the drafters of the Convention did not address themselves successfully to the problem of abduction in its modern form.⁵⁴ The primacy of measures of the state of nationality is totally irrelevant to the solution of this problem. Nor are there provisions for the enforcement, in one jurisdiction, of orders in another or for the return of abducted children.

1976: Two draft conventions were prepared by a Committee of Experts of the Council of Europe: “Draft European Convention on Recognition and Enforcement of Decisions Relating to the Custody of Children” and “Draft European Convention Relating to an International Tribunal on Matters of Custody of Children”. The latter has received very little support at The Hague would be irrelevant for Commonwealth purposes, so will be ignored here. The former was adopted in Strasbourg in November 1979. Its provisions will be considered in detail later. In broad outline, its objective is to require states to restore a child “forthwith” to his state of origin if he has been removed or retained contrary to a “decision” of a competent authority of a state of which the child and his parents were the sole nationals and the child had his habitual residence in that state provided that the request for restoration is made within six months of the reduction or retention. Foreign custody orders are to be recognised and enforced in varying degree depending on the speed in which an application to restore the child is made. Provision is also made for the establishment of Central Authorities in contracting states with the tasks of facilitating communication between states on these matters, discovering the whereabouts of children and ensuring the return of children when enforcement is granted.

7.2 1979 The Special Commission of The Hague Conference discussed the problem in March 1979 and, after setting out its conclusions, a Preliminary Draft Convention was agreed in November 1979.

⁵² Article 8.

⁵³ Article 5.

⁵⁴ An attempt to introduce an article dealing with cases of evasion of the authorities having jurisdiction failed: Dyer Report, 42.

This draft also makes use of the concept of Central Authorities, which had been used under other Hague Conventions, with tasks similar to those envisaged under the European Convention. This Preliminary Draft will be compared in detail to the European Convention later, but at this point it will be observed only that one of its major differences from the latter is that it is not, as the European Convention is, premised upon the existence of a prior “decision” in the state of origin. The European Convention is, at bottom, a scheme for recognition of foreign custody decisions. The Hague scheme is not directed at such recognition but instead seeks to achieve restoration of the child where he has been removed or retained in breach of custody rights actually being exercised by another person. Such rights are those conferred by the law of the state in which the child was habitually resident immediately before the removal or retention, whether through operation of law or by reason of a judicial or administrative decision or by reason of an agreement having the force of law in that state. Thus the prior existence of a decision in the state of origin will be relevant in determining whether the removal or retention was in breach of such custody rights, but would not of itself be the basis of the return of the child.

Assessment

8.1 As a fundamental principle, it is necessary to agree that improper abduction or retention of children is contrary to the welfare of children generally, even if in a particular case it may not be against an individual child’s interests. There seems little disagreement over this. Apart from preventive measures, to be discussed later, discouragement of such practices requires arrangements to be internationally agreed for the return of children from the place to which I shall hereafter refer as the “recipient state”. Furthermore, if staying access with a parent in a country other than that of the child’s normal home is to be encouraged (thus maintaining contacts between a child and both its parents after a divorce), the stability and feasibility of such arrangements will be encouraged by the establishment of effective means by which they can be enforced.

8.2 Although the Conclusions of the Special Commission of The Hague Conference seem to envisage applying the same rules to abduction made in breach of an existing decision as to a removal “by stealth or force” it is not clear whether these two situations can be treated in quite the same way. We will first consider the case of an abduction or retention contrary to an existing order.

Abduction or retention contrary to existing order (other than interim)

8.3 It seems that an appropriate procedure would be to notify the country in which the child is found (or suspected to be present) of the relevant decision which the appropriate authorities in that country would be obliged to enforce. This is broadly the approach of the U.S. Uniform Act, the Canadian Act, the European Convention and the proposal

submitted to the Permanent Bureau by the United Kingdom representatives. Enforcement should not require reference to a court for decision or confirmation, since this would cause delays in a situation where speed is of the highest importance. However, it must remain open to anyone resisting the enforcement of the order to challenge it before the courts of the recipient state. On what grounds should it be open to resist the order?

8.4 A clear ground of challenge would be that the "foreign" order was not the kind of order contemplated by the procedure. Here it is necessary to refer to the basis on which the original court exercised jurisdiction. It is not possible to avoid the jurisdictional question, at least at this stage. Would it be enough if the original state was the state of the child's nationality, or its mere presence, or domicile and so on? The question of jurisdiction has been much discussed and a few remarks on this will be made below⁵⁵ but at this stage it need be said only that the concept of "habitual residence" seems to be the most appropriate. Thus, if it could be shown that the original decision was not made in the state of the child's habitual residence at the time the proceedings leading to the decision were instituted, it should not be entitled to automatic enforcement under this procedure. (This is not to say that it would not, in other circumstances, be relevant).

8.5 The court making the decision must have the best interests of the child as its guiding principle in child custody decisions. It should be enough if this is the general principle of law in that jurisdiction and it need not be set out *expressis verbis* in the judgment in question. I do not think that it would be difficult to get most countries to agree to adopt this standard, especially in the aftermath of the International Year of the Child. Of course, as has been well pointed out⁵⁶ the "welfare principle" is an indeterminate one. What is conceived of as being in the best interests of a child might vary from culture to culture. I do not think this should be held against it; indeed, such variation seems to me to be healthy and very much within the spirit of Commonwealth co-operation. It exists extensively even within single cultures (note the polar opposite views taken by the Freudian psycho-analytic school represented in Goldstein, Freud and Solnit, *Beyond the Interests of the Child* and the growing advocacy of alternating custody in the U.S.A.). What is important is that courts, and societies generally, at least agree that the child's welfare is the primary question to which attention must be addressed. One cannot and should not seek more in an international, or even national, context. Unless there are reasons for doubting the good faith of a state that is prepared to declare its acceptance of this principle, other states must be prepared to allow due scope for possibly competing notions of a child's best interests which may be taken by a competent court of the state of the child's habitual residence. It should be a condition for participating in any convention that a state accepts to ensure that this

principle is enjoined upon its competent authorities in deciding these questions.

8.6 The decision should be challengeable on the ground that to return the child would be seriously detrimental to its interests. Most approaches to this problem allow such an emergency clause. There may be obviously extreme cases, as where the child is suffering from physical ill-health where it may be clearly applicable, or circumstances such as those in *re E(D)* (1967). It would be necessary to frame this exception carefully lest it became a loophole whereby the merits of the case generally are re-opened.

8.7 Should the decision be open to challenge (and re-litigation) on the ground of change of circumstances? One has in mind a case such as *E. v. F.* (1974:N.Z.) where the original decision was an old one and it was certainly possible that the English court would have recognised a change in circumstances and allowed the child to remain in New Zealand. Such circumstances could also arise if the original decision had been departed from by mutual agreement between the parties, which probably frequently happens as the years pass. It seems unsatisfactory, especially if the countries are as far apart as England and New Zealand, to be compelled to undergo the expense and disruption of litigating again in England provided that the New Zealand court could be apprised fully of the English proceedings and provided relevant evidence obtainable there was communicated to it. On the other hand, it could be argued that to allow a case which has started in one jurisdiction to be "continued" in another, especially if the child is there in breach of the original arrangements, is to encourage that which we are concerned to stop.

8.8 It may be that there is room for different arrangements between different countries in this respect. If the facts of *E. v. F.* (1974:N.Z.) had arisen in a case involving, say, Germany and France, the balance of advantage, it would seem, would be to send the case (and, presumably, the child) back to the country of the original decision to see whether that decision should be varied. This might even be reasonable between the United Kingdom and the U.S.A. owing to the relative ease of travel between them. But travel between many Commonwealth countries may not be so simple and, if the difference between the cultures is great, as it might be if the countries concerned were, say, Nigeria and Canada, one wonders whether one should put a Nigerian parent to the expense and difficulty of sending a child back to Canada when the Canadian court may, and is even likely to, decide that the circumstances had changed so much since its original order that the child should be sent back to Nigeria again.

8.9 Hence I would suggest, for consideration, that the availability of challenge on the ground of change of circumstances should be a matter which might be subject to bilateral arrangement. In many cases I would suggest that it should not be a ground for challenge at all. But where it might be allowed, it should be carefully defined and circumscribed. For example, it could be framed so as to allow challenge

55 Para. 8.16.

56 See Dyer Report, 30.

only if such change of circumstances is shown as to make it likely, on the balance of probabilities, that a court in the original jurisdiction would vary the original order and it is in the child's interests that the "new" court should hear the issue. The provision should be accompanied by measures for co-operation over the obtaining of evidence in the original country and perhaps even for meeting the expenses incurred by the other party for attending the proceedings. I would not exclude an abduction or retention as one of the causes of the change of circumstances. It is unlikely that such an action would be likely to lead the original court to vary its order, but circumstances could arise where it would be unrealistic to exclude new factors introduced by an abduction or retention.

8.10 Should the original decision be challengeable on the ground that there was no proper hearing? The Council of Europe Convention refers to the requirement of proper notices having been served, and the judicial practice surveyed showed that courts were less likely to pay regard to foreign decisions taken without full consideration of the evidence.⁵⁷ Interim orders made after proceedings had commenced in the original state are another matter, for they represent a holding operation. It seems that, on principle, only decisions made after proper hearing should be entitled to automatic enforcement. The difficulty is that some *ex parte* decisions are made *after an abduction* and are really penal orders designed to secure the return of the child. It seems, therefore, that, unless the order is an interim order made *after proceedings had commenced* (as in *re C* (1978)) or an *ex parte* order made *after an abduction thought to be unlawful* (both these situations to be considered below), a foreign decision should be open to challenge on the ground that it was not made after full hearing. But this would not apply to an order which was based on the consent of the parties.

Abduction or retention after commencement of proceedings but before decision after full hearing

8.11 Here, as has been observed, the judicial practice seems to be to require the return of the case to the jurisdiction in which it was commenced. There may or may not be an interim order in the original jurisdiction requiring this return, but such an order would not seem to be essential. It should surely be enough if proceedings had been instituted. But return should be resistible on grounds 1 to 3 mentioned under (a) above. Ground 4 (change of circumstances) would not apply, because that ground refers to a change of circumstances since the decision was made, and here there would be no decision.⁵⁸ Similarly, ground 5 would be inapplicable. The only question would be whether return should be resistible on the ground that the foreign court, if it made the order, would decide in favour of the abductor. This was largely the basis for the Court of Appeal decision in *re C* (1978) and was considered relevant in *Kernot* (1965). As in the situation covered in ground 4 above, there does seem some justification in refraining from

sending children a great distance if it is likely that they will only be returned. On the other hand, there are differences. Ground 4 above referred to change in circumstances and the question is which court is the more convenient to hear about these new circumstances. It need not always be the original court. But in this situation the abductor is speculating about the way the "original" court would decide the matter initially. Nor in ground 4 above is the speculation about *how* the original decision might be varied; it is simply *that* the situation had changed so much since the original decision that it is likely they would impinge on it in some way. It seems unsatisfactory to indulge in the kind of speculation as in *re C* (1978). I would suggest that return of the child in these circumstances should be resistible only for reasons 1 to 3 above and a case such as *re C* (1978) should be treated as one where the non-return of the children should be justified, if at all, or the ground that their return would be seriously detrimental to their interests.

Abduction where there has been no final decision nor had proceedings been commenced at the time of the abduction

8.12 These cases can take a number of forms; for example, those where the parties had already separated and regulated custody by agreement and one party removes (or retains) the children in breach of that agreement (see *re A* (1970)); or where the abduction is quite unexpected by the other party, as was probably so in cases like *re T* (1968) and *re L* (1974). There is provision in the European Convention for the enforcement of decisions which have been "confirmed" by the competent authorities in the state of origin.⁵⁹ If this refers to a procedure such as a "consent decree", then the principles would be the same as those applicable to a decision in the state of origin.

8.13 If there is no such formally confirmed order and the arrangement has been informal only, or if the abduction is unexpected, then the problem, can be approached from two angles. One is that adopted in the European Convention which requires an aggrieved party to approach a court in the state of origin and obtain a declaration that the removal or retention was "improper". A favourable decision would be treated like any other decision of the competent court of the state of origin. This in effect happens if, after improper removal or retention, one party obtains an *ex parte* order for the return of the child. The other angle is to concentrate about the state to which the child has been removed (or where it is retained) and require the courts in that state to order the return of the child notwithstanding that there is no order in the state of origin.

8.14 The problem about the first approach is that the abductor could argue that the order in the state of origin was made without proper notice to him or full hearing and he might contest matters like the terms of any alleged agreement (or even its existence) and he may deny that the removal was improper. There is

⁵⁷ See *re B.* (1940) as explained in *In re H.* (1966); *Walker v. Walker*, 1974 3 W.W.R. 48.

⁵⁸ See *Brooks v. Brooks*, 530 P. 2d. 547 (1975).

⁵⁹ Article 8(3).

nothing *per se* illegal in a parent taking a child away from another parent, especially if he alleges that this is done for the child's benefit (or, as in cases like *re H* (1966), *re M-R (a minor)*⁶⁰ and *Norman v. Norman* (1968): Aus.), to induce the other parent to come to the recipient country. Hence the European Convention leaves it open to the state of origin to declare in each particular case whether it is one of 'improper removal' or not. Since such a decision will, under the Convention, receive almost automatic recognition and enforcement, it is necessary to allow the defendant the opportunity of showing, if he can, that the removal was not improper. Of course it might be thought correct and in accord with the principles of the Convention that that issue should be determined (if contested) at the state of origin. On the other hand, it could lead to litigation in both the country of origin and the recipient state and gives rise to possibilities of delay which will be considered again when the European Convention and The Hague Preliminary Draft are considered in detail.

8.15 The Hague Preliminary Draft adopts the other angle. The Special Commission had concluded that the jurisdiction of the recipient state should be limited wherever the child was retained there "without the consent of the lawful custodian" whether or not this was brought about by stealth or force or whether it was in breach of a decision of the state of origin. This approach is similar to that of the English courts where they have ordered the return of children on the ground that they "belong" in the state of origin. It should be remembered that, if orders for the return of children were dependent on the acquisition of a decision in the state of origin and it became normal to provide reciprocal enforcement of such orders, a tendency might develop to abduct children before the unsuspecting party has had time to institute proceedings. This consideration argues in favour of any scheme which achieves the rapid return of children in cases of such "anticipatory" abductions.

Habitual residence

8.16 In the above discussion, it has been assumed that it would be generally agreed that the country which should have the responsibility of determining the child's best interests is the country of the child's habitual residence. This was the conclusion of the English and Scottish Law Commissions and is the test favoured in a Report by the Province of Ontario to the Sixtieth Annual Meeting of the Uniform Law Conference in Canada in 1978 which is critical of the "close and substantial connection" test used in the Canadian Act. It is also the principle adopted by the Special Commission of The Hague Conference. There seems to be a strong objection in principle in making nationality the determining factor as to whether provisions for the protection of children can be activated. It perpetuates an approach which seems to regard a state as having some kind of "rights" over a child bearing its nationality, or even a child of parents bearing its nationality, even though neither the parent nor the child necessarily has any other connection with the state. This quasi-proprietorial claim

of states is surely to be resisted. Fortunately it has not played a very large part in the private international law of Commonwealth countries and should be rejected. The "close and substantial connection" test would normally coincide with an "habitual residence" test. It is, however, less determinate than the latter and, if used in conjunction with it, could lead to courts in different countries claiming jurisdiction. This has been a weakness in the U.S. Uniform Act.⁶⁰ The most desirable solution appears to be the sole adoption of the "habitual residence" test.

Time limits

8.17 The U.S. Uniform Act makes use of time limits (six months "living with his parents") in establishing what is a child's "home state"; the Conclusions of the Special Commission of the Hague Conference state that, where an application to the recipient state is made more than six months after its removal from the state of origin, the court of the recipient state can hear the case on its merits only if the child has been habitually resident within its jurisdictions for at least a year. As Bodenheimer has pointed out such time limits could work to the benefit of an abductor who has evaded detection successfully for a sufficient length of time, and in the case of the U.S. Act, she suggests that the provision defining "home state" as that in which the child has lived during the previous six months would not be interpreted to inure to the benefit of such a person. The jurisdiction of the previous "home state" would take priority. Yet jurisdiction based rules will encounter problems such as this. Under the scheme suggested above similar problems would arise. But if the party in the state of origin has acted promptly in applying for a request for return, this should be treated as a significant factor. It may be reasonable to suggest, therefore, that if that party has made no such application within six months of the abduction or retention, the court in the recipient state should have discretion to hear the merits if this is in the child's interests. In other cases the position outlined above should continue to apply, so that if, for example, the party in the state of origin acted within the six months but the abductor was not traced until, say, two years later, the court should still be obliged to honour the request subject to the exceptions already set out. One of these is, of course, that the return would be seriously detrimental to the child and inevitably the chances that this would be so increase the longer the child remains away from its country of origin. But this seems to be inevitable and a balance has to be struck between the interests of children generally and of the child in question. I feel it better to leave the matter to be determined under the "serious detriment" exception than to enact some time limit in this context because such a limit can operate in an arbitrary way. But to put some time limit within which the application to return must be made is a different matter because lodging such an application is within the control of the party in the

⁶⁰ See Richard Stern, article cited in note 36.

state of origin who should be encouraged, if the return of the child is to be requested, to act speedily.

Prevention

8.18 The Conclusions of the Special Commission of the Hague Conference do not mention this topic but a certain amount of information is found in the replies of various Governments to the Questionnaire contained in the Dyer Report. It does not present a very hopeful picture. The measures seem meagre and, one suspects, mostly ineffective. They range from putting the child in a home or with foster parents (or even into the custody of the police) while the parents are in dispute (hardly, it seems, a beneficial result for the child) to threats of tort action against an abducting parent, which might be thought to have deterrent effect. Australia provides an elaborate answer, mentioning the power of a court to require passports to be handed in if there is a threat of abduction and also provisions for warning points of departure from the country and serving notice on a carrier not to transport certain persons.⁶¹ In the United Kingdom there is provision for notifying the Home Office of an expected abduction and this leads to warnings being sent to departure points from the country. Clearly the effectiveness of such measures depends to some degree on matters of geography. A departure abroad from Australia is generally a more elaborate affair than one from Luxembourg and even the United Kingdom is at an advantage from its island character. But for many countries, any effective measures of prevention are very difficult and, other than exhortation, it is difficult to see what can be achieved in this regard in an international agreement.

Alternate custody

8.19 The United States answer to the Dyer Questionnaire mentions, quite rightly, the importance of trying to prevent abductions and unlawful retentions by achieving amity between the parties as often as possible. This should be a matter of highest priority in family law at all levels, but, again, is hardly a matter for an international convention. Some groups, particularly in the United States, see the grant of alternate custody as an answer to abduction problems. They argue that if the child is shared between the parents after their divorce the incentive to remove or retain the child permanently from the other parent is reduced. This is very likely to be true, for it seems natural that a parent who has lost an attempt to win custody of the child and who is unable to exercise regular access to the child will be tempted to take the law into his own hands.

8.20 However, the whole question of alternate custody raises difficult questions of practicability and, more important, of assessment of the child's

interests. In spite of claims by the interested groups, I have seen no convincing evidence that these arrangements are necessarily in the children's interests. But whether this is so or not, it must be a matter to be decided within the domestic legal systems in a genuine effort to apply the welfare principle. Should it be decided that alternate custody, or (in a least extreme alternative), extended staying access, is in the best interests of a child and if this involves the child staying for periods of time in different countries, such arrangements would be greatly assisted by an international agreement on the principles outlined above. The arrangements could be incorporated in a court order (by consent or otherwise) in the state of origin and would be entitled to recognition in the recipient state. Indeed, it might be very useful, as a precautionary measure, if such decisions were routinely registered with a Central Authority in the recipient state.

The European and The Hague Conventions Compared

9.1 Member states of the Council of Europe must now decide whether to sign and ratify the Draft European Convention adopted by the Council of Ministers in November 1979.⁶² In November 1980, delegates to the Hague Conference will meet in Plenary Session to decide whether to adopt the Preliminary Draft Convention. It is open to non-members of the Council of Europe to accede to the European Convention. Since the European Convention and The Hague Preliminary Draft (hereafter referred to as The Hague Document) diverge in some important respects it seems urgent to decide which, if either, of the proposed conventions is to be preferred. Each Convention (attached as Annexes) will, therefore, be critically considered in the light of the foregoing discussion.

The duty of Central Authorities

9.2 Both documents make use of the concept of Central Authorities as the prime administrative agencies for implementing the conventions. There is little difference in the duties placed upon them. The Hague Document is more insistent on attempts being made to settle the matter on a voluntary basis, which is desirable. One important difference may lie in the express reference in The Hague Document empowering Central Authorities to "initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, where appropriate, the determination of issues relating to rights of custody or access." (Article 7 f). There is no comparable provision in the European Convention but there are indications that Central Authorities may play such a role. They are to avoid, in particular by any necessary provisional measures, prejudice to the interests of the child or the

61 Recommendations are set out in a Confidential Report to the Attorney-General of an Interdepartmental Committee on Prevention of Removal of Children from Australia by One Parent. See also New Zealand's Guardianship Amendment Act 1979, inserting a new section 20 into the Guardianship Act 1968.

62 The United Kingdom Government is considering whether to sign and ratify the Council of Europe Convention: *Daily Telegraph* 15 January 1980.

applicant” and also “to secure the recognition or enforcement of the decision (of the state of origin)”. (Article 5 (1)b & c). This presumably may include the initiation of judicial proceedings. But the inter-relationship between administrative and judicial proceedings under the European Convention is obscured by the provision in Article 8(2) that “if, in accordance with the law of the state addressed, the authorities cannot comply with paragraph 1 of this article (restoration of the child) without judicial authority, none of the grounds of refusal specified in this Convention shall apply to the judicial proceedings.” The grounds for refusal are set out in Articles 9 and 10 and will be considered in detail later. Article 8(2) cannot mean that there can be *no* grounds of refusal if restoration of the child depends on judicial order (which may be the case in many countries) so the effect of the provision must be to remove the controlling effect of Articles 9 and 10, which seek to limit the grounds of refusal to those set out in those articles, where the child’s return requires judicial order. Since the achievement of agreed limitations of grounds of refusal to return a child is the major purpose of constructing a Convention of this type, Article 8(2) could undermine the major purposes of the endeavour. The Hague Document contains no such limitation for the terms of Article 11, which set out the requirement to return the child, apply both to judicial and administrative authorities.

The nationality principle

9.3 A major complication of the European Convention lies in the role played in its provisions by the nationality principle. While states are put under a general duty (Article 7) to recognise and enforce custody decisions of other contracting states, the obligation placed on Central Authorities to “cause steps to be taken forthwith to restore the custody of the child” (Article 8) will not arise unless *both* parents *and the child himself* have as their *sole* nationality that of the state where the decision of which they are seeking enforcement is made. If this is satisfied, the return of the child, if requested within six months of the decision or removal, should be automatic. There are no provisions for refusal, not even if the return might seriously endanger the child’s welfare. (But see para. 10.1 below). This is surely to pay excessive deference to the claims of the state. Yet, as will be seen, failure to comply with this narrow principle could result in failure to secure the rapid return of the child, even if there are no grounds for fearing for its safety on return. The introduction of the nationality principle thus creates a severe lack of balance in the structure of the Convention which can only be mitigated by extensive use by states of their rights to enter reservations. Further difficulty is raised by Article 8(3) which applies if a person has taken a child out of one country into another under “an agreement officially confirmed by a competent authority”. In such circumstances if the child is not returned in accordance with the agreement, it is stated that “custody of the child shall be restored in accordance with (Article 8 (1)b and (2))”. Paragraph (1)b requires a request for restoration to be made within

six months of the removal (it is not clear what relevance paragraph (2) has). No mention is made of compliance with paragraph (1)a, which contains the nationality principle. Does this mean that, in this situation, that principle is not to apply? If not in that situation, why to any situation?

9.4 Non-compliance with the nationality principle will not, however, totally frustrate the operation of the Convention. The obligation to “cause steps to be taken forthwith” to restore the child will not arise if the principle is not satisfied, but the general duty to recognise and enforce the custody decision (Article 7) remains. This duty, however, is qualified by the provision of specific grounds for refusing to recognise and enforce the decision. The grounds available depend on whether the application for restoration is made within six months of the removal of the child (Article 9) or falls outside that time limit (Article 10). These grounds will be considered later. At this point it is necessary only to observe that they are potentially very wide indeed so that failure to satisfy the nationality principle may rob the applicant of any real assistance the Convention can give.

9.5 There can be no doubt that the absence of any reference to nationality in The Hague Document is a great improvement on the European Convention. The overriding principle here is that of “habitual residence.” The applicant may be “any person” claiming breach of custody rights (Article 8) but these must be rights he was *actually exercising* in accordance with the law of the state in which the child was habitually resident immediately before its removal or retention. It is the situation of the child and its relationships which matter and it is surely right to direct attention to the circumstances prevailing and the legal conditions in the place where the child was habitually resident.

The requirement of a decision

9.6 A fundamental difference in approach between the two documents is that the European Convention is premised on the prior existence of a “decision” in the state of origin whereas The Hague Document is not. Even if an abduction takes place in that state before any such decision exists, it only becomes “improper” for the purposes of the Convention if declared as such by the state of origin (Articles 1 and 12). Under The Hague Document there must simply be a “breach of rights of custody actually exercised” by a person according to the law of the state of the child’s habitual residence. (Article 3). These rights may arise by operation of law, by judicial or administrative decision or by agreement. Which approach is to be preferred?

9.7 If a decision about custody already exists there would, in practice, be little difference between the two systems, subject to the position concerning grounds for refusal, to be discussed in paras. 9.12–9.19 below. Where there is no such decision at the time of the removal or retention, the aggrieved party would be at some disadvantage under the scheme of the European Convention. He or she must first approach his

authorities (presumably, the courts) for a decision declaring the removal or retention to be wrongful. Apart from expense (which will in turn depend on the provisions for legal aid in the country concerned) the main difficulty will be that of time. If she knows the whereabouts of the defendant she must serve him with notice of the proceedings and the defendant must be given sufficient time to arrange his defence. (Article 9(1)a). This might take some time, and it may be possible for the defendant to employ delaying tactics. The importance of this is that, in order to take advantage of Articles 8 and 9 of the Convention, the application for restoration of the child must be made to the Central Authority of the recipient state within six months from the date of the improper removal. (Article 8(1)b). It is not difficult to imagine cases where an aggrieved person fails to meet this time requirement due to no fault of his or her own.⁶³

9.8 In a case where an abduction has taken place where no prior decision exists, an aggrieved party acting under The Hague scheme seems to be in a better position, although much might depend on the efficiency of the machinery introduced under it. Here too, an application must be made within six months from the breach of custody rights (Article 11)⁶⁴ but need only allege a breach of custody rights. Such an application no doubt must be accompanied by documents indicating the exercise of such rights and, were one to be obtained, could also be supplemented by proof of a decision subsequently obtained in the state of origin supporting that claim. Similarly, in the case of a retention where a parent exercising access rights abroad failed to return the child, the European Convention allows proceedings for restoration only where the child has been retained contrary to “an agreement officially confirmed by a competent authority” in the state of origin. (Article 8(3)). Under The Hague Document it would be sufficient simply if the agreement “had the force of law” in that state. Violation of any rights of custody or access under such an agreement would in itself be sufficient to make application for restoration.

9.9 Although the absence of any requirement of prior decision or “official confirmation” of an agreement would put an applicant under The Hague Document at an advantage compared to an applicant under the European Convention, this must be seen in the light of the grounds for refusal specified in each document. These will be considered in detail later⁶⁵ but it may be stated here that these could favour the applicant under the European Convention (provided he satisfies the requirements of Articles 8 and 9) because the authorities in the recipient state will in effect simply implement the decision upon which he relies whereas the applicant under The Hague Document is at some risk of an investigation being made in that state.

63 Although the requirement to give notice does not apply if the defendant has concealed his whereabouts, difficulty might arise if it is known but is a place from which he cannot easily arrange for his defence in the state of origin.

64 See para. 9.11 below.

65 Paras. 9.12–9.19 below.

Time limits

9.10 Both documents contain provision seeking to encourage expeditious applications for the return of abducted or retained children. But those in the European Convention are more complex and are intimately related to the nationality principle. Essentially, the scheme is that if *both* the six month time limit *and* the nationality principle are satisfied, no grounds for refusal should be available and the child should be returned “forthwith”. If the time limit is satisfied but not the nationality principle, only the grounds for refusal set out in Article 9 (see below, para. 9.14) apply. If *neither* are satisfied, the very broad grounds for refusal under Article 10 (see below, para. 9.16) are permitted. There is no provision for extending the six month period even where, for example, the applicant has been unable to trace the defendant or the child.

9.11 By comparison, The Hague Document contains a simple and elegant solution. Here, too, the application must be made within six months of the breach of custody rights in order to activate the duty to return the child “forthwith”. However, this period only runs from the date of discovery of the child if his whereabouts have been “unknown” (*semble*, to the applicant). (Article 11). The Document makes no express reference to any *additional* grounds of refusal if the time limited is overrun, as the European Convention does. It simply states that its provisions are not to “limit” the power of judicial or administrative authorities to order the return of the child after the expiration of the time limit. (Article 15). Thus the recipient state will, in such cases, be left to follow its own internally fashioned solution to the problem in cases of late applications. It seems that the highly complex provisions of Article 10 of the European Convention amount to no more than the same thing. While simplicity is not in all cases to be preferred as an end in itself, there can be little doubt that the complexities of the European provisions on this could add to the difficulties of attaining uniform compliance and interpretation.

Grounds for refusal

9.12 The two documents differ markedly in their provisions relating to grounds for refusing to return a child to an applicant. This is partly a reflection on the differing approaches which have already been outlined. Hence, the European Convention contains provisions justifying a refusal which relate to the circumstances in which the decision upon which the application for return is based was given and The Hague Document permits the basis for the application under its provisions, viz., the actual exercise of custody rights, to be challenged.

9.13 The provisions of the European Convention are the more complex. A distinction is drawn between applications falling under Article 8 and other applications. As stated earlier, Article 8 is only satisfied if the conditions relating to nationality and the time limit are met. In addition, it is required that the child should have had his habitual residence in the territory of the state of which he and his parents are the sole

nationals at the time of the institution of the proceedings in question or of the improper removal. In such a case it is envisaged that the restoration of the child should be automatic. No grounds for refusal are specified, although what the position is if the restoration requires judicial authority is unclear owing to the obscurity of Article 8(2) (See para. 9.2 above).

9.14 If the nationality principle is not satisfied but the application is nevertheless made within six months of the removal, Article 9 sets out the exclusive grounds for refusal. They are that (i) the decision in the state of origin was made in the absence of the defendant or his legal representative and he was not notified of the proceedings in sufficient time to enable him to arrange his defence (unless he had concealed his whereabouts); (ii) the decision was taken in the absence of the defendant or his legal representative and “the competence of the authority giving the decision was not founded” on the habitual residence of the defendant or on the last common habitual residence of the child’s parents (one of whom still being habitually resident there) or on the habitual residence of the child; (iii) before the child was removed there was a decision relating to the child’s custody in the state addressed incompatible with the decision in the state of origin provided that when it was given the child had spent longer in the state addressed (the recipient state) over the previous year than in the state of origin. The purpose of this is partly to establish a jurisdictional requirement of habitual residence as a basis for the recognition of foreign custody decisions. The technique differs slightly from that used under Article 8, for that Article only applies if the *child actually was* habitually resident in the state of origin when removed or when the proceedings were instituted, whereas under Article 9 it is sufficient if the competence of the authority making the decision was *founded on* habitual residence of the defendant, the parents *or* the child. There is room for uncertainty here. Presumably jurisdiction exercised on the basis of (for example) nationality or consent would not be “founded” on habitual residence. Would it be open to argue that the habitual residence requirements were *in fact* satisfied? Why should this distinction exist between Articles 8 and 9?

9.15 It is similarly curious that the protection given by Article 9 to an absent defendant who is not given sufficient notice of the proceedings should be withheld from a defendant who happens to be a sole national of the state of origin. It is surely reasonable that such a defect, at least if not brought about by the defendant’s own fault, should be a basis for non-recognition of the decision and therefore a sound ground for refusal. However, it has already been pointed out that the opportunities this may give a defendant for delaying the acquisition of a decision could cause the applicant to fail to meet the six month time limit which must be complied with in order to bring the application within Articles 8 or 9.

9.16 Where Articles 8 and 9 are inapplicable, due to failure to comply with the nationality principle or with the time limits, an application may be met with additional grounds of refusal set out in Article 10.

However, these additional grounds are not exclusive, as the grounds in Article 9 are intended to be, so states will be free to add other grounds if they so choose. If this is so, there is hardly any point in setting out these additional grounds. Indeed, they are so wide that they can hardly represent any controlling factor at all. In particular, the ground entitling refusal that “the effects of the decision (in the state of origin) are manifestly incompatible with the fundamental principles of the law relating to the family and children in the state addressed” (Article 10 (1)a) seems to allow the state addressed to apply its own policies for dealing with the case in accordance with its own family law principles untrammelled by the Convention. It is therefore difficult to see the point of the inclusion of another ground for refusal which is carefully worded to allow refusal “where it is found that by reason of a change in the circumstances, including the passage of time *but not including* a change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child.” (Article 10 (1)b). It may well be “manifestly incompatible” with the fundamental principles of a state’s family law to follow a decision which is “manifestly no longer in accordance with the welfare of the child” whether this is due to a change of residence alone or for any other reason.

9.17 In contrast to such obscurities, the provisions of The Hague Document offer clarity and simplicity. The grounds for refusal operate so as to restrict the *prima facie* duty of the recipient state to return a child forthwith on an application made within six months of the breach of custody rights. There are three. (1) If the (defendant) establishes that “at the time of the alleged breach the applicant was not actually exercising the custody rights or acting in good faith”; (2) if the (defendant) establishes that “there is a substantial risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;” (3) if “the judicial or administrative authorities find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.” (Article 12).

9.18 The first of these seems necessary as it is in effect a denial of the premise upon which the application for return is based. However it raises the danger that the applicant may be drawn into a dispute in the recipient state over the question whether he or she was “actually” exercising custody rights. This may not be very different from assessing the merits of the case, which the Document seeks to avoid. (Article 16). It may be that this fear is exaggerated and that the authorities of the recipient state will be satisfied with documentary evidence that (for example) the applicant is the child’s mother and that the child was living in the same residence as her at the time of the removal. Of more concern is the provision allowing the defendant to seek to establish that the applicant was not, at the time of the alleged breach, “acting in good faith.” Would this permit allegations of marital misconduct (the mother secretly seeing another man with a view to leaving the husband and taking the children with her

to live with the other man), of attempts to prevent the defendant from seeing the child in breach, perhaps, of access arrangements? If so, the whole issue of merits would be introduced and a major goal of the Convention subverted. Unless these doubts can be satisfactorily settled, it is to be hoped that this clause of Article 12a. will be removed at the Plenary Meeting at The Hague in November 1980.

9.19 The ground for refusal based on apprehension of risk of harm to the child is a common and, it seems, essential provision and its absence from the European Convention is a serious omission. It might be remarked that its presence should assist towards the excision of the clause relating to the applicant's bad faith because such bad faith should only be of relevance if the return of the children to the applicant would entail a substantial risk to their welfare. The additional clause allowing refusal if this would "otherwise place the child in an intolerable situation" could also prove useful. It is probably wide enough to cover the case, of which concern was expressed above,⁶⁶ that a child might be futilely returned where the expectation is reasonably held that the authorities in the state of origin are likely to send him back again to the recipient state. It was suggested that this issue might be subject to bilateral arrangements, but the existence of such a clause could achieve the same effect by being sensibly applied in differing contexts.

Reservations

9.20 The Hague Document has not finally determined the scope of reservations to be admitted to the Convention. The European Convention allows reservation liberally. Article 18 allows any contracting state to make reservation that it shall not be bound by Article 12, which brings abductions made before any decision in the state of origin into the Convention by permitting the aggrieved party to obtain a decision that the removal was improper. If this were not enough, Article 17 allows any contracting party by reservation to introduce the wide grounds of refusal of Article 10 into cases covered by Articles 8 and 9. The carefully constructed gradations between Articles 8, 9 and 10 can thus be undermined. Since, as has been explained above, Article 10 (1)a supplies a ground of such width, any application of that to an application which has succeeded in satisfying the rigours of Articles 8 and 9 would effectively nullify the purposes of entering the Convention at all.

The Hague document: a Commonwealth perspective

10.1 It will be clear that the European Convention is unsatisfactory in a number of respects. In order to avoid the automatic return provisions of Article 8, states are likely, by reservation, to introduce into that Article the wide ground for refusal of Article 10(1)a and probably do likewise for Article 9. This is a far

wider ground of refusal than apprehension of harm for the child on its return. The Convention, then, seems to offer a very uncertain basis for *uniform* international action. The Hague Document will therefore be examined to see how far its adoption would be reconcilable with the position already reached in some Commonwealth countries and also how far they correspond to some of the goals of policy suggested in this report as desirable.

10.2 As far as judicial developments are concerned, it was seen that the predominant view currently accepted is that the courts retain their jurisdiction to determine the merits of the case of a child abducted into their country but that much weight will probably be placed on a foreign order, especially one made after full hearing and based upon the welfare principle, and, if there is no such order, it may well be decided that it is in the child's interests to return without delay to the country where he "belongs". The Hague Document is not a scheme for the automatic recognition and enforcement of foreign custody orders and to that extent is similar to this judicial approach. Under this scheme, any prior decision would be relevant only insofar as it indicated that the applicant had been exercising custody rights and that these were breached. The courts normally set their face against unilateral breaches of such rights occurring within their own jurisdiction. Such are thought, *prima facie*, to be contrary to a child's interests and it seems to be entirely within the spirit of Buckley L. J. in *re L.* (1974) that, where an application is brought expeditiously, it should be considered to be in the child's interests to return it and restore the exercise of the disrupted relationship. That is, the emphasis of The Hague Document on *relationships* rather than *decisions* accords with this practice, for the decision is seen only as evidence of relationships and, accordingly, of where it is, *prima facie*, in the child's best interests to be. It is true that acceptance of the principles of the document would, theoretically, deprive the court of jurisdiction to make a full ranging investigation into the merits of the case and thus strike at the heart of the *McKee* principle. But it is suggested that it would not affect the *actual practice* of the courts in such cases and that their ultimate responsibility for the welfare of the child would be adequately secured by the presence of the ground for refusal based on apprehension of harm to the child or of placing him in an intolerable situation.

10.3 Like the U.S. Uniform Act, legislation taken in Commonwealth countries has been based on schemes of recognition and enforcement of foreign custody orders. This would suggest an approach closer to that of the European Convention than The Hague Document. However, adherence to the latter would in no way *conflict* with such steps for recognition already taken. The existence of a (registered or unregistered) order would provide strong and, in most cases, incontrovertible evidence whether the removal or retention has been in breach of an applicant's custody rights. The registration of orders would indeed further the objects of the scheme. The requirement that the rights breached must be those applicable in the state of the child's habitual residence

66 Para. 5.10 above.

might be thought to have a potentially restrictive effect on systems of automatic registration and enforcement of orders such as those of Australia and New Zealand. But in an international context such an explicit restriction seems desirable. The bilateral character of the Australian and New Zealand schemes, which enables those countries to "prescribe" which overseas orders to bring within their scheme allows them to choose overseas countries which exercise jurisdiction on a basis similar to habitual residence. The express reference to habitual residence would thus seem a reasonable safeguard for what would, in effect, be a significant broadening for Australia and New Zealand of their present schemes.

10.5 As argued above⁶⁷ the fact that The Hague Document covers cases of abduction where there has been no prior order is of special importance where reciprocal recognition and enforcement of custody orders becomes widespread. To this extent the document fills a gap left in the legislative schemes in the Commonwealth.⁶⁸ The question whether this problem is better approached by requiring the aggrieved party first to seek a decision in his own jurisdiction or by allowing him to make an immediate application to the recipient state has been discussed above.⁶⁹ Subject to some reservations about the extent of permitted grounds for refusal of return, the view was taken that the balance of advantage probably lay with the course adopted by The Hague Document. It should be noted that this position is similar to that taken in the U.S. Uniform Act. Finally, the grounds for refusal of return (subject to the reservation already mentioned) in The Hague Document are very similar to those accepted in the Australian, New Zealand and Canadian legislation.

10.6 Does The Hague Document in general meet the suggested guidelines for an approach to this problem set out in section 8 of this Report? A machinery for notifying any relevant order or decision in a country to which a child was taken could certainly be constructed within its provisions and the principle that that country will return a child removed or retained there contrary to the rights appearing in such an order is established. The principle that these should be the rights prevailing at the child's habitual residence is satisfied; the right to refuse return where this is likely to harm the child is satisfied; futile return can be avoided by use of the provision justifying refusal if this would place the child in an intolerable situation; an interim order, made *ex parte*, would not of itself be a ground for ordering the child's return but simply an indicator of where the child "belonged". The only guideline which is not expressly satisfied is the important one that orders should be recognised only if made in a state recognising the child's welfare as paramount in such cases. The problem is somewhat obviated by the fact that the scheme is not one of enforcing the foreign decision but simply returning the child to its prior condition. But this answer is not very satis-

factory for the custody rights of which breach is alleged might have been determined by court order and this may not have given sufficient consideration to the child's interests. It would still be my wish that contracting states would assert their recognition of the welfare principle on entering the Convention. The point might be made that by the very act of entering the Convention (in good faith) a state is implementing a policy which places the welfare of children in a pre-eminent position because it is seeking to establish a system which promotes stability for children above the claims of individual adults irrespective of the claims the *adult* may have (whether based on nationality or otherwise) to have the matter dealt with differently.

10.7 On questions of cost, the European Convention requires contracting states not to claim payment from any applicant in respect of measures taken by the Central Authority under Article 5 and this includes "where applicable the costs incurred by the assistance of a lawyer." The Hague Document also states that Central Authorities shall bear their own costs in applying the Convention (Article 22). However, as far as the use of lawyers is concerned, The Hague Document merely requires Central Authorities to "provide or facilitate the provision of legal aid and advice" where this is "appropriate" (Article 7g). It does require Contracting states to allow nationals and persons habitually resident in any other contracting state the same facilities for legal aid and advice as its own nationals and habitual residents enjoy but there is recognition that these facilities may vary so the Document expressly permits Central Authorities to require payment for legal services which are not met through any legal aid system (and there may be none) and also to require payment for expenses incurred in repatriating the child.

10.8 On the basis of this survey it appears that The Hague Preliminary Draft offers substantial advantages to Commonwealth countries over the European Convention. The Hague Document will be further considered at a Plenary Session of The Hague Conference late in 1980. It is strongly urged that Commonwealth countries which are disposed to take steps to combat the problem of international child abduction will take an interest in the final drawing up of The Hague Convention and, eventually, make that Convention the basis of an international system to protect children from these ordeals.

Summary

1. The Report is designed to provide a review of the legal principles which have developed in Commonwealth law as a response to the problem of the international abduction of children. These principles are primarily to be found in court decisions, although in recent years the legislative bodies of some countries have enacted additional provisions, to which reference is also made. I have made use of all materials known to me but the possibility certainly exists that some significant decision or legislative act has not been noticed. Having made this review, reference is made

67 Para. 8.15.

68 See Ontario Report at the Uniform Law Conference of Canada, August 1978.

69 Paras. 9.6-9.9 above.

in brief to developments in the United States and then to attempts at international level to secure agreement between states on the best way to co-operate in these cases. The Report concludes by comparing the two major international instruments extant covering the problem, the European Convention adopted by the Council of Ministers of the Council of Europe in November 1979 and the Preliminary Draft Convention adopted by the Special Commission of The Hague Conference on Private International Law during the same month. An attempt is made to indicate which of the two instruments would be more suitable for a basis for Commonwealth action.

2. Section 2 gives a critical analysis of the progress of English law on this issue covering the forty years following 1940. It is shown that the courts initially adopted the position that, if a child was brought into their jurisdiction, it was in principle irrelevant whether this was done surreptitiously or contrary to a foreign order because, if the child's future was raised before them, they were bound to decide the issue in accordance with their own assessment of the child's best interests. To give automatic effect to a foreign order would be an improper delegation of their task. This principle was affirmed rigorously by the Judicial Committee of the Privy Council in *McKee v. McKee* (1951) on appeal from the Supreme Court of Canada. This judgment lodged this approach firmly in Canadian law and, despite certain doubts about it, it remained the dominant judicial approach there until dissatisfaction of its application led to legislative action in a number of provinces following the year 1974. In England, during the mid-1960's, the courts began to express doubts about the *McKee* principle and a new principle developed, largely fashioned by Cross J., according to which the judge should give effect to the orders of a foreign court unless satisfied that it was beyond reasonable doubt that to do so would inflict serious harm on the child. This approach enjoyed some success, but after some criticisms, was rejected in 1978. The *McKee* principle was restated, although it was recognised that a judge might, in certain cases, reasonably come to the conclusion that it was in a child's best interests to be immediately returned to a country with which it maintained close links and for its future to be determined in that country.

3. Section 3 concentrates more exclusively on the experience elsewhere in the Commonwealth. The same kinds of fluctuation in judicial opinion are also found, particularly in New Zealand, where the courts found themselves enjoined by statute to apply the *McKee* principle, but expressed misgivings about it. In 1975 the Family Law Act of Australia set up a structure for the registration in that country of custody decisions of prescribed overseas countries which were, in principle, to be enforced in Australia and which would, if found to exist, deprive the Australian courts of jurisdiction to hear the case unless circumstances were exceptional. New Zealand adopted the same system at the end of 1979. In Canada, the Uniform Law Conference drew up a model Extra-Provincial Enforcement of Custody Orders Act in 1974, enacted now (in substance) in

eight provinces. Ontario has not, however, adopted it but has made proposals for amending and widening it.

4. Section 4 gives a brief description of the Uniform Child Custody Jurisdiction Act which has been enacted by many states of the United States. This is concerned primarily with defining circumstances when a state may properly exercise jurisdiction in custody cases with an out-of-state element. This is generally thought to have had a beneficial effect in the United States in deterring against child abduction and making arrangements for access exercised outside a child's home state more secure.

5. Section 5 attempts to assess the common law approaches to the problem. The major problem areas are divided into two types of situation: one where a child has been removed or retained in breach of an extant order and the other where there is no such order. Even under the re-asserted *McKee* principle, a court could give "proper" weight to a foreign order, so the problem resolved itself into one of knowing what weight was "proper" to give to such an order. It seemed that where it appeared likely that the foreign order was not based on true investigation nor upon an application of the welfare principle (that the child's interests should be treated as paramount), courts tended to put little weight on the order. On the other hand, where such an order was an interim order made after proceedings had been commenced in the foreign country, there seemed to be a strong inclination for the child to be returned to the jurisdiction which is already seised of the matter. In the second situation the courts seemed to adopt a more pragmatic approach. If they felt that the children "belonged" in the country from which they had been taken, they would be returned. But the courts seemed more open, in such cases, to consider the context of the case broadly and conclude, where they thought it proper, that no benefit would be achieved by returning the children. It was very clear that courts would not return children if they felt that this was to risk causing them serious harm.

6. Certain special factors seemed to be particularly relevant in these cases in an attempt to arrive at the most just decision. Courts tended to be concerned about the cost and inconvenience caused to the innocent party in having to follow the abductor to another country. On the other hand, they also seemed to take into account the inconvenience, expense and disruption to the children which would be incurred if they ordered their return, and this became an overriding factor if the court believed that the foreign court would, when it eventually heard the case, only send the child back again. Another factor of importance was whether the court believed that it or the foreign court had better access to evidence relevant to assess the children's welfare.

7. Section 6 considers the suggestions made by the English and Scottish Law Commissions concerning cases within the United Kingdom when conflict occurs between different jurisdictions in that country. In particular, it is noted that the Commissions use the

concept of “habitual residence” as a basis for exercising jurisdiction. It is also noted that a system of reciprocal recognition of orders may be easier to attain in a small, culturally homogeneous community than in an international context.

8. Section 7 considers the progress of attempts to secure international agreements on this and related topics. It concludes with a brief account of the major features of the European Convention and The Hague Preliminary Draft Convention.

9. Section 8 attempts to set out some general principles which might serve as guidelines in any approach to the problem. It is assumed that it is considered desirable that the practice of abducting children across international frontiers is harmful to children generally, even if it may not be so in every individual case to the child concerned, and that accordingly international action is desirable.

10. Where there has been an abduction or retention contrary to an existing order, it was thought that it would be appropriate to have a procedure for notifying the country in which the child was found (or suspected to be present) of the relevant decision and that this should of itself provide the sufficient condition for action by the notified state in accordance with the decision. However, it should be open to objection by the abductor on certain grounds. The following grounds were thought, in principle, to be reasonable:

- (a) that the order was not made in the country of the child’s habitual residence at the time of the abduction;
- (b) that there are strong grounds for believing that the decision was not based on the principle that the child’s welfare was paramount;
- (c) that to return the child is likely to be seriously detrimental to his interests;
- (d) in certain cases it might be reasonable to oppose return on the ground of the disruption this would in itself cause to the child. This would depend very much on the circumstances of the case, one important factor being distance (geographical or cultural) between the countries concerned and likelihood that the foreign court might itself modify its order and send the child back. The child’s own views, if capable of ascertainment, might also be relevant.
- (e) that the order was not made after a proper hearing, unless it was of interim nature, made after proceedings had commenced. Where the abduction had taken place before any order had been made, but proceedings had been commenced, return should again be ordered on notice that such proceedings had commenced subject to the same grounds for refusal, *mutatis mutandis*, mentioned under (a) to (c) above. Ground (d) should not apply because that assumed the possibility of a change of circumstances since the foreign decision was made, while here there would be no such decision. Nor would ground (e) apply. Nor, in such a case, should the consideration alone that the foreign court might send the child back be conclusive: return should only be refused if this would create a real risk of harm for the child.

11. Where there has been an abduction or retention in the absence of any order or proceedings in the foreign state, two possible approaches are possible. One would be to require the aggrieved party to obtain an order in (her) home state requiring the child’s return, to lodge that with the recipient state and to make that order the basis for the order returning the child. But this entails giving the abductor an opportunity to defend his action in the proceedings in the state of origin. This is the approach of the European Convention and causes certain difficulties, discussed later in the Report. The other approach, adopted in The Hague Preliminary Draft, is to allow the aggrieved party direct access to the recipient state to allege the improper removal, to demonstrate the child’s prior habitual residence in the state of origin, and obtain the child’s return on that basis alone. This approach follows that of the judicial decisions ordering immediate return of children (based on an assessment of their own interests) to the country where they “belonged”.

12. The jurisdictional question is then considered and it is concluded that the concept of habitual residence is the most desirable. In particular, no attention should be paid to the nationality either of the child or his parents as this reflects some kind of notion of a state asserting quasi-proprietorial rights over the child where the true concern should be directed at the child’s welfare, which demands that a child should not be lightly removed from the environment in which it has his closest relationships and associations and that it is normally best for his future to be determined in that environment. (para. 8.16).

13. The question of time limits is next considered (para. 8.17). It is considered desirable that there should be encouragement for the aggrieved party to act swiftly and thus for the special policy requiring a presumption in favour of rapid return of the child to be limited for a period of, say, six months after the removal or retention. However, this period should not begin to run until an abductor who had concealed himself had been found, otherwise skill at concealment would be rewarded. However, it would have to be recognised that the longer the abductor concealed himself, the more likely it would be that he could resist the child’s return on the ground that it would be seriously detrimental to his interests.

14. Paragraph 8.18 pays very brief attention to the question of prevention. This is thought to depend very much on the circumstances of each country. No doubt countries can learn from each other what techniques have proved most successful in limiting the extent of abductions.

15. Paragraph 8.19 considers proposals that have sometimes been made for systems of “alternate custody” which have been alleged to reduce the risk of abduction which, it is claimed, arises when parents feel aggrieved at custody decisions of courts. Some scepticism is expressed on the desirability and feasibility of such arrangements but it is conceded that, where such arrangements are made successfully, they may well benefit the children and where this involves children crossing state frontiers, international agree-

ments which give such arrangements greater security will be of benefit to the parties and their children.

16. Section 9 of the Report compares the provisions of the European Convention and The Hague Preliminary Draft (called The Hague Document) in some detail. The major observations are the following:

(a) While both documents would establish Central Authorities with similar functions, the European Convention suffers from lack of clarity concerning the interrelationship between judicial and administrative authorities. In particular, Article 8(2) is drafted in such a way as to appear to exclude from the major provisions of the Convention concerning rapid return of children all cases where the recipient state cannot secure the return of a child without judicial authority. The extent of this limitation is not obvious, but could be extreme. There is no such limitation in The Hague Document.

(b) The European Convention creates a three tiered structure under which a child's return is automatic if the nationality principle and a six month time limit are satisfied. If the nationality principle is not satisfied the grounds for returning the child depend on whether the time limit is satisfied or not. The provisions for automatic return are not subject to any safeguards permitting refusal based on apprehension of harm to the child. This undue prominence given to the claims of nationality creates an imbalance in the European Convention which The Hague Document avoids.

(c) The scheme of the European Convention is premised on the existence of a prior decision in the state of origin. Thus, if an abduction or retention takes place before any such decision is made, the aggrieved party must seek such a decision in (her) home state before applying for the child's return. This can cause difficulties, especially as it is provided that, where the whereabouts of the abductor are known, (he) must be given time to arrange his defence. This problem could become acute because, in order to obtain the benefit of the major provisions of the Convention securing the rapid return of the child, the application must be made to the recipient state within six months of the removal or retention. There is no provision for extension of this period. Under The Hague Document, the aggrieved party needs no prior decision. (She) need only approach the authorities in the recipient state and allege that there has been a breach of custody rights which she was actually exercising and which were recognised by the state in which the child was habitually resident. Whether this puts this applicant in a better position than the applicant under the European Convention depends on a consideration of the grounds for refusal (summarised below, paragraph 18).

17. Both the European and The Hague schemes encourage rapid action by giving special status to application for return made within six months of the removal, although in the case of the latter, this time begins to run only when the abductor has been found. In the European Convention, the advantage is that the timely applicant is subject to fewer grounds for refusal than the later one. However, the drafting of the Euro-

pean Convention on this issue is unduly cumbersome and The Hague Document appears to achieve much the same result by simply saying that nothing in its provisions prevents the recipient state from returning the child after the expiration of the time limit: in other words, it is left to the individual laws of each country how to deal with such cases.

18. The grounds for refusal differ sharply between the documents. The European Convention distinguishes between applicants who satisfy *both* the nationality principle and the time limit and those who satisfy only the latter. In the first case, return is automatic; in the second, refusal is allowed if the decision is not *founded* on the habitual residence of the defendant, the parents or the child or if the defendant was absent and not given due notice of the proceedings. These provisions raise interpretative problems and opportunities for delay (paras. 9.14–9.15). That the return might seriously harm the child is not a ground for refusal creates the risk that states will use their powers of reservation to introduce wide grounds of refusal in such cases. In all other cases, Article 10 specifies further grounds for refusal which are not exclusive and very wide indeed. Under The Hague Document the grounds of refusal refer firstly to the question whether the applicant was actually exercising custody rights which (she) alleges were breached. This can be challenged. It is observed that this provision carries the risk that the merits could be opened to investigation in the recipient state, which the Convention seeks to avoid, and the degree to which this risk is run would depend on how far the relevant authorities in a recipient state are prepared to accept *prima facie* evidence by the applicant of the actual exercise by (her) of custody rights. More serious is the potential ground of refusal on the allegation that the applicant was not acting in good faith. This seems to be an invitation to try the merits in the recipient state and the hope is expressed that this clause will be deleted at the Plenary Session of the Conference. The Hague Document also allows refusal if the return of the child raises apprehension of risk of harm to the child or "otherwise place the child in an intolerable situation". This ground is supported, not only because such an emergency ground seems essential, but also because it seems to meet possible objections to returning a child if this would cause him severe disruption, especially if it is thought that the home state is likely to send him back in the end.

19. Paragraph 9.20 refers to the reservations permitted in the European Convention. These are very extensive and, if taken advantage of to any degree, which seems inevitable, could seriously weaken any impact which the Convention would have.

20. Section 10 concludes the Report by looking at The Hague Document from a Commonwealth perspective. It is concluded that the European Convention contains too many uncertainties to form the basis for uniform international action. The Hague scheme is compared with the position currently reached in the Commonwealth on this issue and

evaluated as to whether it successfully achieves the goals considered earlier in the Report to be a desirable basis for action. It is concluded that, while the adoption of the scheme would be inconsistent with the *McKee* principle in theory, it would in effect codify the way in which it is currently implemented. In particular, the principle of seeking to restore actually exercised custody rights rather than automatically enforcing foreign orders is fully consistent with current judicial practice. Adherence to the scheme would not, however, give rise to inconsistency in those jurisdictions which have adopted limited schemes of recognition and enforcement of foreign custody orders. Such orders provide excellent evidence of existing custody rights and their registration would enhance the purposes of The Hague scheme. Indeed, the scheme would fill the area left open by those provisions, *viz.* cases of abduction before any foreign order is made. The limitation of the scheme to restoration of custody rights exercised in the country of the child's habitual residence is in line with Commonwealth views on jurisdiction and would be a valuable safeguard in any international commitment.

21. It is considered that The Hague Document successfully meets the guidelines considered relevant for such a scheme. Although it does not expressly require contracting states to commit themselves to undertake that the child's interests should be the primary goal in their legal principles governing these cases (and it is thought that this would be a desirable commitment) it is suggested that the very entry by a state into a Convention of this kind, if made in good faith, shows a commitment to place the welfare of children above the claims some adults and other sectional interests might make in these cases.

22. It is pointed out that the provisions as to costs in both schemes are similar but that The Hague Document is based on the assumption that not all contracting parties will have widespread legal aid schemes operative in their countries.

23. The Report concludes by urging all Commonwealth countries disposed to combat the problem of international child abduction to take an interest in the final drawing up of The Hague Convention and to make that Convention the basis of an international system to protect children from these ordeals.

ANNEX A

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

PRELIMINARY DRAFT CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

adopted by the Special Commission
on November 16th, 1979

CHAPTER I—SCOPE OF THE CONVENTION

Article 1

The objects of this Convention are—

- a* to secure the prompt return of children wrongfully removed to or retained in any Contracting State, and
- b* to secure in all Contracting States the effective enjoyment of the rights of custody and of access.

Article 2

Contracting States will take all appropriate measures to secure within their territories the implementation of the objects of the Convention. They shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful when it is in breach of rights of custody actually exercised by a person [or institution], either jointly or alone, based upon the

law of the State in which the child was habitually resident immediately before the removal or retention, whether through operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having the force of law in that State.

Article 4

The Convention shall apply to any child under the age of [16] years who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

Article 5

For the purposes of this Convention—

- a* "rights of custody" are rights relating to the care of the person of the child, and in particular the right to determine the child's place of residence;
- b* "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II—CENTRAL AUTHORITIES

Article 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States and States with more than one system of law shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the relevant Central Authority in that State.

Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through other competent authorities in their States, they shall—

- a* take steps to discover the whereabouts of wrongfully removed or retained children;
- b* take or promote the taking of such provisional measures as may be necessary to prevent further harm to the child or further prejudice to interested parties;
- c* exchange, where appropriate, information relating to the social background of the child;
- d* take or cause to be taken all steps appropriate either to ensure the voluntary return of the child or to bring about an amicable resolution of the issues;
- e* provide information of a general character as to the law of their State relating to the application of the Convention;
- f* initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, where appropriate, the determination of issues relating to rights of custody and access;
- g* where appropriate, provide or facilitate the provision of legal aid and advice, including the services of legal counsel;
- h* provide such administrative arrangements as may be necessary and appropriate to achieve the safe return of the child.

CHAPTER III—RETURN OF CHILDREN

Article 8

Any person who claims that there has been a breach of his custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain—

- a* details concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
 - b* the date of birth of the child;
 - c* the grounds on which the applicant's claim for return of the child is based;
 - d* all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.
- The application may be accompanied or supplemented by—
- e* a certified copy of any relevant decision or any agreement having the force of law;
 - f* a certificate or a sworn declaration emanating from a competent authority of the State of the child's habitual residence, or from a qualified person, concerning the contents of the law of that State with respect to custody rights;
 - g* any other relevant document.

Article 9

Prior to the institution of legal proceedings, the Central Authority of the State where the child is to be found shall take or cause to be taken all appropriate measures in order to obtain the return of the child by consent.

Article 10

The judicial or administrative authorities of Contracting States shall act expeditiously on applications for the return of children.

If these judicial or administrative authorities have not reached a decision within six weeks after their receipt of the application, the Central Authority of the requested State shall so inform the applicant and the Central Authority of the requesting State, stating the reasons. The requirements imposed upon the Central Authority by this paragraph apply only where the Central Authority has been informed of the application.

Article 11

Where there has been a breach of custody rights in term of article 3 and, at the date of the application to the judicial or administrative authority of the State where the child is located, a period of less than six months has elapsed from the date of the breach of custody rights, the authority shall order the return of the child forthwith.

However, where the residence of the child was unknown, the period of six months referred to in the previous paragraph shall run from the date of the discovery of the child, subject to the proviso that the total period shall not exceed one year from the date of the breach.

Article 12

Notwithstanding the provisions of the preceding article, the judicial or administrative authority of the requested State is not bound to order the return of

the child if the person who has removed or retained the child establishes that—

- a* at the time of the alleged breach the applicant was not actually exercising the custody rights or acting in good faith; or
- b* there is a substantial risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authorities may also refuse the return of the child if they find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In evaluating the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority of the child's habitual residence.

Article 13

In determining whether or not the child should be returned, the judicial or administrative authority shall have regard to the law of the State of the habitual residence of the child before the removal, as that law is specified in article 3.

Article 14

The Central, judicial or administrative authorities of a Contracting State may request the authorities of the State of the habitual residence of the child to take all practicable steps to obtain a decision or other determination relating to the fact that the child has been removed or retained and that the child's removal or retention was wrongful within the meaning of article 3 of the Convention.

Article 15

The provisions of this Chapter do not limit the power of judicial or administrative authorities to order the return of the child after the expiration of the time limits set out in article 11.

Article 16

A decision concerning the return of the child shall not be construed as one relating to the merits of custody rights.

CHAPTER IV—RIGHTS OF ACCESS

Article 17

An application for fixing or protecting the exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through their competent authorities, may initiate or assist in the institution of proceedings with a view to fixing or to protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V—GENERAL PROVISIONS

Article 18

No security, bond or deposit, however described, shall be required [of a person habitually resident in a Contracting State] as a condition of the initiation of judicial proceedings falling within the scope of this Convention.

Article 19

No legalisation or similar formality may be required in the context of the Convention.

Article 20

Any application, communication or other document addressed to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may object to the use of either French or English, but not both, by making the reservation provided in article X.

Article 21

Nationals of the Contracting States and persons who are habitually resident in the territory of those States shall be entitled in matters concerned with the application of the Convention to legal aid and advice in any other Contracting State as if they themselves were nationals of and habitually resident in that State.

Article 22

Each Central Authority shall bear its own costs in applying the Convention.

Central Authorities and other administrative authorities of Contracting States shall not impose any charges in relation to applications submitted under this Convention but may—

- a* require the payment of any charges which are not met through the legal aid system and which arise from the employment of legal counsel;
- b* require the payment of the expenses incurred or to be incurred in repatriating the child.

Article 23

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well-founded, the Central Authority is not obliged to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted of its objections.

Article 24

A Central Authority may require that any application be accompanied by an authorization empowering it to act on behalf of the applicant, or to designate a person or institution so to act.

Article 25

This Convention shall not prevent any person whose custody or access rights have been breached applying directly to the judicial or administrative authorities of a Contracting State.

[Article 26]

Any application submitted to the Central Authorities of the Contracting States in accordance with the terms of this Convention, together with documents and other information appended thereto or provided by a Central Authority, shall be admissible in the courts of the Contracting States.]

Article 27

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units—

- a* any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b* any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

Article 28

In relation to a State which in matters of custody of children has two or more systems of law applicable to

different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

Article 29

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

Article V

(Relations with other Conventions: to be decided by the Fourteenth Session.)

Article W

(Temporal application of the Convention: to be decided by the Fourteenth Session.)

Article X

(Reservation accepted.)

Article Y (to be included among the final clauses)

If a Contracting State has two or more territorial units which have their own rules of law in respect of custody of children, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention shall extend to all its territorial units or to one or more of them, and may modify its declaration by submitting another declaration at any time.

These declarations shall be notified to the Ministry for Foreign Affairs of the Kingdom of the Netherlands, and shall state expressly the territorial units to which this Convention applies.

ANNEX B

EUROPEAN CONVENTION ON RECOGNITION AND ENFORCEMENT OF DECISIONS CONCERNING CUSTODY OF CHILDREN AND ON RESTORATION OF CUSTODY OF CHILDREN

The member States of the Council of Europe, signatory hereto,

Recognising that in the member States of the Council of Europe the welfare of the child is of overriding importance in reaching decisions concerning his custody;

Considering that the making of arrangements to ensure that decisions concerning the custody of a child can be more widely recognised and enforced will provide greater protection of the welfare of children;

Considering it desirable, with this end in view, to emphasise that the right of access of parents is a normal corollary to the right of custody;

Noting the increasing number of cases where children have been improperly removed across an international frontier and the difficulties of securing adequate solutions to the problems caused by such cases;

Desirous of making suitable provision to enable the custody of children which has been arbitrarily interrupted to be restored;

Convinced of the desirability of making arrangements for this purpose answering to different needs and different circumstances;

Desiring to establish legal co-operation between their authorities,

Have agreed as follows:

Article 1

For the purposes of this Convention:

- a. *child* means a person of any nationality, so long as he is under 16 years of age and has not the right to decide on his own place of residence under the law of his habitual residence, the law of his nationality or the internal law of the State addressed;
- b. *authority* means a judicial or administrative authority;
- c. *decision relating to custody* means a decision of an authority in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence, or the right of access to him;
- d. *improper removal* means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; improper removal also includes:
 - i. the failure to return a child across an international frontier at the end of a period of the exercise of the right to access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised;
 - ii. a removal which is subsequently declared unlawful within the meaning of Article 12.

PART I

Central authorities

Article 2

1. Each Contracting State shall appoint a central authority to carry out the functions provided for by this Convention.
2. Federal States and States with more than one legal system shall be free to appoint more than one central authority and shall determine the extent of their competence.
3. The Secretary General of the Council of Europe shall be notified of any appointment under this Article.

Article 3

1. The central authorities of the Contracting States shall co-operate with each other and promote co-operation between the competent authorities in their respective countries. They shall act with all necessary despatch.
2. With a view to facilitating the operation of this Convention, the central authorities of the Contracting States:
 - a. shall secure the transmission of requests for information coming from competent authorities and relating to legal or factual matters concerning pending proceedings;

- b. shall provide each other on request with information about their law relating to the custody of children and any changes in that law;
- c. shall keep each other informed of any difficulties likely to arise in applying the Convention and, as far as possible, eliminate obstacles to its application.

Article 4

1. Any person who has obtained in a Contracting State a decision relating to the custody of a child and who wishes to have that decision recognised or enforced in another Contracting State may submit an application for this purpose to the central authority in any Contracting State.
2. The application shall be accompanied by the documents mentioned in Article 13.
3. The central authority receiving the application, if it is not the central authority in the State addressed, shall send the documents directly and without delay to that central authority.
4. The central authority receiving the application may refuse to intervene where it is manifestly clear that the conditions laid down by this Convention are not satisfied.
5. The central authority receiving the application shall keep the applicant informed without delay of the progress of his application.

Article 5

1. The central authority in the State addressed shall take or cause to be taken without delay all steps which it considers to be appropriate, if necessary by instituting proceedings before its competent authorities, in order:
 - a. to discover the whereabouts of the child;
 - b. to avoid, in particular by any necessary provisional measures, prejudice to the interests of the child or of the applicant;
 - c. to secure the recognition or enforcement of the decision;
 - d. to secure the delivery of the child to the applicant where enforcement is granted;
 - e. to inform the requesting authority of the measures taken and their results.
2. Where the central authority in the State addressed has reason to believe that the child is in the territory of another Contracting State it shall send the documents directly and without delay to the central authority of that State.
3. With the exception of the cost of repatriation, each Contracting State undertakes not to claim any payment from an applicant in respect of any measures taken under paragraph 1 of this Article by the central authority of that State on the applicant's behalf, including the costs of proceedings and, where appli-

cable, the costs incurred by the assistance of a lawyer.

4. If recognition or enforcement is refused, and if the central authority of the State addressed considers that it should comply with a request by the applicant to bring in that State proceedings concerning the substance of the case, that authority shall use its best endeavours to secure the representation of the applicant in the proceedings under conditions no less favourable than those available to a person who is resident in and a national of that State and for this purpose it may, in particular, institute proceedings before its competent authorities.

Article 6

1. Subject to any special agreements made between the central authorities concerned and to the provisions of paragraph 3 of this Article:

- a. communications to the central authority of the State addressed shall be made in the official language or in one of the official languages of that State or be accompanied by a translation into that language;
- b. the central authority of the State addressed shall nevertheless accept communications made in English or in French or accompanied by a translation into one of these languages.

2. Communications coming from the central authority of the State addressed, including the results of enquiries carried out, may be made in the official language or one of the official languages of that State or in English or French.

3. A Contracting State may exclude wholly or partly the provisions of paragraph 1.b of this Article. When a Contracting State has made this reservation any other Contracting State may also apply the reservation in respect of that State.

PART II

Recognition and enforcement of decisions and restoration of custody of children

Article 7

A decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State.

Article 8

1. In the case of an improper removal, the central authority of the State addressed shall *cause steps to be taken forthwith* to restore the custody of the child where:

- a. at the time of the institution of the proceedings in the State where the decision was given or at the time of the improper removal, if earlier, the child and his parents had as their sole national-

ity the nationality of that State and the child had his habitual residence in the territory of that State, and

- b. a request for the restoration was made to a central authority within a period of six months from the date of the improper removal.

2. If, in accordance with the law of the State addressed, the requirements of paragraph 1 of this Article cannot be complied with without recourse to a judicial authority, none of the grounds of refusal specified in this Convention shall apply to the judicial proceedings.

3. Where there is an agreement officially confirmed by a competent authority between the person having the custody of the child and another person to allow the other person a right of access, and the child, having been taken abroad, has not been restored at the end of the agreed period to the person having the custody, custody of the child shall be restored in accordance with paragraphs 1.b and 2 of this Article. The same shall apply in the case of a decision of the competent authority granting such a right to a person who has not the custody of the child.

Article 9

1. In cases of improper removal, other than those dealt with in Article 8, in which an application has been made to a central authority within a period of six months from the date of the removal, recognition and enforcement may be refused only if:

- a. in the case of a decision given in the absence of the defendant or his legal representative, the defendant was not duly served with the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange his defence; but such a failure to effect service cannot constitute a ground for refusing recognition or enforcement where service was not effected because the defendant had concealed his whereabouts from the person who instituted the proceedings in the State of origin;
- b. in the case of a decision given in the absence of the defendant or his legal representative, the competence of the authority giving the decision was not founded:
 - i. on the habitual residence of the defendant, or
 - ii. on the last common habitual residence of the child's parents, at least one parent being still habitually resident there, or
 - iii. on the habitual residence of the child;
- c. the decision is incompatible with a decision relating to custody which became enforceable in the State addressed before the removal of the child, unless the child has had his habitual residence in the territory of the requesting State for one year before his removal.

2. Where no application has been made to a central authority, the provisions of paragraph 1 of this Article shall apply equally, if recognition and

enforcement are requested within six months from the date of the improper removal.

3. In no circumstances may the foreign decision be reviewed as to its substance.

Article 10

1. In cases other than those covered by Articles 8 and 9, recognition and enforcement may be refused not only on the grounds provided for in Article 9 but also on any of the following grounds:

- a. if it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed;
- b. if it is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child;
- c. if at the time when the proceedings were instituted in the State of origin:
 - i. the child was a national of the State addressed or was habitually resident there and no such connection existed with the State of origin;
 - ii. the child was a national both of the State of origin and of the State addressed and was habitually resident in the State addressed;
- d. if the decision is incompatible with a decision given in the State addressed or enforceable in that State after being given in a third State, pursuant to proceedings begun before the submission of the request for recognition or enforcement, and if the refusal is in accordance with the welfare of the child.

2. In the same cases, proceedings for recognition or enforcement may be adjourned on any of the following grounds:

- a. if an ordinary form of review of the original decision has been commenced;
- b. if proceedings relating to the custody of the child, commenced before the proceedings in the State of origin were instituted, are pending in the State addressed;
- c. if another decision concerning the custody of the child is the subject of proceedings for enforcement or of any other proceedings concerning the recognition of the decision.

Article 11

1. Decisions on rights of access and provisions of decisions relating to custody which deal with the right of access shall be recognised and enforced subject to the same conditions as other decisions relating to custody.

2. However, the competent authority of the State addressed may fix the conditions for the implemen-

tation and exercise of the right of access taking into account, in particular, undertakings given by the parties on this matter.

3. Where no decision on the right of access has been taken or where recognition or enforcement of the decision relating to custody is refused, the central authority of the State addressed may apply to its competent authorities for a decision on the right of access, if the person claiming a right of access so requests.

Article 12

Where, at the time of the removal of a child across an international frontier, there is no enforceable decision given in a Contracting State relating to his custody, the provisions of this Convention shall apply to any subsequent decision, relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person.

PART III

Procedure

Article 13

1. A request for recognition or enforcement in another Contracting State of a decision relating to custody shall be accompanied by:

- a. a document authorising the central authority of the State addressed to act on behalf of the applicant or to designate another representative for that purpose;
- b. a copy of the decision which satisfies the necessary conditions of authenticity;
- c. in the case of a decision given in the absence of the defendant or his legal representative, a document which establishes that the defendant was duly served with the document which instituted the proceedings or an equivalent document;
- d. if applicable, any document which establishes that, in accordance with the law of the State of origin, the decision is enforceable;
- e. if possible, a statement indicating the whereabouts or likely whereabouts of the child in the State addressed;
- f. proposals as to how the custody of the child should be restored.

2. The documents mentioned above shall, where necessary, be accompanied by a translation according to the provisions laid down in Article 6.

Article 14

Each Contracting State shall apply a simple and expeditious procedure for recognition and enforcement of decisions relating to the custody of a child. To that end it shall ensure that a request for enforcement may be lodged by simple application.

Article 15

1. Before reaching a decision under paragraph 1.b of Article 10, the authority concerned in the State addressed:

- a. shall ascertain the child's views unless this is impracticable having regard in particular to his age and understanding; and
- b. may request that any appropriate enquiries be carried out.

2. The cost of enquiries in any Contracting State shall be met by the authorities of the State where they are carried out.

Requests for enquiries and the results of enquiries may be sent to the authority concerned through the central authorities.

Article 16

For the purposes of this Convention, no legalisation or any like formality may be required.

PART IV

Reservations

Article 17

1. A Contracting State may make a reservation that, in cases covered by Articles 8 and 9 or either of these Articles, recognition and enforcement of decisions relating to custody may be refused on such of the grounds provided under Article 10 as may be specified in the reservation.

2. Recognition and enforcement of decisions given in a Contracting State which has made the reservation provided for in paragraph 1 of this Article may be refused in any other Contracting State on any of the additional grounds referred to in that reservation.

Article 18

A Contracting State may make a reservation that it shall not be bound by the provisions of Article 12. The provisions of this Convention shall not apply to decisions referred to in Article 12 which have been given in a Contracting State which has made such a reservation.

PART V

Other instruments

Article 19

This Convention shall not exclude the possibility of relying on any other international instrument in force between the State of origin and the State addressed or on any other law of the State addressed not derived from an international agreement for the purpose of obtaining recognition or enforcement of a decision.

Article 20

1. This Convention shall not affect any obligations which a Contracting State may have towards a non-contracting State under an international instrument dealing with matters governed by this Convention.

2. When two or more Contracting States have enacted uniform laws in relation to custody of children or created a special system of recognition or enforcement of decisions in this field, or if they should do so in the future, they shall be free to apply, between themselves, those laws or that system in place of this Convention or any part of it. In order to avail themselves of this provision the States shall notify their decision to the Secretary General of the Council of Europe. Any alteration or revocation of this decision must also be notified.

PART VI

Final clauses

Article 21

This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 22

1. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 21.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 23

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to this Convention, by a decision taken by the majority provided for by Article 20.d of the Statute and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 24

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

Article 25

1. A State which has two or more territorial units in which different systems of law apply in matters of custody of children and of recognition and enforcement of decisions relating to custody may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that this Convention shall apply to all its territorial units or to one or more of them.
2. Such a State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territorial unit specified in the declaration. In respect of such territorial unit the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territorial unit specified in such declaration, be withdrawn by notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

Article 26

1. In relation to a State which has in matters of custody two or more systems of law of territorial application:
 - a. reference to the law of a person's habitual residence or to the law of a person's nationality shall be construed as referring to the system of law determined by the rules in force in that State

or, if there are no such rules, to the system of law with which the person concerned is most closely connected;

- b. reference to the State of origin or to the State addressed shall be construed as referring, as the case may be, to the territorial unit where the decision was given or to the territorial unit where recognition or enforcement of the decision or restoration of custody is requested.
2. Paragraph 1.a of this Article also applies *mutatis mutandis* to States which have in matters of custody two or more systems of law of personal application.

Article 27

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in paragraph 3 of Article 6, Article 17 and Article 18 of this Convention. No other reservation may be made.
2. Any Contracting State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

Article 28

At the end of the third year following the date of the entry into force of this Convention and, on his own initiative, at any time after this date, the Secretary General of the Council of Europe shall invite the representatives of the central authorities appointed by the Contracting States to meet in order to study and to facilitate the functioning of the Convention. Any member State of the Council of Europe not being a party to the Convention may be represented by an observer. A report shall be prepared on the work of each of these meetings and forwarded to the Committee of Ministers of the Council of Europe for information.

Article 29

1. Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

Article 30

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention, of:

- a. any signature;

- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this Convention in accordance with Articles 22, 23, 24 and 25;
- d. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Luxembourg, the.....1980, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to any State invited to accede to this Convention.

THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS AND ORDERS AND THE SERVICE OF PROCESS WITHIN THE COMMONWEALTH

A PROGRESS REPORT

Memorandum by the Commonwealth Secretariat

CONTENTS

Introduction	235	<i>Appendices:</i> A List of Participants and Secretariat—	
The Regional Meetings	235	Caribbean Regional Meeting	240
Service of Process Abroad	235	Pacific Regional Meeting	241
Grants of Administration	236	Africa/Asia Regional Meeting	242
Maintenance Orders	237	B Draft Model Bill for a Grants of Administration (Resealing) Act	244
Money Judgments	238	C Draft Model Bill for a Maintenance Orders (Facilities for Enforcement) Act	247
The Model Bills	239	Notes on the Draft Model Bill	261
Designation of Commonwealth Countries	239	D Draft Model Bill for a Foreign Judgments (Reciprocal Enforcement) Act	265
International Organisations in the Field	239	E Draft Model Bill for a Commonwealth Countries Act	276
Future Work	239		
Appreciation	239		

THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS AND ORDERS AND THE SERVICE OF PROCESS WITHIN THE COMMONWEALTH

A PROGRESS REPORT

Memorandum by the Commonwealth Secretariat

Introduction

1. It was at the Meeting of Commonwealth Law Ministers in 1973 that Ministers first considered intra-Commonwealth legal relations in the field of execution of judgments. The particular aspect of the topic for consideration was the enforcement of maintenance orders but Ministers recognised that the whole field was one of growing importance to individuals and commercial organisations within the Commonwealth and deserved more general study.

2. As a result of discussions at the 1973 Meeting, the Secretariat commissioned Professor J. D. McClean and Professor K. W. Patchett to prepare a report examining the subject in detail. The two Professors produced a Preliminary Report for the 1975 Meeting, limited to money-judgments, maintenance orders and arbitral awards. The report demonstrated the existence of a number of Commonwealth schemes for legal co-operation in the field. The existence of those schemes was itself evidence of the practical importance of the subject-matter, but the schemes had not been kept up to date, did not reflect developments in international thought, and for a variety of reasons did not provide the comprehensive coverage which was seen to be required.

3. The professors were invited to continue and complete their examination, and a full report was presented at the Winnipeg Meeting in 1977. It examined money-judgments, maintenance orders, arbitral awards, bankruptcy, dissolution and winding-up of corporate bodies, grants of administration and service of process. The report contained recommendations for the improvement of Commonwealth co-operation in these areas and drew attention to the need for legislation in Commonwealth countries to take account of work done by specialist bodies such as The Hague Conference on Private International Law and UNIDROIT. The report was warmly received by Ministers who invited the Secretariat to pursue the professors' recommendations. The purpose of this present Report is to indicate the progress that has already been made and to indicate possible lines for future action.

The Regional Meetings

4. Three Regional Meetings have been held to examine aspects of the topic. They were held at Basseterre, St. Kitts, in April 1978; at Apia, Western Samoa, in April 1979; and in Nairobi, Kenya, in January of this year. A full list of jurisdictions represented, in some cases by Ministers but more commonly at senior official level, will be found in **Appendix A**. All three Meetings demonstrated the

value of such regional meetings of lawyers concerned with the practical workings of legislation on particular topics, and as will be seen from what follows, the Meetings were extremely successful in advancing consideration of the matters under review. It was only possible in the limited time available to examine four principal topics: the service of process, grants of administration, maintenance orders, and money-judgments.

Service of Process Abroad

5. The Meetings examined the question of service of process abroad, recognising the critical importance of satisfactory facilities for such service to the growing volume of international litigation. The traditional reliance on service being effected by the plaintiff or his agent, entirely familiar in common law jurisdictions, is unacceptable in many of the civil law jurisdictions with which many Commonwealth countries now have growing trade links, and the importance of dealing satisfactorily with resulting problems was particularly stressed at the Nairobi Meeting (where many countries represented had civil law neighbours).

6. Within the Commonwealth, there are no arrangements for giving official assistance to litigants seeking to serve process abroad. The growing diversity of procedural rules within the Commonwealth, which does of course have jurisdictions influenced by civil law and Roman-Dutch traditions, creates a need for official assistance, and the Meetings recognised the strength of the case for its introduction. A simple and inexpensive system was desirable in the interests of litigants and state Treasuries.

7. If such a system were available within the Commonwealth, it would greatly facilitate arrangements with civil law countries, which commonly object to the service of process other than through official channels. It was therefore seen as highly desirable to find an approach compatible with the needs of Commonwealth and non-Commonwealth states.

8. The Meetings were aware that a number of Commonwealth member states were already parties to *The Hague Convention on Service Abroad of Process*. This was specifically designed, in the tradition of The Hague Conference, for use by common law and civil law countries alike. It was simple (involving little more than the sending of the process and related documents to a designated official in the receiving State, who arranged for service to take place and who certified in due course that this had been done) and, by avoiding the use of consular or diplomatic channels, inexpensive and speedy.

9. The conclusion of the Meetings was that accession by Commonwealth countries generally to this Convention was a most desirable step. The Convention would come to serve as a scheme for service in other Commonwealth countries and as a bridge between the Commonwealth and countries of different legal traditions.

10. Encouraged by the views expressed at the Basseterre Meeting, the Secretariat invited Professors McClean and Patchett to prepare detailed Explanatory Documentation on a number of the Conventions produced at The Hague. The first of these was produced last year and examines the Service Abroad Convention, as well as those on Evidence and Legalisation. The brochure contains detailed information on the procedure for accession to the Service Convention with draft Rules of Court. In view of the unanimity of opinion at the Regional Meetings, Ministers may feel that it would be timely for those Commonwealth countries which have not already done so to set in hand consideration of accession to the Convention.

11. The Meetings also considered whether it was desirable to remove one further procedural hurdle from the path of the plaintiff contemplating international litigation. The traditional Rules of Court governing service out of the jurisdiction not only prescribe the cases in which such service is permissible but also require the prior leave of the court before service may be effected. A number of jurisdictions have, in recent revisions of their procedural rules, removed the need for prior leave in at least some categories of case; safeguards are retained so that improper service is invalid and may lead to sanctions as to costs. While recognising that this was not a matter on which the need for uniformity was very strong, the Meetings generally considered that the point could usefully be considered when reviews of this area of law were contemplated.

Grants of Administration

12. The traditional mechanism, adopted in almost all the common law jurisdictions, for facilitating the administration of estates where assets are to be found in more than one country, is to permit an original grant of administration to be resealed in each jurisdiction in which the personal representative needs to exercise his authority.

13. The Surveys and the Working Meetings have suggested that the resealing system has proved to be a straightforward and effective mechanism which generally operates smoothly with the minimum of controversy and expense. There was widespread agreement in all the Regions that the scheme was fundamentally sound and that it should continue to provide the basis for future arrangements.

14. At the same time, some shortcomings and possible improvements have been made evident by the experience gained from the use of the scheme over the years of this century but especially in the post colonial era. The principal deficiencies—which have

been dealt with by statutory amendment in some Commonwealth countries, principally in Australia and Canada—are:

(i) *the coverage of the scheme*: in many instances the relevant legislation does not reflect the changed nature of the Commonwealth, since it continues to apply the scheme to jurisdictions referred to, either collectively or individually, in terminology of uncertain meaning or validity. The consequence of this and, in the case of those states which must extend the scheme by individual order, of limited numbers of such orders is that the scheme has less than Commonwealth-wide application. A further weakness is that in most cases there is no possibility of applying the scheme to non-Commonwealth States, even where grants of administration are made in forms and circumstances closely akin to those in Commonwealth States.

(ii) *procedural features*: recent versions of the legislation have introduced several improvements on the original model, in a number of cases remedying shortcomings which practice has revealed. These relate, for example, to the range of persons who may make applications, better safeguards for creditors and others interested in the administration and the responsibilities of those acting under a resealed grant on behalf of the personal representative.

(iii) *administration in civil law systems*: the original scheme applied not only to grants of probate and letters of administration but to instruments issued by courts of probate having like effect. In some jurisdictions, however, authority to collect and administer an estate is not given pursuant to a court order. The Commonwealth Scheme does not meet this case. The most striking example relates to those civil law systems (both within and outside the Commonwealth) under which an heir enters upon his inheritance by operation of law. Unless there has been judicial intervention in a contested or complicated case, there will be no formal authority which the heir could present to a common law court for resealing.

15. As a result of the Working Meetings, the following steps for improvement of existing arrangements seem to command support:

(i) the basic model used by the majority of Commonwealth countries could usefully be refurbished by

(a) giving it automatic Commonwealth-wide application;

(b) allowing its extension to non-Commonwealth countries in so far as they provide for the grant or issue of formal authority to administer estates through instruments which have equivalent effect to a grant of probate or letters of administration;

(c) introducing up-to-date procedural improvements into the statute;

(ii) the model Bill which has been discussed in various revisions by all the Meetings and attempts to meet all the requirements merits consideration

for adoption by Commonwealth Governments (see **Appendix B**);

(iii) consideration should be given by Commonwealth Governments to the possibility of accession to the *Convention concerning the International Administration of the Estates of Deceased Persons* prepared by the Hague Conference in 1973 but not yet in force. This Convention, which is principally concerned to deal with the needs of civil law heirs seeking authority to enter into their entitlement in common law countries, was not considered by the Working Meetings as a suitable replacement for the existing Commonwealth scheme where that was capable of being applied. It was, however, seen as a potential supplementary scheme to meet circumstances not covered by the Commonwealth arrangement. The implications and mechanism of accession would be a suitable matter upon which detailed advice could be given by the Secretariat.

Maintenance Orders

16. As already noted, the enforcement of maintenance orders was one of the first aspects of the present field to be recognised as in need of attention, partly because Law Ministers were aware of a good deal of legislative activity in the area and partly because of its importance in terms of human happiness.

17. Almost all Commonwealth countries were found to have legislation based upon a scheme devised in 1920. That Scheme caters for both situations encountered in this area:

- (i) that in which the payer under a maintenance order leaves the jurisdiction in which the order was made, so that the payee needs to be enabled to enforce the order in the country to which the payer has gone; and
- (ii) that in which a claim for maintenance is made against a defendant who has already taken up residence abroad, e.g. a claim by a wife against a husband who has travelled abroad and has now ceased to remit payments for her support.

18. This Scheme, like that on Grants of Administration is defective in a number of respects:

- (i) *coverage of the scheme*: the legislation implementing the scheme is to be found in virtually common form in almost all countries of the Commonwealth. However, it does not apply automatically in relation to other Commonwealth countries but only those specifically designated as reciprocating states. This formality has been recognised as no longer necessary and is not required in relation to other Commonwealth countries in legislation already in force in New Zealand and Western Samoa.
- (ii) *refinement of procedure*: the basic scheme has been found to contain *lacunae* and procedural difficulties. In countries in which the scheme has been heavily used, notably Australia and Canada, there have been a number of revisions incorporating

improvements; many of these improvements were in the United Kingdom's Maintenance Orders (Reciprocal Enforcement) Act 1972 referred to at the 1973 Law Ministers' Meeting. They have not been taken into account in the legislation of many Commonwealth member countries.

(iii) *inapplicability to non-Commonwealth countries*: the features of the Commonwealth scheme which have proved most beneficial in practice, notably the "shuttlecock" procedure designed to meet the second of the two situations outlined in para. 17 are, unfortunately, not found in the legislation of countries outside the Commonwealth. It is therefore impossible to designate such countries as reciprocating countries, and some different approach is needed.

19. After detailed discussions at the Regional Meetings there was general agreement to the following strategy:

- (i) the refurbishment of the Commonwealth scheme to take account of the various improvements adopted in recent revisions, to include a wide definition of maintenance orders (including, in particular, affiliation orders, a matter once controversial but upon which there was very wide agreement at the Regional Meetings), and to dispense with the requirement for the designation of reciprocating countries so far as other Commonwealth countries are concerned;
- (ii) to encourage more Commonwealth countries to accede to the *United Nations Convention on the Recovery Abroad of Maintenance* which provides a mechanism for dealing with claims against absent defendants (*i.e.* the second situation identified in para. 17) which is less satisfactory than that in the Commonwealth scheme but provides a useful basis for governing relations with non-Commonwealth countries; and
- (iii) similarly to encourage more Commonwealth countries to accede to *The Hague Convention on the Enforcement of Decisions Relating to Maintenance Obligations* which deals with the enforcement of existing orders (and so with the first situation identified in para. 17) and is, again, suitable for governing relationships with civil law and other non-Commonwealth countries.

20. A Model Bill was prepared and discussed in various versions at the Regional Meetings. It is so constructed that individual jurisdictions could adopt it so as to refurbish the Commonwealth Scheme in its local application without necessarily acceding to either of the Conventions. The text of the Bill is given in **Appendix C**. Ministers may think it appropriate for the Draft Bill, with full explanatory material, to be circulated to each Commonwealth jurisdiction for detailed examination and possible enactment. The Secretariat would be able to give detailed advice as required and would take account of comments and criticisms received as a result of the examination of the Bill by the relevant officers of Commonwealth governments.

Money Judgments

21. The substantial majority of Commonwealth States have in force legislation for the registration and enforcement of judgments from other sovereign states. This legislation is modelled upon United Kingdom statutes either of 1920 (which has application within the Commonwealth only) or of 1933 (which is capable of being applied also to foreign states). The intention of the draftsmen of the later Act was that it should displace the former. Whilst this has occurred in a significant number of cases, in many both Acts are found on the statute book, although one or other may not in fact be operative whilst in others the later scheme has never been introduced.

22. The Regional Meetings, in examining the Commonwealth schemes, were made aware, in this matter as in others, of certain basic shortcomings relating to the coverage of the schemes. Extension orders too frequently showed little evidence of a systematic application of the scheme to those jurisdictions with which there were the main geographical, trading or migratory links. Little recent activity to review or revise the coverage was evident in many cases. There was little evidence of any attempt in many countries to apply the arrangements to non-Commonwealth States, even where power to enter into them was given.

23. Views were expressed at the Regional Meetings that reform in this area of law was unlikely to constitute a high priority in jurisdictions with relatively small economies and there were some fears that any improved facilities would be principally to the advantage of the Commonwealth countries with advanced economies. At the same time, it was apparent that there was widespread acceptance of the principle of providing international mechanisms which reduced the cost and delays which a creditor seeking to enforce his judgment abroad encounters and that in the longer term it would be advantageous to states with developing economies to have reciprocal arrangements at least with their main trading partners.

24. Those countries making regular use of the Commonwealth schemes were generally satisfied that they were uncomplicated in their operation and gave rise to few practical difficulties. There was also general support for the widening of the scheme to embrace other types of civil judgments in addition to money judgments, in particular judgments for the recovery of moveable property.

25. The Regional Meetings, therefore, favoured, as the immediate strategy, the following steps—

(a) confining the arrangements to a single scheme, and in particular the replacement of the 1933 scheme for that of 1920, especially in those jurisdictions where both statutes had already been enacted;

(b) in every case, the refurbishing of existing orders to ensure that up-to-date constitutional references to jurisdictions and their courts were in force;

(c) a review of those orders to determine whether extensions could be made in favour of jurisdictions with which the principal links of commerce and population obtained;

(d) an exchange of experience of negotiations with non-Commonwealth countries to determine the circumstances in which reciprocal arrangements had been effected and the action which must be taken in each instance to bring these about. It was apparent that the technique employed by the United Kingdom, that of negotiating formal international treaties, was not commonly employed by other Commonwealth countries which had found it possible to establish facilities by informal diplomatic correspondence.

26. The Regional Meetings, however, were made aware of the numerous international schemes in relation to enforcement of foreign judgments which were developing. In particular, attention was drawn to *The Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, the *Brussels (EEC) Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, and the current negotiations for a *UK/US Civil Judgments Convention*. It was fully recognised that these instruments represented major initiatives which could have a profound influence upon the future development of multilateral arrangements and therefore potentially upon the Commonwealth schemes. For it was apparent that these Conventions embodied features which were not fully consistent with those in the Commonwealth legislation.

27. In the latter respect, the later Working Meetings were particularly conscious that the future approach of the United Kingdom which will need to enact new legislation to meet the requirements of both the EEC Convention and the UK/US Convention could be influential. The Nairobi Meeting, in particular, suggested that the Law Ministers' Meeting might provide an opportunity for the United Kingdom Government, which was not represented at any of the Regional Meetings, to outline—

(a) whether the new bases for the assumption of jurisdiction in civil matters which will be necessary to fulfil the EEC Convention would also be applicable to proceedings in the UK which did not fall within that Convention, especially those which might affect residents or domiciliaries of Commonwealth countries;

(b) whether the 1933 legislation was to be amended to permit the US/UK Convention to be given effect under that statute or whether a further statute was envisaged to give municipal effect to the Convention;

(c) whether, especially if the 1933 Commonwealth schemes were to be so amended, it would in future be used primarily for non-Commonwealth arrangements whilst the rather less satisfactory 1920 scheme would remain the principal vehicle for the Commonwealth.

28. The Regional Meetings were generally of the view that as various international schemes grew,

there would be increasing demands to re-examine whether the Commonwealth schemes should attempt to reflect the emerging trends. For these new schemes extend the grounds upon which foreign judgments are to be recognised and enforced and introduce additional safeguards to protect the interests of both judgment creditors and debtors.

29. It was, however, apparent to all the Meetings that this aspect of judgments' enforcement more than those others reviewed by them gave rise to exceptionally demanding technical considerations which had still not been the subject of concluded international agreement. Accordingly, it was felt that—

(a) Commonwealth Governments need to keep these developments under constant and continuing review;

(b) developments to date should be the subject of analysis by an *ad hoc* Group of Commonwealth Experts with special expertise in this part of private international law;

(c) the Model Bill (see **Appendix D**), which attempts in statutory form to identify the kinds of issue to which this matter now gives rise, and possible solutions, should be made available both to Governments and to such an *ad hoc* Group to assist in such reviews and analysis.

30. It was generally conceded that any fundamental alterations to the Commonwealth schemes in respect of money-judgments either unilaterally or collectively would be premature given the extent of international activity currently taking place.

The Model Bills

31. The Regional Meetings have welcomed the preparation by the Professors of the model legislation on the matters under discussion. The Secretariat shares the view that this procedure is advantageous, both to the participants at technical meetings who can see precisely what are the legislative implications of the agenda items, and to jurisdictions which may wish to take legislative action but would be hindered by a lack of adequate legal drafting resources.

32. It is however stressed that the Model Bills have no greater status than that outlined above. They are presented with the recognition that considerable adaption will be required in particular jurisdictions, though in the hope that a measure of uniformity may be preserved.

Designation of Commonwealth Countries

33. In their Reports, Professors McClean and Patchett drew attention to the weaknesses found in a number of schemes for Commonwealth co-operation as a result of a failure by individual countries to take account of constitutional developments elsewhere. Some legislation giving effect to Commonwealth schemes still uses phrases such as "British pos-

sessions" or refers to countries by archaic titles such as "Gold Coast Colony" or "the Straits Settlements". Attention has been drawn in the Reports of the three Regional Meetings to the Commonwealth Countries Act 1977 of New Zealand, and participants at those Meetings welcomed, in general, the approach of that measure. At **Appendix E** there is presented a draft Bill based upon the New Zealand Act but in a form which it is thought will be more generally useful.

International Organisations in the Field

34. As a result of the discussions of the 1975 Law Ministers' Meeting, the Commonwealth Secretariat negotiated Observer status with The Hague Conference and with UNIDROIT. The value of such links has already proved itself. The Secretariat has been represented at two meetings of Special Commissions of The Hague Conference, and the Secretary-General of the Conference was a welcome participant at the Regional Meeting in Nairobi. A major Session of The Hague Conference, an event held every four years, will take place in October 1980, and is to discuss the international abduction of children (an item proposed by Canada); legal aid in international litigation; negotiable instruments; and other topics. Ministers may wish to comment on the development of such links, where the Secretariat can perform a function as agent for Commonwealth jurisdictions, monitoring and communicating the latest expert opinions on technical subjects in an economical and yet effective way. The preparation of a series of brochures examining the existing Hague Conventions from the point of view of Commonwealth jurisdictions, with model legislation, has already been mentioned.

Future work

35. It has not yet proved possible to take further a number of topics examined in the reports by Professors McClean and Patchett. Arbitral awards, bankruptcy and winding-up are such topics. An important area not yet examined is the whole question of the recognition of divorces and related orders, which would be a development of the work already done on maintenance orders, and which might also take account of the conclusions of studies on child custody aspects. Reference has already been made to the further work needed in the money-judgments area. Ministers may wish to comment on perceived priorities in the future work to be undertaken, in an area of legal co-operation of undoubted value to the people of the Commonwealth.

Appreciation

36. At previous Meetings, Ministers have commended the work of Professors McClean and

Patchett, and acknowledged the very real contribution they have made to initiatives aimed at improving Commonwealth arrangements and co-operation in this important and complex area of the law. The Professors' earlier Reports, and the Reports of the Regional Meetings, have been distributed throughout the Commonwealth, and beyond, to Governments, law reform agencies, libraries serving lawyers, and to practitioners themselves. Writing about the St. Kitts Report, a New Zealand reviewer had this to say—

The material in this Report is of an intensely practical nature, has been prepared to the best of research standards, and is presented clearly and well. It is of a range and degree of detail that will be appreciated by all conflicts lawyers and proceduralists and is wholeheartedly recommended to practitioners and academics with those interests.

37. An Australian reviewer of the same Report commented in these terms on the general approach of the Commonwealth to these developments—

The general approach of the Commonwealth is sensible. It is recognized that in some areas the community of interests and common legal heritage makes a separate Commonwealth scheme desirable. But there has been demonstrated a readiness to participate in broader international schemes, such as those devised by The Hague Conference, where suitable. This non-parochial and internationalist attitude stands in marked contrast to other regional groupings, particularly the European Economic Community, which have tended to look inward in these matters and have somewhat undermined the work of The Hague Conference and other international organizations. The Commonwealth can play a special role in the field of private international law, particularly for the smaller member States. On their own, such States may lack the resources of expertise to undertake studies into existing schemes and to evaluate new developments and to participate as individual members of international bodies active in the field.

38. This progress report once again reveals the deep debt owed by the Commonwealth Secretariat to the two Professors, and we are happy both to express our appreciation and to pay tribute to them for their scholarly and distinguished work.

APPENDIX A

CARIBBEAN REGIONAL MEETING

Basseterre, St. Kitts, 24–26 April 1978

List of Participants and Secretariat

Antigua	The Hon. Cosmas Phillips, Q.C. Attorney-General and Minister of Legal Affairs.
Barbados	Miss Yolande Bannister Chief Parliamentary Counsel. Mr. Colin A. Rocheford Registrar of the Supreme Court.
British Virgin Islands	Mr. Gerard St. C. Farara Legal Assistant.
Canada	Mr. F. J. E. Jordan Director, Constitutional, Administrative and International Law Section, Department of Justice, Ottawa.
Cayman Islands	Mr. David E. Ritch Crown Counsel.
Jamaica	The Hon. Mr. Justice O. D. Marsh Chief Parliamentary Counsel.
Guyana	Mr. Kenneth W. Barnwell Registrar of the Supreme Court.

St. Kitts-Nevis-Anguilla	The Hon. Lee L. Moore, M.P. Attorney-General and Minister of Legal Affairs. Mr. H. L. Browne Crown Counsel. Mr. K. A. Liburd Crown Counsel.
Trinidad and Tobago	Mr. Ivor Blackman Assistant Solicitor-General.
Turks and Caicos Islands	Mrs. Ena C. Woodstock, M.B.E. Magistrate.
Caricom Secretariat	Albert N. J. Matthew Assistant Legal Counsel.
Secretariat for Meeting	Professor J. D. McClean University of Sheffield, UK. Professor K. W. Patchett Caricorm Secretariat, Guyana. Mr. J. D. Pope Assistant Director, Legal Division, Commonwealth Secretariat. Mr. D. W. Sagar Special Adviser, (Legal) C.F.T.C. Mrs. Dorothy Hector, Miss Irene Harris and Miss Paulette Thompson, Basseterre, St. Kitts.

PACIFIC REGIONAL MEETING

Apia, Western Samoa, 18–23 April 1979

List of Participants and Secretariat

Australia	Mr. F. J. Mahony, OBE Deputy Secretary, Attorney-General's Department. Mr. T. Parslow, ED, QC Solicitor-General for State of Queensland. Mr. D. R. L. Boucher Principal Legal Officer, Attorney-General's Department.
Cook Islands	Mr. Michael C. Mitchell Advocate General.
Fiji	Mr. W. M. McGregor First Parliamentary Counsel.
Hong Kong	Mr. Jeremy F. Matthews Deputy Legal Draftsman. Mr. P. G. O'Dea Assistant Registrar, Supreme Court.
Malaysia	En. Fong Seng Yee Head of Civil Section, Attorney-General's Chambers.

New Zealand	Mr. R. G. Montagu Chief Legal Adviser, Department of Justice. Mr. P. D. Kennedy Second Secretary, New Zealand High Commission, Apia. Mr. W. K. Dewes Legal Adviser, Department of Justice.
Niue	Mr. Solomona Kalauni Secretary for Justice.
Papua New Guinea	The Hon. Mrs. Nahau Rooney, MP, Minister for Justice. Mr. Cas P. Mundran Executive Officer. Mr. B. B. Sakora Assistant Secretary for Justice.
Singapore	Tan Teow Yeow Senior State Counsel, Attorney-General's Chambers. Gwee Hak Theng Attorney-General's Chambers.
Solomon Islands	Mr. Frank O. Kabui Assistant Attorney-General.
Tonga	Mr. Laki Niu Assistant Crown Solicitor.
Tuvalu	Mr. J. F. Wilson Attorney-General.
Western Samoa	Mr. Neroni Slade Attorney-General. Mr. Clarence Nelson Attorney-General's Chambers.
Secretariat for Meeting	Professor David McClean University of Sheffield, UK. Professor Keith Patchett University of Wales, UK. Mr. J. D. Pope Assistant Director, Legal Division, Commonwealth Secretariat.

AFRICA/ASIA REGIONAL MEETING

Nairobi, Kenya, 9–14 January 1980

List of Participants and Secretariat

Bangladesh	Mr. Nur-Uz-Zaman Choudhury Deputy Secretary, Ministry of Law and Parliamentary Affairs.
Cyprus	Mr. Frixos Michaelides Director-General, Ministry of Justice.

The Gambia	Mr. A. N. M. O. Darboe Legal Draftsman, Attorney-General's Office.
Ghana	Mr. K. A. Amoo-Adare Chief State Attorney, Attorney-General's Department.
Kenya	Mr. D. J. Coward Registrar-General. Mr. R. Rose First Parliamentary Counsel.
Lesotho	Mr. R. Kali Director of Public Prosecutions Ministry of Justice. Mr. B. K. Molai Senior Resident Magistrate Ministry of Justice.
Malaŵi	Mr. Green Munlo State Advocate, Ministry of Justice.
Nigeria	Mrs. Tinuade Oyekunle Assistant Director, International and Comparative Law Division, Ministry of Justice.
Seychelles	Mr. Rajan Dhanjee State Counsel, Department of Legal Affairs.
Sierra Leone	Mr. V. V. Thomas State Counsel, State Law Office.
Sri Lanka	Miss M. BarrKumaraKulasinghe Senior Assistant Secretary, Ministry of Justice.
Swaziland	Mr. A. Nithianandan Acting Attorney-General.
Tanzania	Mr. D. S. Meela Deputy Attorney-General, Attorney-General's Chambers. Mr. Louis Chua Chief Resident Magistrate.
Uganda	Mr. Tom Ogwal Acting Director of Civil Affairs, Ministry of Justice. Mr. A. Ochwo Deputy Registrar, High Court of Uganda Mr. P. C. R. Kabatsi Senior State Attorney, Ministry of Justice. Miss Dora J. Kabito Personal Secretary, Ministry of Justice.

Zambia	Mr. M. S. Kampumpa Senior State Advocate, Ministry of Legal Affairs.
Observer	Dr. Georges A. L. Droz Secretary General of the Hague Conference on Private International Law, The Hague.
Secretariat for Meeting	Professor David McClean Commonwealth Secretariat Consultant. Professor Keith Patchett Commonwealth Secretariat Consultant. Mr. R. C. Nzerem Assistant Director, Legal Division, Commonwealth Secretariat.

APPENDIX B

DRAFT MODEL BILL

entitled

GRANTS OF ADMINISTRATION (RESEALING) ACT, 198–

[Revised 1 February, 1980]

An Act to make new provisions for the resealing in _____ of probates and letters of administration and instruments having similar effect granted outside _____ ; to repeal the [Probates (Resealing) Act] and for matters incidental thereto.

Short title	1. This Act may be cited as Probates and Letters of Administration (Resealing) Act, 197– .
Interpretation	2. (1) For the purpose of this Act, the expression— “court” includes any competent authority, by whatever name it is designated, having jurisdiction to make a grant of administration; “grant of administration” means a probate or letters of administration or any instrument having, within the jurisdiction where it was made, the effect of appointing or authorising a person (in this Act referred to as “the grantee”) to collect and administer any part of the estate of a deceased person and otherwise having in that jurisdiction an effect equivalent to that given, under the law of _____ , to a probate or letters of administration; “personal representative” means the executor, original or by representation, or administrator for the time being, of a deceased person and includes any public official or any corporation named in the probate or letters of administration as executor or administrator as the case may be; [“Registrar” means the Registrar of the Supreme Court;] “reseat” means reseat with the seal of the Supreme Court. (2) Any references in this Act to the making of a grant of administration shall include any process of issuing by or filing with a court by which an instrument is given an effect equivalent to that of a grant of probate or of letters of administration. (3) This Act shall apply in relation to grants of administration granted before or after the passing of this Act.

Applications
for Resealing

3. (1) Where a grant of probate or letters of administration of the estate of any deceased person has been made by a court in any part of the Commonwealth or in any other country, an application may be made under this section for the resealing of the grant of administration.

(2) An application under this section shall be made to the Registrar and may be made by—

- (a) a personal representative or the grantee, as the case may be; or
- (b) a person authorised by power of attorney given by any such personal representative or grantee; or
- (c) a legal practitioner registered in _____ acting on behalf of any such personal representative or grantee or of a person referred to in paragraph (b).

(3) Not less than twenty-one days before making an application under this section, the person intending to make it shall cause to be published in a newspaper or newspapers circulating in _____ and approved for the purpose of this section by the Registrar an advertisement which—

- (a) gives notice that the person named in the advertisement intends to make an application under this section;
- (b) states the name and the last address of the deceased person;
- (c) requires any person wishing to oppose the resealing of the grant letters of administration to lodge a caveat with the Registrar by a date specified in the advertisement which shall be a date not less than twenty-one days after the date of the publication of the advertisement.

(4) An applicant under this section shall produce to the Registrar—

- (a) the grant of administration or an exemplification thereof or a duplicate thereof sealed with the seal of the court by which the grant was made or a copy of any of the foregoing certified as a correct copy by or under the authority of that court;
- (b) where the document produced under paragraph (a) does not include a copy of the will, a copy of the will, verified by or under the authority of that court;
- (c) an affidavit stating that an advertisement has been duly published pursuant to subsection (3);
- (d) where the applicant is a person referred to in subsection (2)(b), the power of attorney authorising him to make the application and an affidavit stating that the power has not been revoked;
- (e) [an Inland Revenue certificate affidavit] as if the application were one for the making of a grant of administration by the Supreme Court; and
- (f) such evidence, if any, as the Registrar thinks fit as to the domicile of the deceased person,

and shall deposit with the Registrar a copy of the grant of administration.

Caveats

4. (1) Any person who wishes to oppose the resealing of a grant of administration shall, by the date specified in the advertisement published pursuant to section 3(3), lodge a caveat against the sealing.

(2) a caveat under subsection (1) shall have the same effect and shall be dealt with in the same manner as if it were a caveat against the making of a grant of probate or letters of administration by the Supreme Court.

(3) The Registrar shall not, without an order of the Supreme Court, proceed with an application under section 3 if a caveat has been lodged under this section.

Resealing of
grants of
administration

5. (1) Subject to this section, where an application has been duly made under section 3 and the date specified in the advertisement published pursuant to section 3(3) has passed and no caveat has been lodged under section 4 or any caveat so lodged has not been sustained, the Registrar may, if he is satisfied that—

- (a) such estate duties, if any, have been paid as would have been payable if the grant of administration had been made by the Supreme Court;

(b) security has been given in a sum sufficient in amount to cover the property in _____ to which the grant of administration relates and in relation to which the deceased died intestate, cause the grant of administration to be resealed.

(2) It is not necessary for security to be given under subsection (1)(b) in the case of a grant of administration which was made to any public official outside _____ .

(3) Where it appears that a deceased person was not, at the time of his death, domiciled within the jurisdiction of the court by which the grant was made, probate or letters of administration in respect of his estate may not be resealed, unless the grant is such as the Supreme Court would have had jurisdiction to make.

(4) The Registrar may, if he thinks fit, on the application of any creditor require, before resealing, that adequate security be given for the payment of debts or claims due from the estate to creditors residing in _____

(5) The Registrar—

(a) may, if he thinks fit, at any time before resealing refer an application under section 3 to the Supreme Court; and

(b) shall make sure such a reference if so requested in writing by the applicant at any time before resealing or within twenty-one days after he has refused to reseat,

and where an application is so referred, the grant of administration may not be resealed except in accordance with an order of the Supreme Court.

Effects of
resealing

6. (1) A grant of administration resealed under section 5(1) shall have like force and effect and the same operation in _____ , and such part of his estate as in _____ shall be subject to the same liabilities and obligations, as if the probate or letters of administration had been granted by the Supreme Court.

(2) Without prejudice to subsection (1), the personal representative or grantee, where the application is made by him or is made under section 3(2)(c) on his behalf or the person duly authorised under section 3(2)(b), where the application is made by him or is made under section 3(2)(c) on his behalf, shall, after the resealing, be deemed to be, for all purposes, the personal representative of the deceased person in respect of such of his estate as is in _____ , and, subject to section 7, shall perform the same duties and be subject to the same liabilities as if he was personal representative under a probate or letters of administration granted by the Supreme Court.

Duties of
person
authorised
by personal
representative,
etc.

7. (1) A person duly authorised under section 3(2)(b) who is deemed to be a personal representative by virtue of section 6(2) shall, after satisfying or providing for the debts or claims due from the estate of all persons residing in _____ or whose debts or claims he has had notice, pay over or transfer the balance of the estate in _____ to the personal representative named in the grant or the grantee, as the case may be or as such personal representative or grantee may, by power of attorney, direct.

(2) Any such person referred to in subsection (1) shall duly account to the personal representative or grantee, as the case may be, for his administration of the estate in _____

Rules of court

8. Rules of court may be made for regulating the practice and procedure, including fees and costs, on or incidental to an application under this Act for resealing a grant of administration.

Repeals

9. The [Probates (Resealing) Act] is hereby repealed.

Commencement

10. This Act shall come into force on such date as the [Head of State] shall, by order, designate.

APPENDIX C

DRAFT MODEL BILL

entitled

MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 198—

An Act to make new provision to facilitate the enforcement of maintenance orders; to make provision with a view to the accession by [] to the United Nations Convention on the Recovery Abroad of Maintenance done at New York on 20th June 1956 and to the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations done at The Hague on 2nd October 1973; and for connected purposes.

Short title 1. This Act may be cited as the Maintenance Orders (Facilities for Enforcement) Act 198—.

Interpretation 2.(1) In this Act—

“affiliation order” means an order (however described) adjudging, finding or declaring a person to be the father of a child, whether or not it also provides for the maintenance of the child;

“certificate of arrears”, in relation to a maintenance order, means a certificate certifying that the sum specified in the certificate is to the best of the information or belief of the officer giving the certificate the amount of the arrears due under the order at the date of the certificate or, as the case may be, that to the best of his information or belief there are no arrears due thereunder at that date;

“certified copy”, in relation to an order of a court, means a copy of the order certified by the registrar or other proper officer of the court to be a true copy;

“Commonwealth country” means any country outside [] which is an independent sovereign member of the Commonwealth or any territory for whose international relations any such country is responsible;

“competent court in a Hague Convention country” means any court in a Hague Convention country which has jurisdiction on one of the grounds specified in section 34(4);

“convention country” means a country designated by [Order] made under section 23;

“court” includes any tribunal or person having power to make, confirm, enforce, vary or revoke a maintenance order;

“court in a Hague Convention country” means any judicial or administrative authority in a Hague Convention country;

“Hague Convention” means the Convention referred to in section 31, and “Hague Convention country” means a country designated by [Order] under that section.

“maintenance order” means an order (however described), including a settlement made by or before a competent court in a Hague Convention country, of any of the following descriptions, and in the case of an order which is not limited to the following descriptions, the part of the order which is so limited, that is to say:—

(a) an order (including an affiliation order or order consequent upon an affiliation order) which provides for the periodical payment of sums of money towards the maintenance of any person, being a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain;

(b) an affiliation order or order consequent upon an affiliation order, being an order which provides for the payment by a person adjudged, found or declared to be a child’s father of expenses incidental to the child’s birth, or, where the child has died, of his funeral expenses, or, where the mother of the child has died, of her funeral expenses; and

(c) an order within the foregoing provisions of this definition made against a payer on the application of a public body which claims reimbursement of sums of money payable under the order with respect to the payee if reimbursement can be obtained by the public body under the law to which it is subject,

and, in the case of a maintenance order which has been varied (including a maintenance order which has been varied either by a court in [] or by a competent court in a

Hague Convention country whether or not the original order was made by such a court, means that order as varied;

Provided that the expression “maintenance order” shall not include an order made in a Hague Convention country of a description which that country or [] has reserved the right under article 26 of The Hague Convention not to recognise or enforce

“payee” in relation to a maintenance order, means the person entitled to payments for which the order provides;

“payer”, in relation to a maintenance order, means the person liable to make payments under the order;

“prescribed” means prescribed by rules of court;

“provisional order” means (according to the context)—

(a) an order made by a court in [] which is provisional only and has no effect unless and until confirmed, with or without alteration, by a competent court in a Commonwealth country; or

(b) an order made by a court in a Commonwealth country which is provisional only and has no effect unless and until confirmed, with or without alteration, by a court in [] having power under this Part of this Act to confirm it;

“registered order” means an order which is for the time being registered in a court in [] under Part III;

“registering court”, in relation to a registered order, means the court in which that order is for the time being registered;

“related documents” means—

(a) the application on which the order was made;

(b) a certificate of arrears signed by the registrar of the registering court;

(c) a statement giving such information as he possesses as to the whereabouts of the payer; and

(d) any relevant documents in his possession relating to the case.

“the responsible authority”, in relation to a Commonwealth country, means any person who in that country has functions similar to those of the [Minister for Foreign Affairs] under Part I, and in relation to a Hague Convention country means the appropriate authority in that country.

(2) Any reference in this Act to the payment of money for the maintenance of a child shall be construed as including a reference to the payment of money for the child’s education.

PART I

ENFORCEMENT OF MAINTENANCE ORDERS MADE IN [] AND IN COMMONWEALTH COUNTRIES

ORDERS MADE BY COURTS IN []

Transmission of
a maintenance
order made in
[]
for registration
in a Common-
wealth country

3.(1) This section applies to any maintenance order, not being a provisional order or an order made by virtue of a provision of Part III or of Part IV, made, whether before or after the commencement of this Part, by a court in [].

(2) Where it appears that the payer under a maintenance order to which this section applies is residing in or is proceeding to a Commonwealth country, the registrar of the court by which the order was made [or in which it is registered] may, of his own motion or on the application of a payee under the order, send to the [Minister for Foreign Affairs] a Request for Registration in the prescribed form.

(3) The [Minister for Foreign Affairs] shall transmit the Request for Registration to the responsible authority in the Commonwealth country if he is satisfied that the statement relating to the whereabouts of the payer gives sufficient information to justify that being done.

(4) Nothing in this section shall be taken as affecting any jurisdiction of a court in [] with respect to a maintenance order to which this section applies, and any such order may be enforced, varied or revoked accordingly.

Provisional orders for confirmation in a Commonwealth country	4.(1) Where an application is made to a court in [] for a maintenance order against any person who is proved to be residing in or to be proceeding to a Commonwealth country, and the application is one on which the court would have jurisdiction to make a maintenance order if that person were resident in [] and a summons to appear before the court to answer the application had been duly served upon him, the court shall have jurisdiction to hear the application and may make a provisional order. (2) Where a court makes a provisional order by virtue of this section, the registrar of the court shall send to the [Minister for Foreign Affairs] a Request for Confirmation in the prescribed form.
Effect of confirmation	5. A provisional order made by virtue of section 4 which has been confirmed by a competent court in a Commonwealth country shall be treated for all purposes as if the court in [] which made the order had made it in the form in which it was confirmed and as if the order had never been a provisional order, and subject to section 7 any such order may be enforced, varied or revoked accordingly.
Further proceedings in respect of a provisional order	6.(1) Where before a provisional order made by virtue of section 4 is confirmed, either— (i) a document, duly authenticated, setting out or summarising evidence taken in a Commonwealth country for the purpose of proceedings relating to the confirmation of the order is received by the court in [] which made the order; or (ii) that court, in compliance with a request made to it by a court in a Commonwealth country, takes the evidence of a person residing in [] for the purpose of such proceedings, the court in [] which made the order shall consider that evidence. (2) If it appears to the court, having considered such evidence that the provisional order ought not to have been made, or ought not to have been made in the form in which it was made— (a) it shall, in such manner as may be prescribed, give to the person on whose application the order was made an opportunity to consider that evidence, to make representations with respect to it, and to adduce further evidence; and (b) after considering all the evidence and any representations made by that person, it may revoke the provisional order, and may make a fresh provisional order. (3) Where a court makes a fresh provisional order by virtue of the preceding sub-section, the registrar of the court shall send in the prescribed manner to the court in the Commonwealth country a Request for Confirmation in the prescribed form.
Variation and revocation in [] of orders	7.(1) This section applies to a maintenance order which has been transmitted to a Commonwealth country in pursuance of section 3 and to a provisional order made by virtue of section 4 which has been confirmed by a competent court in a Commonwealth country. (2) A court in [] which, having considered an application for the variation of an order to which this section applies, proposes to vary the order— (a) may do so by a provisional order; and (b) shall do so by a provisional order where it proposes to increase the rate of payments under the order unless either— (i) both the payer and the payee under the order appear in the proceedings; or (ii) the applicant appears and the appropriate process has been duly served on the other party. (3) Where a court in [] makes a provisional order by virtue of this section, the registrar of the court shall send in the prescribed manner to the court in a Commonwealth country having power to confirm the provisional order a Request for Confirmation in the prescribed form.
Confirmation of provisional orders affecting orders made in []	8.(1) This section applies to a maintenance order which has been transmitted to a Commonwealth country in pursuance of section 3 and to a provisional order made by virtue of section 4 which has been confirmed by a competent court in a Commonwealth country. (2) Where a certified copy of a provisional order made by a court in a Commonwealth country, being an order varying or revoking an order to which this section applies, together

with a document duly authenticated, setting out or summarising the evidence given in the proceedings in which the provisional order was made, is received by the court in [] which made the order, that court may confirm or refuse to confirm the provisional order and if that order is an order varying the order, confirm it either without alteration or with such alterations as it thinks reasonable.

(3) For the purpose of determining whether a provisional order should be confirmed under this section, the court shall proceed as if an application for the variation or revocation, as the case may be, of the order in question had been made to it.

ORDERS MADE IN COMMONWEALTH COUNTRIES

Registration in [] court of maintenance order made in a Commonwealth country

9.(1) This section applies to a maintenance order made before or after the commencement of this Part against any person by a court in a Commonwealth country, including a provisional order made by such a court which has been confirmed by a court in another Commonwealth country.

(2) Subject to the following provisions of this section, the registrar of a court in [] who receives from the [Minister for Foreign Affairs] a certified copy of an order to which this section applies shall register the order in the prescribed manner in the court.

(3) Before registering an order under this section, the registrar shall take such steps as he thinks fit for the purpose of ascertaining whether the payer is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the payer.

Setting aside registration

10. The registration of an order under section 9 shall be set aside if the court in which the order has been registered is satisfied on an application by the payer that the order is not an order to which that section applies.

Confirmation and registration in [] of a provisional order made in a Commonwealth country

11.(1) This section applies to a provisional order made before or after the commencement of this Part against any person by a court in a Commonwealth country.

(2) Where the registrar of a court in [] receives from the [Minister for Foreign Affairs] a certified copy of an order to which this section applies together with—

(a) a document, duly authenticated, setting out or summarising the evidence given in the proceedings in which the order was made; and

(b) a statement of the grounds on which the making of the order might have been opposed by the payer under the order,

the registrar shall cause proceedings to be commenced in the court for the confirmation of the order.

(3) If a summons to appear in the proceedings for the confirmation of the order cannot be duly served on the payer, the registrar shall return the certified copy of the order and documents which accompanied it to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the payer.

(4) Subject to the provisions of section 19 of this Act, proceedings for the confirmation of the order shall be conducted as if an application for a maintenance order against the payer had been made to the court.

(5) At the hearing it shall be open for the payer to raise any defence which he might have raised in the original proceedings had he been present, but no other defence, and the statement received from the court which made the order of the grounds on which the making of the order might have been opposed shall be conclusive evidence that the payer might have raised a defence on any of those grounds.

(6) If the payer establishes any such defence as he might have raised in the original proceedings, the court shall refuse to confirm the order, and the registrar shall return the certified copy of the order and the documents which accompanied it to the [Minister for Foreign Affairs].

(7) In any other case, the court shall confirm the order either without alteration or with such alteration as it thinks reasonable, and the registrar shall register the order in the prescribed manner.

Enforcement in [] of orders registered under Part I	12.(1) An order registered in a court in [] by virtue of section 9(2) or 11(7) may be enforced in [] as if it had been made by the court in which it is registered and as if that court had had jurisdiction to make it; and proceedings for or with respect to the enforcement of any such order may be taken accordingly. (2) The registrar of the court by which an order is enforceable by virtue of this section shall take all such steps for enforcing the order as may be prescribed. (3) In any proceedings for or with respect to the enforcement of an order which is for the time being registered in any court under this Part a certificate of arrears sent to the court or to the registrar thereof shall be evidence of the facts stated therein. (4) Subject to subsection (5), sums of money payable under an order registered under this Part shall be payable in accordance with the order as from the date on which the order was made. (5) A court confirming an order under section 11(7) may direct that the sums of money payable under it shall be deemed to have been payable in accordance with the order as from such date, being a date later than the date on which the order was made, as it may specify; and subject to any such direction an order so confirmed shall be treated as if it had been made in the form in which it was confirmed and as if it had never been a provisional order.
Variation and revocation of orders registered under Part I	13.(1) This section applies to orders registered in [] by virtue of section 9(2) or 11(7). (2) The court in which an order to which this section applies is registered shall have the like power, on an application made by the payer or the payee, to vary or revoke the order as if the court had made the order and had had jurisdiction to make it. (3) Where the court in which an order to which this section applies is registered varies the order it may do so by means of a provisional order and shall do so unless— (a) both the payer and the payee are for the time being residing in []; or (b) the application is made by the payee; or (c) the variation consists of a reduction in the rate of payments under the order and is made solely on the ground that there has been a change in the financial circumstances of the payer since the order was made or, in the case of an order registered by virtue of section 11(7), since the order was confirmed, and the courts in the Commonwealth country in which the order was made do not have power, according to the law in force in that country, to confirm provisional orders varying maintenance orders. (4) When the court in which an order to which this section applies is registered revokes the order it may do so by means of a provisional order and shall do so unless both the payer and the payee are for the time being resident in []. (5) On an application for the revocation of an order to which this section applies, the court shall, if both the payer and the payee are for the time being residing in [], apply the law of [], but shall in any other case apply the law of the Commonwealth country in which the order was made; but where the court is required by virtue of this subsection to apply the law of a Commonwealth country it may make a provisional order if it has reason to believe that the ground on which the application is made is a ground on which the order could be revoked according to that law, notwithstanding that it has not been established that it is such a ground. (6) Where a court makes a provisional order under this section, the registrar shall send in the prescribed manner to the court in the Commonwealth country which made the order a Request for Confirmation in the prescribed form.
Confirmation of provisional orders affecting orders registered under Part I	14.(1) This section applies to orders registered in [] by virtue of section 9(2) or 11(7). (2) Where a certified copy of a provisional order made by a court in a Commonwealth country, being an order varying or revoking an order to which this section applies, together with a document duly authenticated, setting out or summarising the evidence given in the proceedings in which the provisional order was made, is received by a court in [] in which an order to which this section applies is registered, that court may confirm or refuse to confirm the provisional order and if that order is an order varying the order, confirm it either without alteration or with such alterations as it makes reasonable.

(3) For the purpose of determining whether a provisional order should be confirmed under this section, the court shall proceed as if an application for the variation or revocation, as the case may be, of the order in question had been made to it.

(4) The registrar of the court in which any order to which this section applies is registered shall register in the prescribed manner any order varying such an order.

Cancellation of
registration and
transfer of order

15.(1) This section applies to orders registered in [] by virtue of section 9(2) or 11(7).

(2) Where an order to which this section applies is revoked

(a) by an order made by the court in which it is registered; or

(b) by a provisional order made by that court which has been confirmed by a court in a Commonwealth country and notice of the confirmation is received by the court in []; or

(c) by an order made by a court in a Commonwealth country and notice of the revocation is received by the court in [].

the registrar of that court shall cancel the registration; but any arrears due under the order at the date when its registration is cancelled shall continue to be recoverable as if the registration had not been cancelled.

(3) Where the registrar of a court in which an order to which this section applies is registered is of opinion that the payer has ceased to reside within the jurisdiction of that court, he shall cancel the registration of the order and subject to sub-section (4) shall send the certified copy of the order to the [Minister for Foreign Affairs].

(4) Where the registrar of a court in which an order to which this section applies is registered is of opinion that the payer is residing within the jurisdiction of another court in [], he shall transfer the order to that court by sending the certified copy of the order to the registrar of that other court, and that registrar shall, subject to subsection (6) register the order in the prescribed manner in that court.

(5) Where the certified copy of an order is received by the [Minister for Foreign Affairs] under this section and it appears to him that the payer is still residing in [], he shall send the certified copy of the order to the registrar of the court within the jurisdiction of which it appears that the payer is residing, and the registrar of that court shall, subject to sub-section (6), register the order in the prescribed manner in that court.

(6) Before registering an order under sub-section (4) or (5), the registrar shall take such steps as he thinks fit for the purpose of ascertaining whether the payer is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the payer.

(7) A registrar required by the provisions of this section to send to the [Minister for Foreign Affairs] or to the registrar of another court the certified copy of an order shall send with that copy—

(a) a certificate of arrears signed by him;

(b) a statement giving such information as he possesses as to the whereabouts of the payer; and

(c) any relevant documents in his possession relating to the case.

Transmission of
certain orders
by [Minister for
Foreign Affairs]

16.(1) This section applies to maintenance orders received by the [Minister for Foreign Affairs] from the responsible authority in a Commonwealth country and to orders which have been registered in a court in [] by virtue of section 9(2) or 11(7).

(2) If it appears to the [Minister for Foreign Affairs] that the payer under an order to which this section applies is not residing or has ceased to reside in [], he shall send to the responsible authority of the Commonwealth country which in all the circumstances is appropriate—

(a) the certified copy of the order in question and a certified copy of any order varying that order;

(b) if the order has at any time been registered in a court in [], a certificate of arrears signed by the registrar of the court in which it was last registered;

(c) a statement giving such information as the [Minister for Foreign Affairs] possesses as to the whereabouts of the payer; and

(d) any other relevant documents in his possession relating to the case.

(3) Where the documents mentioned in sub-section (2) are sent to the responsible authority in a Commonwealth country other than that in which the order in question was made, the [Minister for Foreign Affairs] shall inform the responsible authority in the Commonwealth country in which the order was made of what he has done.

SUPPLEMENTAL

17.(1) No appeal shall lie from a provisional order made under any provision of this Part of this Act by a court in [].

(2) Where any court in [] refuses to make a provisional order in pursuance of section 4 or revokes a provisional order in pursuance of section 6, the applicant shall have the like right of appeal (if any) from the refusal to make, or the revocation of, the provisional order as he would have if that order were not a provisional order.

(3) Where in pursuance of any provision of this Part, any court in [] confirms or refuses to confirm a provisional order made by a court in a Commonwealth country (including a provisional order varying or revoking a maintenance order), the payer or payee under the order shall have the like right of appeal (if any) from the confirmation of, or refusal to confirm, the provisional order as he would have if that order were not a provisional order and the court which confirmed or refused to confirm it had made or, as the case may be, refused to make it.

(4) Where in pursuance of any provision in this Part, any court in [] makes, or refuses to make, an order varying or revoking a maintenance order made by a court in a Commonwealth country, then, subject to sub-section (1), the payer or payee shall have the like right of appeal (if any) from that order or from the refusal to make it as he would have if the maintenance order had been made by the court in [].

(5) Nothing in this section (except sub-section (1)) shall be construed as affecting any right of appeal conferred by any other enactment.

Obtaining of evidence for the purposes of proceedings in a Commonwealth country

18.(1) Where for the purpose of any proceedings in a court in a Commonwealth country relating to a maintenance order to which this Part applies a request is made by or on behalf of that court for the taking in [] of the evidence of a person residing therein relating to matters specified in the request, a court in [] shall have power to take that evidence and, after giving notice of the time and place at which the evidence is to be taken to such persons and in such manner as it thinks fit, shall take the evidence in such manner as may be prescribed.

(2) Evidence taken by virtue of this section shall be sent in the prescribed manner by the registrar of the court to the court in the Commonwealth country by or on behalf of which the request was made.

Remission of case to a court in a Commonwealth country; interim orders

19.(1) A court in [] may for the purpose of any proceedings in that court under this Part relating to an order to which this Part applies request a court in a Commonwealth country to take or provide evidence relating to such matters as may be specified in the request and may remit the case to that court for that purpose.

(2) A court in [] considering the confirmation of an order under section 11 and remitting the case in accordance with this section may make such interim order for periodical payments by the payer as it thinks fit.

Conversion of currency

20.(1) Where the sums of money required to be paid under an order registered in a court in [] under this Part or specified in any statement of arrears due under a maintenance order made by a court in a Commonwealth country are expressed in a currency other than the currency of [], then, as from the relevant date, the sums shall be treated as such sums in the currency of [] as are equivalent thereto on the basis of the rate of exchange prevailing at that date.

(2) For the purposes of this section a written certificate purporting to be signed by an officer of any bank in [] certifying that a specified rate of exchange prevailed between currencies at a specified date and that at such rate a specified sum in the currency of

[] is equivalent to a specified sum in another specified currency shall be evidence of the rate of exchange so prevailing on that date and of the equivalent sums in terms of the respective currencies.

(3) In this section “the relevant date” means—

(a) in relation to an order which is registered in a court in [] or to a statement of arrears due under a maintenance order made by a court in a Commonwealth country, the date on which the order is first registered under this Act;

(b) in relation to an order which has been varied, the date on which the last order varying that order is registered under this Act.

Orders in
foreign
language

21. Where a maintenance order sought to be registered or confirmed in [] under this Part is in a language other than English, the certified copy of the order shall have attached thereto, for all purposes of this Part, a translation in the English language approved by the registrar of the court, and upon such approval being given the order shall be deemed to be in the English language.

PART II

EXTENSION OF PART I TO NON-COMMONWEALTH COUNTRIES

Extension of
Part I to non-
Commonwealth
countries

22. The [Head of State] may by [Order] declare that the provisions of Part I, with such exceptions, adaptations and modifications as may be specified in the [Order] shall apply as if any country designated in the [Order] were a Commonwealth country.

PART III

RECIPROCAL ENFORCEMENT OF CLAIMS FOR THE RECOVERY OF MAINTENANCE

CONVENTION COUNTRIES

Convention
countries

23. The [Head of State] may by [Order] declare that any country or territory specified in the [Order], being a country or territory outside [] and not being a Commonwealth country or a country designated in an [Order] under section 22, to which the United Nations Convention on the Recovery Abroad of Maintenance done at New York on 20th June 1956 extends, is a convention country for the purposes of this Act.

APPLICATION BY PERSON IN [] FOR RECOVERY ETC. OF MAINTENANCE IN A CONVENTION COUNTRY

Application
by person in
[]

24.(1) Where a person in [] (“the applicant”) claims to be entitled to recover in a convention country maintenance from another person, and that other person is for the time being subject to the jurisdiction of that country, the applicant may apply to the [Minister for Foreign Affairs], in accordance with the provisions of this section, to have his claim for the recovery of maintenance from that other person transmitted to that country.

(2) Where the applicant seeks to vary any provision made in a convention country for the payment by any other person of maintenance to the applicant, and that other person is for the time being subject to the jurisdiction of that country, the applicant may apply to the [Minister for Foreign Affairs], in accordance with the provisions of this section, to have his application for the variation of that provision transmitted to that country.

(3) An application to the [Minister for Foreign Affairs] under this section shall be made through the registrar of the prescribed court who shall assist the applicant in completing an application which will comply with the requirements of the law of the convention country and shall send the application to the [Minister for Foreign Affairs], together with such other documents, if any, as are required by that law.

(4) On receiving an application from the registrar, the [Minister for Foreign Affairs] shall transmit it, together with any accompanying documents, to the appropriate authority in the convention country, unless he is satisfied that the application is not in good faith or that it does not comply with the requirements of the law of that country.

(5) The [Minister for Foreign Affairs] may request the registrar to obtain from the court of which he is registrar such information relating to the application as may be specified in the request, and it shall be the duty of the court to furnish the [Minister for Foreign Affairs] with the information he requires.

APPLICATION BY PERSON IN CONVENTION COUNTRY FOR RECOVERY OF MAINTENANCE IN []

Application
by person in
convention
country

25.(1) Where the [Minister for Foreign Affairs] receives from the appropriate authority in a convention country an application by a person in that country for the recovery of maintenance from another person ("the defendant") who is for the time being residing in [], he shall send the application, together with any accompanying documents, to the registrar of the prescribed court.

(2) On receiving the application in accordance with sub-section (1), the registrar shall cause proceedings to be commenced in the court for the consideration of the application.

(3) If a summons to appear in the proceedings cannot be duly served on the defendant, the registrar shall subject to sub-section (4) return the application, together with any accompanying documents, to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the defendant.

(4) If a registrar who receives an application in accordance with sub-section (1) is satisfied that the defendant is residing within the jurisdiction of another court in [], he shall send the application, together with any accompanying documents, to the registrar of that other court and shall inform the [Minister for Foreign Affairs] that he has done so.

(5) A registrar receiving an application under sub-section (4) shall proceed as if he had received it under sub-section (1).

(6) In any case not falling under sub-section (3) or (4), the court shall proceed as if the applicant were before the court.

(7) If the court makes an order on the application the registrar shall register the order in the prescribed manner in the court.

FURTHER PROVISIONS AS TO REGISTERED ORDERS

Transfer or
return of orders

26.(1) Where the registrar of the registering court is of opinion that the payer under a registered order has ceased to reside within the jurisdiction of the court he shall cancel the registration and, subject to sub-section (2), send a certified copy of the order and the related documents to the [Minister for Foreign Affairs].

(2) Where the registrar of the registering court is of opinion that the payer under a registered order is residing within the jurisdiction of another court in [], he shall transfer the order to that other court by sending a certified copy of the order and the related documents to the registrar of that court and, subject to sub-section (4), that registrar shall register the order in the prescribed manner in that court.

(3) Where a certified copy of an order is received by the [Minister for Foreign Affairs] under sub-section (1) and it appears to him that the payer under the order is still residing in [] he shall transfer the order to the court within the jurisdiction of which the payer is residing by sending the copy of the order and the related documents to the registrar of that court and, subject to sub-section (4), that registrar shall register the order in the prescribed manner in that court.

(4) Before registering an order in pursuance of sub-section (2) or (3), a registrar of a court shall take such steps as he thinks fit for the purpose of ascertaining whether the payer under the order is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order and

the related documents to the registrar or the [Minister for Foreign Affairs], as the case may be, from whom he received them, together with a statement giving such information as he possesses as to the whereabouts of the payer.

**Enforcement
of orders**

27.(1) The registrar of the court in which an order is registered under this Part shall take all such steps for enforcing the order as may be prescribed.

(2) A registered order which is registered in a court other than the court by which the order was made may be enforced as if it had been made by the registering court and as if that court had had jurisdiction to make it.

(3) In any proceedings for or with respect to the enforcement of a registered order, a certificate of arrears sent under section 26 to the registrar of the court shall be evidence of the facts stated therein.

**Variation and
revocation
of orders**

28.(1) The registering court shall have jurisdiction to hear any application by the payer or the payee for the variation or revocation of a registered order where the defendant to the application is residing in [] or in a convention country.

(2) Where the [Minister for Foreign Affairs] receives from the appropriate authority in a convention country an application by a person in that country for the variation or revocation of a registered order, he shall send the application, together with any accompanying documents, to the registrar of the registering court.

(3) On receiving the application in accordance with sub-section (1), the registrar shall cause proceedings to be commenced in the court for the consideration of the application.

(4) The court shall not proceed to the hearing of an application for the variation or revocation of a registered order unless

(a) in the case of a defendant to the application residing in [], a summons to appear in the proceedings has been duly served on him; and

(b) in the case of a defendant residing in a convention country, such notice of the proceedings as may be prescribed has been given to the defendant in the prescribed manner.

**Obtaining of
evidence for
purpose of
proceedings in
[]**

29.(1) A court in [] may for the purpose of any proceedings in that court under this Part arising out of an application received by the [Minister for Foreign Affairs] from a convention country request the [Minister for Foreign Affairs] to make to the appropriate authority or court in the convention country a request for the taking in that country of the evidence of a person residing therein relating to matters connected with the application.

(2) A request made by a court under this section shall—

(a) give details of the application in question;

(b) state the name and address of the person whose evidence is to be taken; and

(c) specify the matters relating to which the evidence of that person is required.

(3) If the [Minister for Foreign Affairs] is satisfied that a request made to him under this section contains sufficient information to enable the evidence of the person named in the request relating to the matters specified therein to be taken by a court or person in the convention country, he shall transmit the request to the appropriate authority or court in that country.

**Taking of
evidence at
request of court
in a convention
country**

30.(1) Where a request is made to the [Minister for Foreign Affairs] by or on behalf of a court in a convention country to obtain the evidence of a person residing in [] relating to matters connected with an application to which section 24 applies, the [Minister for Foreign Affairs] shall request such court, or such registrar or other officer of a court, as he may determine to take the evidence of that person relating to such matters connected with that application as may be specified in the request.

(2) The court by which or registrar or other officer by whom a request under sub-section (1) is received from the [Minister for Foreign Affairs] shall have power to take the evidence and, after giving notice of the time and place at which the evidence is to be taken to such persons and in such manner as it or he thinks fit, shall take the evidence of the person named in the request relating to the matters specified therein in such manner as may be prescribed; and the evidence so taken shall be sent in the prescribed manner by the registrar to the court in the convention country by or on behalf of which the request referred to in sub-section (1) was made.

PART IV

ENFORCEMENT UNDER THE HAGUE CONVENTION

HAGUE CONVENTION COUNTRIES

Hague Convention countries

31. The [Head of State] may by [Order] declare that any country or territory specified in the [Order], being a country or territory outside [] and not being a Commonwealth country or a country designated in an [Order] under section 22, in which the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations concluded at The Hague on 2nd October 1973 is in force, is a Hague Convention country for the purposes of this Part.

ORDERS MADE BY COURTS IN []

Transmission of a maintenance order made in [] for registration in a Hague Convention country

32.(1) This section applies to any maintenance order, not being a provisional order or an order made by virtue of a provision of Part III, made, whether before or after the commencement of this Part, by a court in [] if—

- (a) either the payer or the payee had his habitual residence in [] at the time when the application for the maintenance order was made; or
- (b) the payer and the payee were citizens of [] at that time; or
- (c) the payer appeared in the proceedings in which the maintenance order was made and defended on the merits without objecting to the jurisdiction of the court.

(2) Where it appears that the payer under a maintenance order to which this section applies is residing in or is proceeding to a Hague Convention country, the registrar of the court by which the order was made [or in which it is registered] may, of his own motion or on the application of a payee under the order, send to the [Minister for Foreign Affairs] a Request for Enforcement in the prescribed form.

(3) The [Minister for Foreign Affairs] shall transmit the Request for Enforcement to the responsible authority in the Hague Convention country if he is satisfied that the statement relating to the whereabouts of the payer gives sufficient information to justify that being done.

(4) Nothing in this section shall be taken as affecting any jurisdiction of a court in [] with respect to a maintenance order to which this section applies, and, subject to section 33, any such order may be enforced, varied or revoked accordingly.

Variation and revocation in [] of orders

33.(1) This section applies to a maintenance order which has been transmitted to a Hague Convention country by virtue of section 32

(2) Where an application is made to a court in [] by the payee for the variation or revocation of an order to which this section applies, and the payer is residing in a Hague Convention country, the registrar of the court shall send to the [Minister for Foreign Affairs] a notice of the application in the prescribed form, and the court may not vary or revoke the maintenance order unless—

- (a) it is satisfied that the notice of the application has been served on the payer in accordance with the law of the Hague Convention country in which he is residing not less than six weeks before the date of the hearing of the application; and
- (b) it has taken into account any representations made and any evidence adduced by or on behalf of the payer.

(3) Where a court in [] varies or revokes an order to which this section applies, the registrar of the court shall send to the [Minister for Foreign Affairs] a Notice of Variation or Revocation in the prescribed form.

ORDERS MADE BY COURTS IN HAGUE CONVENTION COUNTRIES

Registration
in []
of maintenance
order made in
Hague Conven-
tion country

34.(1) This section applies to a maintenance order made before or after the commencement of this Part against any person by a court in a Hague Convention country.

(2) Subject to the following provisions of this section, the registrar of a court in [] who receives from the [Minister for Foreign Affairs] a certified copy of an order to which this section applies shall register the order in the prescribed manner in the court.

(3) Before registering an order under this section, the registrar shall take such steps as he thinks fit for the purpose of ascertaining whether the payer is residing within the jurisdiction of the court, and if after taking those steps he is satisfied that the payer is not so residing he shall return the certified copy of the order to the [Minister for Foreign Affairs] with a statement giving such information as he possesses as to the whereabouts of the payer.

(4) (a) The registrar may refuse to register the order if the court in the Hague Convention country by or before which the order was made did not have jurisdiction to make the order; and for these purposes a court in a Hague Convention country shall be considered to have jurisdiction if—

(i) either the payer or the payee had his habitual residence in the Hague Convention country at the time when the proceedings in which the maintenance order was made were instituted; or

(ii) the payer and the payee were nationals of that country at that time; or

(iii) the defendant in those proceedings had submitted to the jurisdiction of the court, either expressly or by defending on the merits of the case without objecting to the jurisdiction; or

(iv) in the case of a maintenance order made by reason of a divorce or a legal separation or a declaration that a marriage is void or annulled, the court is recognised by the law of [] as having jurisdiction in that matter.

(b) In deciding whether a court in a Hague Convention country had jurisdiction to make a maintenance order the registrar shall be bound by any finding of fact on which the court based its jurisdiction.

(5) The registrar may refuse to register the order

(a) if such registration is manifestly contrary to public policy;

(b) if the order was obtained by fraud in connection with a matter of procedure;

(c) if proceedings between the same parties and having the same purpose are pending before a court in [] and those proceedings were the first to be instituted; or

(d) if the order is incompatible with an order made in proceedings between the same parties and having the same purpose, either in [] or in another country provided that in the latter case the order fulfils the conditions necessary for its recognition and enforcement in [] under this Act.

(6) Without prejudice to sub-section (5), if the payer did not appear in the proceedings in the Hague Convention country in which the order was made, the registrar shall refuse to register the order unless

(a) notice of the institution of the proceedings, including notice of the substance of the claim, was served on the payer in accordance with the law of that Hague Convention country; and

(b) having regard to the circumstances, the payer had sufficient time to enable him to defend the proceedings.

Setting aside
registration

35.(1) The payer may apply to the court in which an order is registered under section 34 for the registration to be set aside.

(2) The court shall set aside the registration if it is satisfied that the order is not an order to which section 34 applies or that the registrar should have refused to register the order under subsection (6) of that section.

(3) The court may set aside the registration on any ground upon which the registrar might have refused to register the order under section 34.

Appeals against refusal to register	36. The payee may appeal to the court against any refusal by the registrar to register an order to which section 34 applies.
Enforcement in [] of orders registered under section 34	37.(1) An order registered in a court in [] by virtue of section 34 may be enforced in [] as if it had been made by the court in which it is registered and as if that court had jurisdiction to make it, and proceedings for or with respect to the enforcement of any such order may be taken accordingly. (2) The registrar of the court by which an order is enforceable by virtue of this section shall take all such steps for enforcing the order as may be prescribed. (3) In any proceedings for or with respect to the enforcement of an order which is for the time being registered in any court under section 42, a certificate of arrears sent to the court or the registrar thereof shall be evidence of the facts stated therein. (4) Subject to subsection (5), sums of money payable under an order registered under section 42 shall be payable in accordance with the order as from the date on which the order was made. (5) Where an order was made by a court in a Hague Convention country prior to the date of the entry into force of the Hague Convention between [] and that country, no sums of money falling due before that date shall be payable in accordance with the order.
Cancellation transfer and transmission of orders registered under section 34	38.(1) This section applies to a maintenance order registered in a court in [] by virtue of section 34. (2) Subject to the following subsections, section 15 and 16 shall apply in relation to orders to which this section applies as if the Hague Convention country in which the maintenance order was made was a Commonwealth country. (3) In its application to the orders to which this section applies, section 15 shall be amended by the omission of subsection (2)(b). (4) In its application to the orders to which this section applies, section 16 shall be amended by the omission in subsection (2) of the words “which in all the circumstances is appropriate” and of subsection (3).

SUPPLEMENTAL

Obtaining of evidence for purpose of proceedings in []	39. A court in [] may for the purpose of any proceedings in that court under this Part relating to a maintenance order to which this Part applies request the [Minister for Foreign Affairs] to make to the responsible authority in a Hague Convention country a request for the taking or provision of evidence relating to such matters as may be specified in the request.
Obtaining of evidence for the purpose of proceedings in a Hague Convention country	40.(1) Where for the purpose of any proceedings in a court in a Hague Convention country relating to a maintenance order to which this Part applies a request is made by or on behalf of that court for the taking in [] of the evidence of a person residing therein relating to matters specified in the request, a court in [] shall have power to take that evidence and, after giving notice of the time and place at which the evidence is to be taken to such persons and in such manner as it thinks fit, shall take the evidence in such manner as may be prescribed. (2) Evidence taken by virtue of this section shall be sent by the registrar of the court to the [Minister for Foreign Affairs] for transmission to the responsible authority in the Hague Convention country.
Conversion of currency	41. Section 20 shall apply in relation to orders made by a court in a Hague Convention country as if that country were a Commonwealth country.

PART V

SUPPLEMENTAL

- Provisional order to cease to have effect on remarriage
- 42.(1) Where a court has, by virtue of Section 4, made a provisional order consisting of or including a provision for periodical payments by a husband or wife and the order has been confirmed by a competent court in a Commonwealth country, then, if after the making of that order the marriage of the parties to the proceedings in which the order was made is dissolved or annulled but the order continues in force, that order or, as the case may be, that provision thereof shall cease to have effect on the remarriage of the party in whose favour it was made, except in relation to any arrears due under it on the date of such remarriage and shall not be capable of being revived.
- (2) For the avoidance of doubt it is hereby declared that reference in this section to remarriage include references to a marriage which is by law void or voidable.
- Admissibility of evidence given abroad
- 43.(1) A statement contained in—
- (a) a document, duly authenticated, which purports to set out or summarise evidence given in proceedings in a court in a Commonwealth country, a convention country, a Hague Convention country or a country designated in an [Order] under section 22; or
 - (b) a document, duly authenticated, which purports to set out or summarise evidence taken in such a country for the purpose of proceedings in a court in [] under this Act, whether in response to a request made on behalf of such a court or otherwise; or
 - (c) a document, duly authenticated, which purports to have been received in evidence in proceedings in a court in such a country, or to be a copy of a document so received,
- shall in any proceedings in a court in [] under this Act (including any proceedings on appeal from any such proceedings be admissible as evidence of any fact stated therein to the same extent as oral evidence of that fact is admissible in these proceedings.
- (2) A document purporting to set out or summarise evidence given as mentioned in sub-section (1)(a), or taken as mentioned in sub-section (1)(b), shall be deemed to be duly authenticated for the purposes of that sub-section if the document purports to be certified by the judge, magistrate, or other person before whom the evidence was given or, as the case may be, by whom it was taken, to be the original document containing or recording or, as the case may be, summarising, that evidence or a true copy of that document.
- (3) A document purporting to have been received in evidence as mentioned in sub-section (1)(c), or to be a copy of a document so received, shall be deemed to be duly authenticated for the purposes of that sub-section if the document purports to be certified by a judge, magistrate or officer of the court in question to have been, or to be a true copy of a document which has been, so received.
- (4) It shall not be necessary in any such proceedings to prove the signature or official position of the person appearing to have given such a certificate.
- (5) Nothing in this section shall prejudice the admission in evidence of any document which is admissible in evidence apart from this section.
- Order, etc., made abroad need not be proved
44. For the purposes of this Act, unless the contrary is shown—
- (a) any order made by a court in a Commonwealth country, a Hague Convention country or a country designated in an [Order] under section 22 purporting to bear the seal of that court or to be signed by any person in his capacity as a judge, magistrate or officer of the court, shall be deemed without further proof to have been duly sealed or, as the case may be, to have been signed by that person;
 - (b) the person by whom the order was signed shall be deemed without further proof to have been a judge, magistrate or officer, as the case may be, of that court when he signed it and, in the case of an officer, to have been authorised to sign it; and
 - (c) a document purporting to be a certified copy of an order made by a court in such a country shall be deemed without further proof to be such a copy.
- Rules of court
45. Without prejudice to the generality of the powers conferred under [the relevant legislation] [the appropriate authority] may make rules of court prescribing the practice and procedure under this Act.

Repeals	46. The [Maintenance Orders (Facilities for Enforcement) Act 192–] is hereby repealed.
Transitional provisions	47.(1) Where immediately before the commencement of Part I, a country was one to which the [Act repealed by s.46] extended, the provisions of that Part shall apply to any order made under that Act by a court in [] against a person residing in that country and to any order made by a court in that country against a person residing in [] and transmitted to [] for the purpose of proceedings under that Act. (2) Any proceedings brought under or by virtue of any provision of the [Act repealed by s.46] in a court in [] which are pending immediately before the commencement of Part I shall be continued as if they had been brought under or by virtue of the corresponding provision of this Act.
Commencement	48. This Act shall come into force on such day as the [Head of State] may by [Order] appoint and different days may be so appointed for different provisions or for different purposes.

NOTES ON THE DRAFT MODEL BILL FOR A MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ACT 198–

This Draft Bill was prepared in the light of the views expressed at the Working Meeting at Basseterre, St. Kitts in April 1978 and has been revised following discussion at the subsequent Working Meeting at Apia, Western Samoa, in April 1979. It is largely based upon the Maintenance Orders (Reciprocal Enforcement) Act 1972 of the United Kingdom, itself an expanded and improved version of legislation dating from 1920 and enacted in almost all Commonwealth territories; the most important changes were the inclusion of affiliation orders in the class of maintenance orders which could be dealt with under the Commonwealth scheme, and the making of provision for Commonwealth countries' accession to the United Nations' Maintenance Convention.

The St. Kitts' meeting expressed itself in favour of a further major change, the ending of the formal requirement of reciprocity as the basis of arrangements between Commonwealth countries, following in this respect the lead given by New Zealand and Western Samoa legislation. This new principle is fully reflected in the Draft Bill which also includes a number of other features which have been found of value in various Commonwealth countries in their own revisions of the basic scheme.

The draft clauses in Part IV were prepared for the Nairobi meeting. In ratifying the Hague Convention, the U.K. made use of a statutory instrument made under a provision corresponding to clause 22 of the draft Bill. This was a long and complex document, of some 35 printed pages, and departed in a number of ways from the text of the Convention. It seemed preferable to produce draft Clauses for inclusion, if required, in the Bill.

More detailed points are referred to in the brief notes on individual clauses which follow.

Clause 1 (short title). In the absence of a requirement of reciprocity this seems the most appropriate title.

Clause 2 (interpretation) contains definitions of terms. The definition of "Commonwealth country" is based on that in s.61(1) of the Domestic Proceedings Act 1968 (New Zealand); note the inclusion of dependent territories, which may not feature in the definition of "Commonwealth" contained in general interpretation Acts. Clause 2(2) provides for the severance of those parts of orders dealing with maintenance from other parts dealing, for example, with non-Cohabitation. The possible inclusion of orders for lump sum payments is mentioned in Working Paper 9.

PART I

Clauses 3 to 8 deal with orders made in the country enacting the legislation.

Clause 3 (transmission of a maintenance order for registration in a Commonwealth country) deals with final (i.e. not provisional) maintenance orders. Clause 3(2) is based in part upon the Australian Family Law Regulations 1975, reg. 145(1). The special features of this provision, not found in the other models, are (i) the power given to the Registrar to act on his own motion; and (ii) provision for cases in which the payer is "proceeding to" but not yet "residing in" a Commonwealth country. Both features were commended by the St. Kitts' meeting. That meeting also asked for a model Request for Registration; a draft has been prepared for inclusion in a Schedule of Forms to be scheduled to the relevant Rules of Court made under the Act; it simplifies the drafting of this Clause. Clause 3(4) preserves the jurisdiction of the court which made the order to enforce, vary or revoke it. The Clause applies to orders made by any court, superior or inferior.

Here and elsewhere reference is made to functions of the Minister for Foreign Affairs; it would of course be possible to substitute another officer (e.g. the Registrar of the Supreme Court) in respect

of certain functions or to leave the officer to be prescribed in Rules.

Clause 4 (provisional orders for confirmation in a Commonwealth country) is based in part upon the Australian Family Law Regulations 1975, reg. 147(1) in that it makes reference to a person “proceeding to” a Commonwealth country. Clause 4(2) refers to the Request for Confirmation Form, another innovation. In some jurisdictions it may be necessary to include provisions corresponding to section 3(3) of the U.K. Act, which circumvents a rule preventing a court from making certain orders unless it also deals with the legal custody of a child; and to section 3(4) of that Act, excluding the possible reference of a case from an inferior to a superior court.

Clause 5 (effect of confirmation in a Commonwealth country of a provisional order) states the legal position after confirmation of a provisional order, and preserves the jurisdiction to enforce, vary or revoke it, subject to clause 7.

Clause 6 (further proceedings in respect of a provisional order) deals with the situation where a provisional order has been sent to a Commonwealth country but the courts there do not immediately confirm it. Most legislation provides that the court making the provisional order may on receiving more evidence revoke it; clause 6(2)(b) enables a fresh provisional order to be made, a procedure expressly authorised in the Australian Family Law Regulations, reg. 147(5). Requests for Confirmation of such orders, and of provisional orders made under sections 7 and 13, are sent directly to the foreign court concerned; a simpler Form can therefore be used in such cases—see Form 3 of the Schedule of Forms.

Clause 7 (variation and revocation of orders) deals with the variation or revocation of orders by the courts of the country which made them and which is now enacting the legislation.

Clause 8 (confirmation of provisional orders affecting orders made in the country enacting the legislation) deals with the corresponding case where orders are varied or revoked not in the country of origin but by a provisional order made in a Commonwealth country. The draft Bill contains no provisions corresponding to section 5(7)(8) of the U.K. Act, which spell out matters in great detail; no such provisions were felt necessary in earlier legislation.

Clauses 9 to 16 deal with orders made in other Commonwealth countries.

Clause 9 deals with the registration of a final maintenance order (i.e. not a provisional order unless that has been confirmed in a third country) originating in another Commonwealth country. The draft Bill contains no provision corresponding to section 6(2) of the U.K. Act (Minister to act only if it appears that the payer is resident in the country); cf. Clause 16.

Clause 10 (setting aside registration) enables the registration of an order under Clause 9 to be set aside if it is discovered that the order is not one to

which that Clause applies. The case is not dealt with in most legislative models; the Clause is based on s.63 of the Domestic Proceedings Act 1968 (New Zealand). It has *not* been thought desirable to provide that the registration of the order shall be valid up to the date on which it is set aside.

Clause 11 (confirmation and registration in the enacting country of a provisional order made in a Commonwealth country) deals with the procedure on the receipt of a provisional order made in another Commonwealth country. The draft Bill contains provisions to the same effect as those in section 7 of the U.K. Act but re-ordered to follow the usual order of events. The drafting is influenced in places by section 64 of the Domestic Proceedings Act 1968 (New Zealand).

Clause 12 (enforcement of orders registered under Part I) is likely to need expansion to meet the needs of particular jurisdictions. It is desirable to apply to registered orders general statutory provisions governing the enforcement of maintenance orders, the accrual of arrears and the remission of sums due; and to place the payer under a registered order under an obligation to give notice of any change of address to the registrar, with a specified penalty for failure without reasonable cause to give such notice.

Clause 13 (variation and revocation of orders registered under Part I) deals with the variation and revocation of registered orders by the court in which they are registered. The Clause is a re-ordered version of part of section 9 of the U.K. Act; no changes of substance have been made, except for the reference to the prescribed Form for the Request for Confirmation.

Clause 14 (confirmation of provisional orders affecting orders registered under Part I) deals with the corresponding case in which the registered order is varied or revoked by a provisional order made in its country of origin (or possibly in a third Commonwealth country). So far as variation is concerned this Clause is also based on section 9 of the U.K. Act; the case of provisional orders of revocation is not dealt with in that model; the draftsman of the U.K. Act thought such a provision was unnecessary, but seems to have overlooked the possible use of provisional revocation orders, a possibility catered for in the Australian Family Law Regulations 1975, reg. 154(1)(a)(ii).

Clause 15 (cancellation of registration) deals with the procedure on the cancellation of a registered order. Clause 15(4)(5)(6) and appropriate cross-references in Clause 15(3) and 15(7) will be omitted if the country enacting the legislation is not divided into geographical areas for internal jurisdictional purposes.

Clause 16 (transmission of certain orders by the Minister) deals with the procedure in a number of types of cases in which the payer is not residing in the country enacting the legislation.

Clause 17 deals with rights of appeal. Clause 17(2) is based upon section 73(9) of the Domestic Proceedings Act 1968 of New Zealand. It makes clear what

is probably implicit in the other legislation that an appeal lies against a *refusal* to make a provisional order; and it also gives a right of appeal against the revocation of a provisional order on reconsideration under Clause 6. There is no right of appeal against the setting aside of the registration of an order under Clause 10.

Clause 18 (obtaining of evidence) enables courts in the country enacting the legislation to obtain evidence for the purposes of proceedings in another Commonwealth country. The draft Bill contains no provisions concerning the issue of process to compel a witness to attend, to pay expenses to witnesses who are not parties, or for the appointment of examiners. In any jurisdiction the general provisions on such matters can be applied as appropriate.

Clause 19 (remission of case to a court in a Commonwealth country) enables courts to seek evidence from an overseas court. Clause 19(2), based on Australian Family Law Regulations 1975, reg. 146(8), enables an interim order to be made for the period of delay entailed, a feature welcomed at the Apia Meeting.

Clause 20 (conversion of currency) is a simplified version of section 16 of the U.K. Act. There is no provision corresponding to s.16(1) of that Act which provides that payments due under a registered order shall be paid in a prescribed manner. In some jurisdictions generally applicable statute law can be applied; but there appears to be no need for the provision given the wide scope of the rule-making power (cf. Clause 34). In some jurisdictions, it may be desired to limit Clause 20(2) to the appropriate Central or Reserve Bank.

Clause 21 (orders in foreign language) is in the form recommended by the Canadian Commissioners on Uniform Laws, and exemplified by section 15 of the Reciprocal Enforcement of Maintenance Orders Act 1968 (Saskatchewan).

PART II

Clause 22 (extension of Part I to non-Commonwealth countries) enables Part I to be applied with modifications to politically foreign countries. It is based upon section 71 of the Domestic Proceedings Act 1968 (New Zealand). No express requirement of reciprocity is included; but it will no doubt be usual in practice.

PART III

Clause 23 provides for the designation of convention countries for the purposes of Part III.

Clause 24 (application by person in the country enacting the legislation for recovery of maintenance in a convention country) sets out the procedure for “exported” applications under the convention.

Clause 25 (application by a person in convention country for recovery of maintenance in the country enacting the legislation) deals with the converse, “importing”, situation. Clause 25(4)(5) will be omitted in any jurisdiction not divided into geographical areas for internal jurisdictional pur-

poses. It is desirable to insert, as appropriate in each jurisdiction, a provision applying the generally-applicable law as to maintenance or affiliation cases to applications under this Bill: cf. sections 28 and 30 of the U.K. Act.

Clause 26 (transfer or return of orders). In a jurisdiction not divided into geographical areas for purposes of internal jurisdictional rules, only a variant of Clause 26(1) is required. The suggested procedure is slightly simpler than that adopted in the U.K. Act, s.32.

Clause 27 (enforcement of orders); Clause 27(2)(3) are inappropriate in countries not divided into geographical areas for internal jurisdictional purposes. An alternative approach, adopted in Fiji, is to apply generally-applicable enforcement provisions to cases under Part III.

Clause 28 (variation and revocation of orders) is necessitated so far as variation is concerned by article 8 of the convention. The U.K. provision corresponding to Clause 28(2) is limited to variation, presumably on the basis that this is all the convention requires; following discussion at the Apia meeting, it has been widened to include revocation.

Clause 29 (obtaining of evidence for purposes of proceedings in the enacting country) deals with the requests for evidence addressed to courts in convention countries.

Clause 30 (taking of evidence at request of court in a convention country) deals with the converse case. The note to Clause 18 as to compelling attendance, expenses, etc., applies equally to this Clause.

PART IV

Clause 31 provides for the designation of Hague Convention countries.

Clause 32 (transmission of a maintenance order) deals with the “export” of orders. The United Kingdom instrument is restricted to cases of habitual residence (i.e. those falling within clause 32(1)(a)) but the present draft makes full use of the wide scope of the Convention. The complexity of U.K. nationality law no doubt explains part of the omission in the U.K. instrument. Cf. art. 7 of the Convention.

Clause 33 (variation and revocation of orders) makes similar provision for the variation or revocation of orders made under section 32 the Convention applies to “modifications” of earlier orders (see art. 2 (second para.)).

Clause 34 (registration of maintenance order made in Hague Convention country) deals with the “import” of orders made in Hague Convention countries. It will be noted that the decision as to registration is made in the first instance by the registrar but appeal lies to the court to secure the setting aside of registration (*clause 35*) and against a refusal to register (*clause 36*). Clause 34 contains, in sub-section (4), provisions corresponding to arts. 7, 8 and 9 of the Convention; the last words of paragraph (iv) “in that matter” follow the text of the Convention, not the U.K. provision which

at this point substitutes “to make the order”. Sub-section (5) corresponds to art. 5. The U.K. provision corresponding to sub-section (5)(d) ends “under this Part of this Act”, but it is believed that a wider scope accords with the intention of the authors of the Convention (see the official Report by M. Verwilghen). Sub-section (6) corresponds to art. 6. No provision in the draft Clause corresponds to art. 4(2) by expressly excluding foreign orders still subject to ordinary forms of review in the State of origin; this follows the U.K. instrument, but may need re-consideration.

Clause 37 (enforcement of registered orders) corresponds to clause 12; the provisions as to arrears reflect arts. 11 and 24 of the Convention.

Clause 38 applies clauses 15 and 16, mutatis mutandis, to orders falling under this Part.

Clauses 39 to 41 make procedural provision corresponding to clauses in the other Parts, dealing with evidence and exchange rates.

PART V

Clause 42 provides that a provisional order made under Clause 4 shall cease to have effect on remarriage. It is not included in Part I as it does not strictly relate to enforcement.

Clause 43 (admissibility of evidence obtained abroad) is a provision essential to the working of the Act, making the various certificates and statements admissible in evidence. In some jurisdictions, however, sufficiently broad provisions may be contained in an Evidence Act; in such a case this Clause could, of course, be omitted.

Clause 44 (order, etc. need not be proved) dispenses with the need to prove strictly copies of court orders and the signatures and seals they bear. The point in the note to Clause 43 about general Evidence Act provisions is relevant to this Clause also.

Clause 45 (Rules of court) is in general terms; in this respect the Canadian and Singapore precedent is preferred to that favoured in the U.K., Fiji and Hong Kong, where detailed enabling powers are listed.

Clauses 46 and 47 (repeals and transitional provisions) will, of course, need modification to meet the requirements of particular jurisdictions.

Clause 48 (commencement). The provision for the appointment of different days for different provisions or for different purposes is particularly important because of the differing nature of the provisions in Parts I, III and IV. Part I is an improved version of a familiar scheme operating within the Commonwealth; Parts III and IV introduce new sets of procedures involving politically foreign States.

VARIANT FORMS OF THE BILL

A. Any jurisdiction not willing or unable to accede to *either* of the Conventions referred to in the Bill, could enact the Bill with the following modifications:

In clause 2(1) omit the entries relating to “competent court in a Hague Convention country”, “convention country”, “court in a Hague Convention country”, “Hague Convention”, “registered order”, “registering court” and “related documents”.

For the definition of “maintenance order” substitute the following:

“maintenance order” means an order (however described) of any of the following descriptions, that is to say—

(a) an order (including an affiliation order or order consequent upon an affiliation order) which provides for the periodical payment of sums of money towards the maintenance of any person, being a person whom the person liable to make payments under the order is, according to the law applied in the place where the order was made, liable to maintain; and

(b) an affiliation order or order consequent upon an affiliation order, being an order which provides for the payment by a person adjudged, found or declared to be a child’s father of expenses incidental to the child’s birth, or, where the child has died, of his funeral expenses, or, where the mother of the child has died, her funeral expenses,

and, in the case of a maintenance order which has been varied, means that order as varied;

After clause 2(1) insert a new clause 2(2), renumbering existing 2(2) as 2(3):

(2) For the purposes of Part I an order shall be taken to be a maintenance order so far (but only so far) as it relates to the payment of such periodical payments or the payment of such expenses as are mentioned in the definition of “maintenance order” in subsection (1).

In clause 3(1) omit the words “or an order made by a provision of Part III or of Part IV”

Omit Parts III and IV

In clause 43(1)(a) omit the words “a convention country, a Hague Convention country”.

In clause 44(a) omit the words “a Hague Convention country”.

B. Any jurisdiction wishing to accede to the Hague Convention but not the U.N. Convention could enact the Bill with the following modifications:

In clause 2(1) omit the entries relating to “convention country”, “registered order”, “registering court” and “related documents”

In clause 3(1) omit the words “or of Part IV”

Omit Part III

Renumber Part IV as Part III, etc.

In clause 43(1)(a) omit the words “a convention country”.

C. Any jurisdiction wishing to accede to the U.N. Convention but not the Hague Convention could enact the Bill with the following modifications:

In clause 2(1) omit the entries relating to “competent court in a Hague Convention country”, “court in a Hague Convention country” and “Hague Convention”.

Also in clause 2(1) substitute the definition of “maintenance order” set out at A above; and insert the new clause 2(2) there set out.

In clause 3(1) omit the words “or of Part IV”.

Omit Part IV.

In clause 43(1)(a) omit the words “a Hague Convention country”

In clause 44(a) omit the words “a Hague Convention country”.

APPENDIX D

DRAFT MODEL BILL

entitled

FOREIGN JUDGMENTS

(RECIPROCAL ENFORCEMENT) ACT, 198—

[Revised 12 February, 1980]

A Bill for an Act to make new provision in [] for the enforcement of judgments given in countries outside [] which accord reciprocal treatment to judgments given in [] and for other purposes in connection therewith.

BE IT ENACTED etc.

Short title 1. This Act may be cited as the Foreign Judgments (Reciprocal Enforcement) Act, 198—.

Interpretation 2.(1) For the purposes of this Act, the expression—

“anti-trust law” means any provision of any law or any rule of law, commonly known as anti-trust law and includes any such provision or rule having as its purpose or dominant purpose the preservation of competition between business enterprises of any description or the prohibition or regulation of agreements, arrangements or practices designed to restrain or restrict competition in the carrying on of business of any description;

“appeal” means any proceedings by way of application for the discharge or setting aside of a judgment or for a new trial or a stay of execution;

“country” includes a state, province or part of a country or any territory for whose international relations a country is responsible.

“country of the original court” means the country in which the original court is situated or in relation to which that court has jurisdiction;

“designated anti-trust law” means an anti-trust law which has been designated by the [Minister] under section 15;

“designated court” means—

(a) any superior court of a reciprocating country which is a Commonwealth country;

(b) any superior court of any other reciprocating country which is specified in an order made under section 13(2);

(c) any subordinate court of any reciprocating country which is specified in an order made under section 13(1) or (3);

“judgment” means any such judgment, order or award as is referred to in paragraphs (a) to (f) of section 3(1);

“judgment creditor” means the person in whose favour a judgment was given and includes any person in whom the rights under the judgment have become vested by succession, assignment or otherwise;

“judgment debtor” means the person against whom a judgment was given and includes any person against whom the judgment is enforceable under the law of the country of the original court;

“judgments given by the superior courts in []” and “judgments given by subordinate courts in []” includes, as the case may be, judgments given in any court on appeal against any such judgments;

“multiple damages” means an amount payable under a judgment which has been arrived at by multiplying by any factor a sum assessed as compensation for loss or damage sustained by a person in whose favour the judgment was given;

“original court”, in relation to any judgment to which this Act applies, means the court by which the judgment was given and includes any arbitrator or arbitral tribunal by which an arbitral award to which this Act applies was given;

“personal service” means actual delivery of the process to the person to be served therewith, whether effected inside or outside the country in which the process was issued;

[“prescribed” means prescribed by rules of court;]

“reciprocating country” means a country designated for the purposes of this Act by the [Head of State] under section 11(1);

[“registering court”, in relation to a judgment to which this Act applies, means the court to which an application to register the judgment is made;]

“registration” means registration under this Act and the expressions “register”, “registered” and “registrable” shall be construed accordingly;

“subordinate courts in []” means—
[];

“superior courts in []” means—
[].

(2) References in this Act to a judgment of a designated court include references to an award in arbitration proceedings as is referred to in section 3(1)(g).

(3) A certificate issued in a reciprocating country with respect to an award in arbitration proceedings in circumstances of the kind mentioned in section 17(3)(b) constitutes a certificate for the purposes of section 5(4)(a).

Judgments to which the Act applies

3.(1) Subject to subsections (2) and (3), this Act applies with respect to—

(a) any judgment or order of a designated court in any civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or any child or any other person who is or was a dependant of another;

(b) any judgment or order of a designated court in any civil proceedings under which movable property is ordered to be delivered to any person, including any order for the delivery of movable property as part of a scheme for the provision for, or maintenance of, a spouse or a former or reputed spouse or any child or any other person who is or was a dependant of another;

(c) any judgment or order of a designated court in any criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to such a person;

(d) any judgment given in any court on appeal against any judgment or order of a designated court referred to in paragraph (a) to (c);

(e) any judgment of a designated superior court for the costs of an appeal from any subordinate court, whether or not a designated court; and

(f) any award in arbitration proceedings, if the award has, under the law in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country.

(2) This Act applies to a judgment referred to in subsection (1) only if it is final and conclusive as between the parties thereto but a judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

(3) This Act does not apply to—

- (a) any judgment whereby a sum of money is payable or any item of movable property is deliverable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty;
- (b) any judgment to the extent to which it provides for the payment of a sum of money by way of exemplary or punitive or multiple damages;
- (c) any judgment based upon a designated anti-trust law;
- (d) any order for the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or any child or any other person who is or was a dependant of the person against whom the order was made;
- (e) any judgment, other than a judgment referred to in paragraph (a) or (b) of subsection (1), in any matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, whereby any sum of money is payable or item of movable property deliverable;
- (f) any judgment in any proceedings in connection with the custody or guardianship of children;
- (g) any judgment in proceedings concerning the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs;
- (h) any judgment in any matter of succession to, or administration of, estates of deceased persons whereby any sum of money is payable or any item of movable property deliverable;
- (i) any judgment in any matter of social security or public assistance whereby a sum of money is payable by [or to] a public authority or fund;
- (j) any judgment in bankruptcy proceedings or in proceedings for the winding-up or reorganisation of any corporation or in proceedings for judicial arrangements, compositions or like matters;
- (k) any judgment in proceedings relating to damage, death or injury caused by occurrences involving nuclear matter or the emission of ionising radiation; or
- (l) any judgment of a superior court on appeal from a subordinate court which is not a designated court, other than a judgment referred to in subsection (1)(e) or from any tribunal, other than an award referred to in subsection (1)(f).

(4) This Act applies with respect to judgments given before or after the commencement of this Act.

Jurisdiction

4.(1) In any proceedings in which it is necessary for the purposes of this Act to determine whether a court of another country had jurisdiction to adjudicate upon any cause of action, such court shall, subject to subsection (2), be deemed to have had such jurisdiction, where—

- [(a) the judgment debtor, being the defendant in the original court, [argued the merits of the matter in dispute without contesting the jurisdiction of that court;] [voluntarily entered an appearance before that court;]]
- (b) the judgment debtor was plaintiff, or counterclaimed, in the proceedings in the original court;
- (c) the judgment debtor, being the defendant in the original court, had, before the commencement of the proceedings, agreed, otherwise than in pursuance of some statutory requirement, in writing or by an oral agreement confirmed in writing, to submit, in respect of the subject matter of the proceedings or in respect of disputes of the kind which were the subject matter of the proceedings, to the jurisdiction of the original court or of any other court of the country of the original court;
- (d) the judgment debtor, being the defendant in the original court, was, at the time when the proceedings were instituted, [habitually] resident in the country of the court or, not being a natural person, had its place of incorporation or its principal place of business in that country, or, if unincorporated, had its headquarters there;
- (e) the judgment debtor, being the defendant in the original court, had an office or place of business in, or, not being a natural person, had a branch (other than a sub-

subsidiary corporation) in, the country of that court and the proceedings in that court were in respect of a transaction effected, or an occurrence arising from business carried out, by, through or at that office, place or branch;

(f) the judgment debtor, being the defendant in the original court, was conducting business [on a continuing basis] within the country of the original court (otherwise than through a subsidiary corporation), had appointed an agent there to receive service of process in respect of such business and the proceedings in that court were in respect of a transaction effected in connection with, or of an occurrence arising from, such business;

(g) in the case of a claim arising out of a contract, the obligation which was the subject of the proceedings was or was to be wholly or mainly performed in the country of the original court;

(h) in the case of a judgment given in an action *in rem* or any other action to determine rights of ownership, use or possession in immovable property or tangible movable property, the property in question was, at the institution of the proceedings in the original court, situated in the country of that court; or

(i) in the case of an action to recover damages for physical injury to the person, or the death, of any person or for damage to tangible property, the circumstances giving rise to the injury, death or damage substantially occurred in the country of the original court or, as the case may be, the injury or damage was suffered in that country.

(2) A court shall not be deemed to have jurisdiction under subsection (1) where—

(a) by reason of the subject matter of the proceedings, exclusive jurisdiction thereto was, under the rules of private international law of [], vested in the courts or authorities of a country other than that of the original court;

(b) except in the case[s] mentioned in subsection (1)[(a) and] (b), the bringing of the proceedings in the original court was contrary to—

(i) an agreement to which the dispute related; or

(ii) a [trust] instrument, in respect of which the proceedings were instituted,

under which the dispute, or the proceedings, as the case may be, were to be settled otherwise than by proceedings in the courts of the country of the original court or which gave exclusive jurisdiction to a court or authority, other than the original court;

[(c) the judgment debtor, being the defendant in the original court [argued the merits of the matter in dispute] [entered an appearance for the purpose of contesting the jurisdiction of that court or] for the purpose of protecting, or obtaining the release of, property seized in, or threatened with seizure as a result of, the proceedings;]

(d) the judgment debtor was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not enter an appearance otherwise than for the purpose of contesting the jurisdiction of that court.

(3) Any finding of fact made (expressly or by implication) by the original court in the proceedings in which the judgment was given and on the basis of which jurisdiction was assumed in those proceedings shall—

(a) if the judgment debtor entered an appearance in those proceedings and did not contest the jurisdiction of the original court, be conclusive evidence of the fact found; and

(b) in any other case be sufficient proof of that fact unless the contrary is shown.

Application

5.(1) Where a judgment to which this Act applies has been given in a designated court, the judgment creditor may apply to the [Supreme Court] to have that judgment registered within six years of the date of the judgment or, where there have been proceedings by way of appeal against the judgment, of the date of the last judgment in the proceedings.

(2) An application may be made under subsection (1) *ex parte* in any case in which the judgment debtor—

(a) was personally served with process in the original action; or

(b) though not personally served, entered an appearance in the original court otherwise than for the purpose of contesting the jurisdiction of that court or of protecting, or

obtaining the release of, property seized in or threatened with seizure as a result of the proceedings.

and in which, under the law in force in the country of the original court, the time within which an appeal may be made against the judgment has expired and no appeal is pending or an appeal has been heard and disposed of.

(3) Where an application is made under subsection (1) *ex parte*, the court hearing such application, instead of allowing the application, may direct a [summons] to be issued but if no such direction is given, notice of the registration of the judgment made on such an application shall be served upon the judgment debtor by personal service.

(4) An application for registration of a judgment under subsection (1) shall—

(a) be accompanied by a certificate in the form set out in the Schedule or to like effect issued from the original court under its seal and signed by a judge or registrar thereof or by an affidavit to like effect;

(b) have attached thereto the judgment or the exemplification or a certified or duly authenticated copy thereof and, where the judgment is not in the [] language, a translation thereof in that language certified by a notary public or the registrar of the original court or authenticated by affidavit;

(c) be accompanied by an affidavit stating—

(i) that, at the date of application, the judgment has not been satisfied or, as the case may be, the sums or items of movable property, as the case may be, in respect of which the judgment remains unsatisfied;

(ii) that, at the date of application, the judgment can be enforced by execution in the country of the original court;

(iii) where, by virtue of section 6(5), the judgment may be registered only in respect of certain of its provisions, the provisions in respect of which it is sought to register the judgment;

(d) be accompanied by such other evidence as may be prescribed.

(5) Where the application for registration is in respect of a judgment given by a Superior Court of a Commonwealth country and is accompanied by an affidavit, and not a certificate, of the kind referred to in subsection (4)(a), it shall also be accompanied by a certificate under the seal, and signed by a judge or registrar of the original court, certifying that the court is a superior court in that country.

Registration

6.(1) Where, on an application under section 5(1), the [Supreme Court] is satisfied as to the proof of matters required by this Act and any rules of court, it shall, subject to this Act, order the judgment to be registered.

(2) An order shall not be registered under subsection (1) if it appears to the [Supreme Court] that—

(a) it has been wholly satisfied; or

(b) it could not be enforced by execution in the country of the original court.

(3) If it appears to the [Supreme Court] that the judgment has been partly satisfied, the judgment may be registered under subsection (1) only in respect of the sums or the items of movable property, as the case may be, remaining payable or deliverable.

(4) Where a judgment for the payment of a sum of money is satisfied in part by payment in a currency other than the currency of [], the extent to which the registered judgment has been satisfied shall, for the purposes of subsection (3), be calculated on the basis of the rate of exchange prevailing at the date or dates of payment of the relevant sum or sums.

(5) Where a judgment is not in all respects a judgment which may be registered under this Act but provisions of the judgment could, if they alone constituted the judgment of the original court, be so registered, the court may, if it thinks proper, register those provisions of the judgment.

(6) Subject to section 5(2), a judgment may be registered under this Act notwithstanding that a right of appeal exists, or an appeal has been instituted, against the judgment.

Currency in which judgments payable	7.(1) Where the sums payable under a judgment which is to be registered under this Act are expressed in a currency other than the currency of [], the judgment may be registered as a judgment for such a sum payable in such sums in the currency of [] as are equivalent thereto on the basis of the rate of exchange prevailing at the time of registration. (2) For the purposes of this Act, a written certificate purporting to be signed by an officer of any bank in [] certifying that a specified rate of exchange prevailed between currencies at a specified rate and that at such rate a specified sum in the currency of [] is equivalent to a specified sum in another specified currency is evidence of the rate of exchange so prevailing on that date and of the equivalent sums in terms of the respective currencies.
Effect of registration of judgments	8.(1) Subject to this Act, a registered judgment shall, for the purposes of execution, be of the same force and effect as a judgment of the [Supreme Court] entered at the date of registration, its execution shall be subject to the control of the Court and proceedings may be taken thereon as if it were such a judgment. (2) Subject to this Act, where a judgment for the payment of any monetary sum is registered, the following sums may be recovered upon the registered judgment— (a) the amount remaining payable under the judgment, including interest and any costs awarded to the judgment creditor, at the date of registration; (b) interest from the date of registration on such an amount, excluding such interest [and costs] referred to in paragraph (a), calculated at the rate applicable to a judgment of the [Supreme Court], and (c) any reasonable costs awarded by the [Supreme Court] in respect of registration, including the costs of obtaining any certificate or an exemplification or copy of a judgment or a translation thereof, for the purposes of section 5(4). (3) Subject to this Act, where a judgment for the delivery of movable property is registered, the following sums may also be recovered upon the registered judgment— (a) any costs awarded to the judgment creditor remaining payable at the date of registration; (b) any reasonable costs awarded by the [Supreme Court] in respect of registration, including the costs of obtaining any certificate or an exemplification or copy of a judgment or a translation thereof, for the purposes of section 5(4). (4) Unless the [Supreme Court] otherwise orders, execution upon a registered judgment shall be stayed— (a) in the case of an application made <i>ex parte</i>, until the expiration of fourteen days from the date on which the judgment debtor is served with notice of registration under section 5(3) or such extended period as the court may order; or (b) where an application that the registration be set aside is made under section 10 or section 11, until the application is finally determined.
Garnishee orders	9.(1) At the time of, or at any time subsequent to, making an application for registration under section 5, the applicant may apply, <i>ex parte</i>, to the [Supreme Court] for an order that all debts, obligations and liabilities due or accruing due to the judgment debtor from such person as may be named in the application (in this section referred to as the “garnishee”) be attached. (2) The [Supreme Court] upon an application under subsection (1) may, upon the production of such further evidence as it may require and if it deems it proper, order the garnishee to pay to the judgment creditor the amount of the debts, liabilities or obligations due or accruing due to the judgment debtor from the garnishee or so much thereof as is sufficient to satisfy the registered judgment and the costs of the proceedings pursuant to this section. (3) Subject to this section, the rules of court with respect to the attachment of debts due to judgment debtors apply to proceedings pursuant to this section.
Setting aside	10.(1) Where a judgment has been registered under this Act, an application may be made by the judgment debtor that the judgment be set aside on any of the grounds set out in sub-

section (2) and (3) and if the [Supreme Court] is satisfied that any of those grounds has been established, it shall set aside the registration of the judgment.

(2) The grounds upon which a registered judgment may be set aside are that—

- (a) the judgment is not a judgment to which this Act applies;
- (b) the judgment was registered in contravention of this Act;
- (c) the courts of the country of the original court had no jurisdiction to adjudicate upon the cause of action upon which the judgment was given;
- (d) the jurisdiction of the original court was based upon an agreement by the judgment debtor to submit to the jurisdiction of that court, which is invalid under the rules of private international law of [];
- (e) the cause of action upon which the judgment was given had at the date of that judgment been the subject of a final and conclusive judgment of a court having jurisdiction to adjudicate upon that cause of action;
- (f) the matter in relation to which the judgment was given had, subsequent to the date of that judgment, and as a result of proceedings instituted prior to the institution of the proceedings in the original court, become the subject of a final and conclusive judgment of a court in [] which is irreconcilable with the judgment of the original court;
- (g) the judgment debtor, being the defendant in the original proceedings,
 - (i) was not duly served with the process of the original court; or
 - (ii) notwithstanding that he was duly served in conformity with the law of the country of that court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings; and
 - (iii) did not enter an appearance or entered an appearance only for the purpose of contesting the jurisdiction of that court [and did not argue the merits of the matter in dispute];
- (h) the judgment was obtained by fraud, other than fraud which was, or could have been, put in issue by the judgment debtor in the proceedings in the original court or an appeal therefrom;
- (i) there are provisions of the law of [] which, by virtue of the rules of private international law of [], would have been applicable, notwithstanding any choice of another system of law by the judgment creditor and the judgment debtor, had the proceedings been brought in the [Supreme Court], and the judgment disregards those provisions in some material respect;
- (j) it was necessary for the original court, in order to give its judgment, to decide a question relating to any matter specified in paragraphs (c) to (k) of section 3(3) and such decision is different from that which the [Supreme Court], having applied the rules of private international law of [] to that question, would have reached;
- (k) the judgment is one which recognised or enforces another judgment;
- (l) the judgment has been taken on appeal, and reversed or discharged or otherwise set aside, in a court of the country of the original court;
- (m) the judgment debtor is a person who, under the rules of public international law, is entitled to immunity from the jurisdiction of the [Supreme Court];
- (n) the rights under the judgment are not vested in the person by whom the application for registration was made;
- (o) the enforcement of the judgment would be manifestly contrary to public policy in [].

(3) An application may be made under subsection (1) to set aside the judgment to the extent that its enforcement would require payment of sums in excess of monetary limits upon liability imposed by any statute of [] which applies under the rules of private international law of [].

(4) Where the [Supreme Court] is satisfied, on an application made by a judgment debtor, that the sums, including costs, awarded under a registered judgment are substantially in

excess of those which would have been awarded by the [Supreme Court] on the basis of the findings of law and fact made by the original court, had the assessment of those sums been made in proceedings before the [Supreme Court], the [Supreme Court] may set aside the judgment to the extent of that excess.

Effect of
appeals etc.

11.(1) An application may be made by the judgment debtor to set aside the registration of a judgment on the ground that—

- (a) an appeal is pending against that judgment; or
- (b) he is entitled and intends to appeal against that judgment; or
- (c) the matter in relation to which the judgment was given is the same as that in respect of which proceedings, instituted prior to the institution of the proceedings in the original court, are pending in a court in [].

(2) Where the [Supreme Court] is satisfied that the grounds specified in subsection (1)(a) or (b) are established, the [Supreme Court] may, if it thinks fit and on such terms as it thinks just, set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as appears to the [Supreme Court] to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by a competent tribunal.

(3) Where the [Supreme Court] is satisfied that the grounds specified in subsection (1)(c) are established, the [Supreme Court] may, if it thinks fit and on such terms as it thinks just, set aside the registration or adjourn the application until the expiration of such period as appears to the [Supreme Court] to be reasonably sufficient to enable the proceedings, and any appeal therefrom to a competent tribunal, to be disposed of.

Effect of
setting aside in
certain cases

12.(1) Where the registration of a judgment is set aside

- (a) under section 11; or
- (b) solely for the reason that the judgment was not at the date of application for registration enforceable by execution in the country of the original court;

the setting aside of the registration does not prejudice a further application to register the judgment when the appeal or the proceedings have been disposed of or if and when the judgment becomes enforceable by execution in that country, as the case may be.

(2) Where the registration of a judgment is set aside solely for the reason that the judgment was registered for the whole sum payable, or all the items deliverable, thereunder, notwithstanding that it had at the date of the application for registration already been partly satisfied, the [Supreme Court] shall, on the application of the judgment creditor, order the judgment to be registered for the amount remaining payable, or items remaining deliverable, as the case may be, at that date.

Extension
of Act

13.(1) Where the [Head of State] is satisfied that provisions which are substantially reciprocal will be or have been made by a country outside [] for the enforcement therein of judgments given by the superior courts in [], he may, by order, declare that country to be a reciprocating country for the purposes of this Act and that this Act applies with respect to judgments given by the superior courts of that country.

(2) An order made under subsection (1) shall, where the reciprocating country is not a Commonwealth country, specify the courts which are deemed to be the superior courts of that country for the purposes of this Act.

(3) The [Head of State] may in any order made under subsection (1), or by an order amending such order, declare that this Act applies with respect to judgments of the subordinate courts of the reciprocating country and such order shall specify the courts in that country which are deemed to be subordinate courts for the purposes of this Act.

(4) The [Head of State] may, by order, revoke or amend any order made under subsection (1) and where any order is so revoked, and no new order is made, the country with respect to which the order was made thereupon ceases to be a reciprocating country for the purposes of this Act.

(5) An order made under this section shall be published in the [Official Gazette].

Special provision with respect to non-Commonwealth countries.	14. The [Head of State] may, in order to give effect to an agreement between [] and any country, other than a Commonwealth country, in relation to the enforcement of judgments, make, in the order declaring that country a reciprocating country, provision for such exceptions, adaptations and modifications to this Act or rules of court as are specified in the order and such provision shall have effect accordingly.
Special provision with respect to anti-trust judgments	15.(1) Where the [Minister] is satisfied that the recognition and enforcement of judgments based upon an anti-trust law of any country outside [] would be detrimental to, or adversely affect, the trading interests of persons carrying on business of any description in [] or of persons, not being natural persons, having a place of incorporation or a principal place of business, or if unincorporated, having headquarters there, he may make an order designating such anti-trust law for the purposes of this Act. (2) An order made under subsection (1) is subject to an affirmative resolution.
Rules of court	16. Rules of court may be made prescribing any matters necessary or expedient for the purposes of this Act and, without prejudice to the generality of the foregoing, those rules may— (a) make provision empowering the [Supreme Court] to require any person applying for registration of a judgment to give security for costs; (b) regulate the manner in which a judgment debtor is to be served with a notice of the registration of a judgment; (c) prescribe the manner in which any questions arising under this Act are to be determined; (d) prescribe any matter which under this Act is to be prescribed; and (e) prescribe any fees, including the fees of [legal practitioners] in [], for the purposes of this Act.
Certificates	17.(1) Subject to this section, where a judgment under which a sum of money is payable or item of movable property is deliverable has been entered in a superior or subordinate court in [] against any person and the judgment creditor wishes to enforce the judgment in any reciprocating country, the court shall, on the application of the judgment creditor and on payment of the prescribed fee, issue to him— (a) a certified copy of the judgment; and (b) a certificate, in the form set out in the Schedule, or to like effect, containing such particulars as are therein mentioned with respect to the proceedings, including the cause of action and the rate of interest, if any, payable on any sum payable and where the judgment was given in a superior court and the judgment creditor wishes to enforce the judgment in a Commonwealth country, certifying that the court in which the judgment was given is a superior court in []. (2) An application under subsection (1) shall not be made with respect to a judgment— (a) under which a sum of money is payable or any movable property is deliverable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; or (b) the execution of which is stayed for any period pending an appeal or for any other reason, until the expiration of that period. (3) In the case of an award in arbitration proceedings, (a) the certified copy of the judgment shall be issued by the arbitrator or chairman of the arbitration tribunal, as the case may be; (b) the certificate referred to in subsection (1)(b) shall, with such modifications as circumstances dictate, be issued by the [Supreme Court] and such certificate shall state that the award is enforceable as a judgment of the [Supreme Court] under the law of [].
Exclusion of certain proceedings	18.(1) No proceedings, other than proceedings by way of registration of a judgment or by way of execution of a judgment so registered, may be entertained by any court in [] which are brought by a judgment creditor— (a) to recover any sum of moneys payable or any item of movable property deliverable under a judgment to which this Act applies and which is registrable; or

(b) upon an original cause of action to recover from a judgment debtor any sum of money or movable property in respect of which there has been given on the same cause of action a judgment to which this Act applies and which is registrable.

(2) No proceedings may be entertained by any court in [] which are brought by a judgment debtor for the recovery of any sum payable under a judgment of a court outside []—

(a) to the extent to which it is a judgment for exemplary, punitive or multiple damages; or

(b) being a judgment based upon a designated anti-trust law which is given after the date upon which the designation of that law under section 15 comes into effect.

Recognition of
certain foreign
judgments.

19.(1) Subject to this section, any judgment of a designated court shall be recognised in any court in [] as conclusive between the parties thereto, as to the matter adjudicated upon, in all proceedings, (no matter by which of the parties in the designated court they are instituted) on the same cause of action and may be relied upon by way of defence or counter-claim in any such proceedings.

(2) This section shall not apply in the case of any judgment which—

(a) has been registered and the registration thereof has been set aside on some ground other than—

(i) that a sum of money was not payable under the judgment; or

(ii) that the judgment had been wholly or partly satisfied; or

(iii) that, at the date of the application, the judgment could not be enforced by execution in the country of the original court, or

(b) has not been registered but it is shown that any such registration would have been set aside on an application for that purpose on some ground other than those specified in paragraph (a)(i) to (iii).

(3) Nothing in this section shall be taken to prevent any court in [] recognising any judgment as conclusive of any matter of law or fact decided therein under any other statutory provision in that regard or if that judgment would have been so recognised before the passing of this Act, but no such recognition shall be accorded, if it is sought in proceedings in respect of a different cause of action from that on which the judgment was given, until after the expiration of such period as appears to the court to be reasonably sufficient to enable any appeal in respect of the judgment to be instituted and disposed of by a competent tribunal; and the court may, if it thinks fit and on such terms as it thinks just, adjourn the proceedings until such time.

(4) For the purposes of this section, the expression “judgment” means—

(a) any judgment to which this Act applies whether or not it is registrable and, if registrable, whether or not it is registered; and

(b) any other judgment or order given in any civil proceedings which is final and conclusive between the parties,

and the expression “final and conclusive” has the meaning assigned to it by section 3(2).

Repeal and
transitional
provisions

20.(1) The [] is hereby repealed.

(2) Any judgment registered in the [Supreme Court] under the [] before the commencement of this Act shall be deemed to have been registered under this Act and anything done in relation thereto under that Act or any rules of court or other provisions applicable to that Act shall be deemed to have been done under this Act or the corresponding rules of court or other provisions applicable to this Act.

(3) Any application for registration of a judgment under the [] which is pending at the date of commencement of this Act shall be deemed to have been made under this Act.

Commencement

21. This Act shall come into force on a date to be fixed by the [Head of State] by [proclamation] [order].

SCHEDULE
Certificate

(Section 17)

It is hereby certified that there has been duly entered in the records of the Court of _____ at _____
before the Honourable [a Justice] of that Court, a judgment in an action [proceedings] numbered as
No. _____

Between _____

(Plaintiff(s)) [giving name
business &
address]

And _____

Defendant(s)) [giving name
business &
address]

It is also certified that—

(1) the [originating process] was issued on the _____ day of _____ 19____ and proof was furnished to
this court that it was served on the defendant by

- (a) personal service;
- (b) substituted service;
- (c) other form of service [which is to be stated]

(2) the defendant made an appearance personally/by a lawyer [if merely to contest jurisdiction, this should
be stated]

—OR—

the defendant made no appearance

(3) no defence was entered and judgment was allowed by [proof, default or order]

—OR—

a defence was entered and judgment was allowed at the trial.

(4) the grounds relied upon to establish the jurisdiction of the court in the action [proceedings] were:

(5) judgment was given on the _____ day of _____ 19____

(6) (a) There is a right of appeal to [_____] /no right of appeal;

(b) an appeal has been heard and dismissed; or

(c) an appeal has been instituted and is pending and a stay of execution has not been granted; or

(d) no appeal has been instituted and the time for appeal has expired/has not expired;

(7) the particulars of the judgment are as follows—

Claim allowed:

Costs to judgment:

Subsequent costs:

Interest due at [date]:

Extent to which judgment satisfied at [date]:

Balance or items remaining due at [date] including costs and interest:

[Details of debt or items subject to judgment to be inserted]

(8) The Court of _____ is/is not a Superior Court in [_____].

Certified by _____

(name)
(office)

SEAL

on this _____ day of _____ 19____

APPENDIX E
DRAFT MODEL BILL
entitled

COMMONWEALTH COUNTRIES ACT 198—

An Act to enable membership of the Commonwealth to be more easily ascertained [and to provide for the continued operation of the law of [] in relation to certain Commonwealth countries].

BE IT ENACTED etc.

Short title	1. This Act may be cited as the Commonwealth Countries Act 198—.
Membership of Commonwealth	2.(1) A certificate signed by the [Minister for Foreign Affairs] that on a date specified in the certificate a specified country was or was not a Commonwealth country, or that a specified territory was or was not one for whose international relations a specified Commonwealth country was responsible, shall be conclusive evidence in any proceedings before any court of the matters stated in the certificate. (2) If no certificate pursuant to subsection (1) is produced relating to it, the fact that a country is specified in the Schedule to this Act shall be conclusive evidence in any proceedings before any court that that country is a Commonwealth country, and the fact that a country is not so specified shall be conclusive evidence that it is not a Commonwealth country. (3) The [Head of State] may from time to time by [Order] amend the Schedule by adding to it the names of countries that have become Commonwealth countries or deleting from it the names of countries that have ceased to be Commonwealth countries. (4) An [Order] pursuant to subsection (3) shall take effect from a date specified therein, whether that date is before on or after the date of the making of the [Order].
Amendment of [Interpretation] Act 19—	3. The [Interpretation] Act 19— is amended by inserting the following definition: “‘Commonwealth country’ means a country that is an independent sovereign member of the Commonwealth.”
[Operation of law of [] with respect to certain Commonwealth countries]	4. All law of [], whether being a rule of law or a provision of an Act of Parliament or of any other instrument or enactment whatsoever, which applies in relation to a Commonwealth country shall on that Commonwealth country becoming a republic continue to have the same operation, until provision to the contrary is made by the authority having power to alter that law, as if that Commonwealth country had not become a republic.]

SCHEDULE

(Section 2)

COUNTRIES SPECIFIED AS COMMONWEALTH COUNTRIES
(subject to any certificate under section 2(1))

Australia	Grenada	Nauru	Sri Lanka
The Bahamas	Guyana	New Zealand	Swaziland
Bangladesh	India	Nigeria	Tanzania
Barbados	Jamaica	Papua New Guinea	Tonga
Botswana	Kenya	St Lucia	Trinidad and Tobago
Canada	Kiribati	St Vincent and the Grenadines	Tuvalu
Cyprus	Lesotho	Seychelles	Uganda
Dominica	Malawi	Sierra Leone	United Kingdom
Fiji	Malaysia	Singapore	Western Samoa
The Gambia	Malta	Solomon Islands	Zambia
Ghana	Mauritius		

CONTEMPT OF COURT

Memorandum by the Commonwealth Secretariat

Introduction

The law and practice relating to contempt of court has been under scrutiny recently in a number of Commonwealth jurisdictions, and the purpose of this paper is to review some proposals for change and recent legislation in an area of the law which is essential to the fair and impartial administration of justice.

2. In most Commonwealth jurisdictions there are two sources of this law, statutory and case law. Statutes often contain specific provisions regarding various forms of contempt (disobeying a court order, obstructing justice, and misconduct in court, are examples) and often the court's powers, derived from the common law, are expressly retained, or accepted as being within the inherent jurisdiction of the court.

3. In a number of jurisdictions which have had to face industrial relations problems in recent years, the use of the court's powers to punish for contempt have, in several instances, been the subject of acrimonious and protracted debate.

4. Difficulties have often arisen over the resolution of such problems as the proper starting point for strict liability for publications relating to criminal and civil cases; what defences should be available against provisions importing strict liability; the extent of liability for prejudice deliberately caused; disclosing the identity of witnesses after an order suppressing their names; and, more recently, revealing the secrets of the jury room.

5. As regards contempt in the face of the court, although there is unanimity of approach in virtually all the superior courts of the Commonwealth (that the power to commit summarily for contempt should only be used in exceptional cases, and as a last resort where it is clearly proved that the act complained of interferes, or tends to interfere with the proper administration of justice) a power which allows the court to frame the offence, initiate and conduct the prosecution, and then to fix the penalty (often without limit and, sometimes, with no right of appeal) is seen by some members of the public as anachronistic and an affront to the rules of natural justice.

6. It will be recognised, of course, that the very diversity of the generally accepted forms of contempt makes it extremely difficult to formulate general solutions, and recent Commonwealth developments in this area show a meticulous consideration of every facet of the problems that arise.

Phillimore and subsequent developments in the UK

7. Since so many jurisdictions derive their law of contempt from inherited British law and practice, a major event in the Commonwealth was the

publication, in 1974, of the Report of the Phillimore Committee [Cmnd. 5794]. The Committee recommended that legislation should be enacted to clarify the law of contempt and a summary of the Committee's conclusions and recommendations is set out in Appendix A.

8. In March 1978, the previous British administration issued a Green Paper [Cmnd. 7145] inviting public comment on the law of contempt of court. The Paper recognised that the Phillimore Report was a most valuable review of a difficult and sensitive area of the law, but suggested that there was room for legitimate argument about some of its most important recommendations. The central proposals concerning liability for contempt by publication raised issues about the proper balance between freedom of the press and the right of an individual to a fair trial, and upon such fundamental issues, it was suggested, conclusions could not be reached without informed parliamentary and public discussion.

9. The Green Paper raised four main questions for discussion. The first concerned the stage in legal proceedings at which the media should become strictly liable for contempt, or in other words should be under a duty not to publish anything which might seriously prejudice the proceedings, whether or not it is intended to do so. It was explained that under the present law, strict liability arose when proceedings were imminent (save in criminal cases in Scotland, where it arose as soon as a crime was known to have been committed—although this rule was currently under review). The Phillimore Report had recommended that in criminal cases strict liability should not begin until the accused is formally charged. The Green Paper recognised the advantages of such a rule but suggested that it could go too far in allowing prejudicial publication before a formal charge was made, thus endangering the fair trial of an accused person. As a result prosecutions might have to be dropped or convictions reversed on appeal, so that if the accused were innocent, he would have been denied the opportunity fully to clear his name; if guilty, he would have gone unpunished, to the possible danger of the public.

10. In civil cases, the Report had recommended that strict liability should not begin until the case is set down for trial. While the Green Paper did not challenge this recommendation, it pointed out that there were many forms of civil proceedings which had no setting-down stage or any real equivalent. It was suggested, if complex and elaborate rules were to be avoided, that the starting point for strict liability in such cases would have to be the date when the proceedings were formally commenced.

11. The Phillimore Committee had also recommended that it should be a defence to strict liability

that a publication which created a risk of serious prejudice to legal proceedings was nevertheless justified because it was a fair and accurate report of legal proceedings in open court, or because it was part of a legitimate discussion of a matter of general public interest. In relation to reports of legal proceedings, the Paper drew attention to the fact that the Report had also proposed that the judge should be given power to prohibit, in the public interest, the publication of names or other matters arising at a trial. While acknowledging the arguments for a defence of general public discussion, the Paper suggested there was room for the view that (taken with the other changes proposed) such a defence could tilt the balance too far against accused persons and litigants.

12. The Paper considered the Report's recommendation that it should not be contempt of court to bring influence or pressure to bear on a party to legal proceedings unless it amounted to intimidation or unlawful threats to his person, property or reputation. It pointed out that this was one of the issues that arose in *Attorney-General v. Times Newspaper Ltd.* [1974] A.C. 273, a case which concerned the proposed publication by the *Sunday Times* of an article about the thalidomide litigation. The Paper put forward the view that the recommendation drew no distinction (as the House of Lords had sought to do) between press comment and criticism which is fair and temperate, and that which is unfair and intemperate. Instead it would allow both. [Of course the Green Paper appeared before the April 1979 decision of the European Court of Human Rights.]

13. The Queen's Speech after the present Government was formed stated that a Bill would be introduced to amend and clarify the law of contempt. There have been various press reports about the progress of the drafting of the Bill, and Sir Michael Havers made mention of it recently when addressing a Conference on the Law and the Press organised by the Law Society (of England and Wales) and the Guild of British Newspaper Editors. Sir Michael revealed that the Bill was not likely to be confined to the Phillimore recommendations, although it was expected to be broadly based upon them. If the Bill is published before Ministers meet in Barbados, Sir Michael will be in a position, if he so chooses, to discuss its main provisions.

14. During the course of this address, Sir Michael Havers mentioned the problem of the publicity of committal proceedings where more than one accused was before the court and all did not agree that reporting restrictions should be lifted. On this point, it is interesting to note that in a recent Report issued by the Statute Law Revision Committee of Victoria, one of the recommendations made was that in cases where there is more than one defendant in committal proceedings, an application to allow publicity should have the unanimous agreement of all the defendants.

15. Sir Michael also dealt with the "danger that too free publicity of what goes on in the jury room may bring the system into disrepute", and explained what those dangers were. He told his audience that he had sought to clarify whether such disclosures would

be regarded as contempt of court, but that the result had been inconclusive. He was, of course, referring to *Attorney-General v. Statesman and Nation Publishing Co. Ltd.* [1980] 2 W.L.R. 246 where the Divisional Court held that in order to establish that publication after a trial of a juror's disclosure of jury room secrets was a contempt of court, it was necessary to show, in the light of the circumstances of the case, that such disclosure tended or would tend to imperil the finality of jury verdicts, or to affect adversely the attitude of future jurors and the quality of their deliberations. The Court's view was that in the instant case the sole ground on which the allegation of contempt was based was the publication of some of the secrets of the jury room in the Thorpe trial. Apart from that, there were no special circumstances which, it was suggested, called for condemnation. The evidence showed that for a number of years the publication of jury-room secrets had occurred on numerous occasions. To many of those disclosures no exception could be taken because, from a study of them, it would not be possible to identify the persons concerned in the trials. In those cases jury-room secrets were revealed in the main for the laudable purpose of informing would be jurors what to expect when summoned for jury service. Thus it was not possible to contend that every case of post-trial activity of the present kind must necessarily amount to a contempt.

16. Looking at the case as a whole, the court concluded that the article in the *New Statesman* did not justify the title of contempt of court. That did not mean that the court would not wish to see restriction on the publication of such an article, because it would; but the Court's duty was to say what the law was today, and to see whether, today, the activity in question was a contempt of court. The Court was unable to say that it was, and therefore refused the application.

New Zealand proposals

17. At the end of 1977, in New Zealand a Committee on Defamation published its Report. The Committee explained that at a certain stage of their deliberations, it became apparent to them that it would be desirable to consider certain aspects of the law of contempt which were closely allied to the law of defamation, and their terms of reference were subsequently revised to embrace an examination of the law of contempt as it may concern the publication of matter relating to civil proceedings that are imminent or pending. A summary of the Report's recommendations on this subject appears in Appendix B; also set out is the Committee's draft of a Bill which would give effect to their recommendations.

Proposals in Canada

18. In the same year the Law Reform Commission of Canada published Working Paper No. 20 on Contempt of Court. It was stated to be the first part

of a general study of offences against the administration of justice, and a second Working Paper dealing with the statutory offences would follow. A summary of the Working Paper's tentative recommendations is set out in Appendix C. In passing it is interesting to note that the Commission felt that in view of the constitutional problems that would arise in Canada if there were an attempt to abolish the traditional distinction between civil and criminal contempt (Phillimore, paras. 170—176), there was little point in making such a proposal.

A Bermuda statute

19. Following recommendations made by the Law Reform Committee of Bermuda, the Bermuda legislature enacted the Administration of Justice (Contempt of Court) Act 1979 (No. 17 of 1979). The text of this statute appears in Appendix D. The Act closely followed the draft Bill drawn up by the Committee and, it will be seen, adopts many of the recommendations made in the Phillimore Report. The Act also includes a number of provisions derived from fairly recent United Kingdom legislation.

Conclusions

20. A study of these developments reveals a large measure of similarity of approach, but there are a number of interesting variations, sometimes dictated by local considerations. One such example is that whereas the Phillimore Committee had recommended that it should be a defence to an allegation of contempt to show that a publication formed part of a legitimate discussion of matters of general public interest, and that it only incidentally and unintentionally created a risk of serious prejudice to particular proceedings, in view of the size of Bermuda (where any case likely to be of public interest would be known to a very high proportion of the population) the Bermuda Law Reform Committee were of the opinion that it would not be desirable to introduce such a provision into the island's legislation; such a provision might easily result in a trial by newspaper which the court could not control. The Bermuda Act also deals with contempt of tribunals.

21. Ministers may wish to discuss the principal issues involved in this important and complex area of the law, and exchange ideas and experience on their possible resolution to take account of modern conditions.

PHILLIMORE REPORT

PART V. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

GENERAL CONCLUSIONS

216.—(1) The law of contempt in England and Wales and in Scotland is required as a means of—

- (a) maintaining the rights of the citizen to a fair and unimpeded system of justice ; and
- (b) protecting the orderly administration of the law (paragraph 10).

(2) The operation of the law of contempt should be confined to circumstances where the achievement of its objectives requires the application of a swift and summary procedure (paragraph 21).

(3) In essentials the law of contempt, especially as it affects the press, should be the same in England and Wales and in Scotland so far as procedural differences allow (paragraph 24).

(4) The law as it stands contains uncertainties which impede and restrict reasonable freedom of speech. It should be amended and clarified by statute so as to allow as much freedom of speech as is consistent with the achievement of the objective set out in conclusion 1 (paragraphs 5-7).

(5) One area of uncertainty concerns the period of operation of the law of contempt, as to whether publications are at risk when proceedings are imminent and, if so, what period that expression covers (paragraph 84).

RECOMMENDATIONS

(6) Any conduct, including publication as described in recommendation 8, which is *intended* to pervert or obstruct the course of justice in particular proceedings should continue to be capable of being dealt with as a contempt of court, but only if the proceedings in question have started and have not yet been finally settled or concluded. However, such conduct should normally be dealt with as a criminal offence unless there are compelling reasons requiring it to be dealt with as a matter of urgency by means of summary contempt procedures (paragraphs 66 and 72).

(7) A publication, as described in the following recommendation, should be subject to the law of contempt if it creates a risk of serious prejudice (whether intentionally or not) (paragraph 74) ; but this strict liability should not apply to other conduct (paragraph 77) and should apply to publications only in accordance with recommendations 9-16 below.

(8) For the purposes of recommendations 7 and 9-16 a publication should be defined as any speech, writing, broadcast or other communication, in whatever form, which is addressed to the public at large (paragraph 80).

(9) A publication should give rise to strict liability in the law of contempt only if it creates a risk that the course of justice will be seriously impeded

or prejudiced. A definition on these lines should be provided by statute (paragraph 113).

(10) Where the proceedings in question are *criminal*, strict liability for publications should only apply—

(i) in England and Wales, when the accused person is charged or a summons served ;

(ii) in Scotland, when the person is publicly charged on petition or otherwise or at the first calling in court of a summary complaint (paragraph 123).

(11) Where the proceedings in question are *civil*, strict liability for publications should only apply—

(i) in England and Wales, when the case has been set down for trial ;

(ii) in Scotland, when proof or jury trial has been ordered ;

(iii) in other civil proceedings, the equivalent stage (paragraphs 127 and 129).

(12) Strict liability for publications should cease to operate when a verdict has been returned and sentence pronounced or judgment given, or an equivalent order or decree made or given. If in a jury trial a jury fails to agree, the law should continue to apply until it is clear that no retrial is to be ordered. In the event of a new trial being ordered, the law should again apply from the date when the new trial is ordered (paragraph 132).

(13) The defence of innocent publication and distribution provided by section 11 of the Administration of Justice Act 1960 should be retained, with such modifications as will be necessary if our recommendations are implemented, for England and Wales, and should be extended to Scotland (paragraphs 133 and 154).

(14) It should be a defence to an allegation of contempt to show that the publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith (paragraph 141).

(15) It should be a defence to an allegation of contempt to show that a publication formed part of a legitimate discussion of matters of general public interest and that it only incidentally and unintentionally created a risk of serious prejudice to particular proceedings (paragraph 142).

(16) A defence that a publication is for the public benefit should not be introduced into the law of contempt (paragraph 145).

(17) The existing law governing editorial and corporate responsibility for publications should be retained, with necessary modifications in regard to broadcasting and television organisations (paragraphs 149, 151 and 153).

(18) In Scotland, it should continue to be a contempt of court to publish the content of the written pleadings before the record is closed (paragraph 130).

(19) It should also be provided by statute that bringing influence or pressure to bear upon a party to proceedings shall not be held to be a contempt unless it amounts to intimidation or unlawful threats to his person, property or reputation (paragraph 62).

(20) It should no longer be a contempt to take or threaten reprisals against a witness or juror after the conclusion of legal proceedings with the intention of punishing him for his part in them. Instead, such conduct should be made an indictable offence (paragraph 157) ; with provision for the victim to recover compensation for any loss or damage he may have suffered (paragraph 158).

(21) "Scandalising the court" should cease to be part of the law of contempt. Instead, it should be made an indictable offence both in England and Wales and in Scotland to defame a judge in such a way as to bring the administration of justice into disrepute. Proof that the allegations were true *and* that publication was for the public benefit should be a defence. In England and Wales this offence should be made a branch of the law of criminal libel (paragraphs 164 and 167).

(22) All distinctions between "civil" and "criminal" contempts in England and Wales should be abolished (paragraph 176), and in particular:—

- (a) all rules which confer privilege from process for "civil" as opposed to "criminal" contempt of court should be abolished. Parliament may wish to review the Parliamentary aspects of these rules (paragraph 170);
- (b) the rule that waiver by an aggrieved party in civil proceedings automatically relieves the contemnor of liability should be abolished. The power of the courts to order that a breach of an order be reported to it should be confirmed (paragraph 171);
- (c) all committals to prison for contempt should be for fixed terms (paragraph 172);
- (d) the rules as to execution of process in civil contempt should be brought into line with those for criminal contempt (paragraph 173);
- (e) exercise of the Royal prerogative of mercy should not be advised in any case of contempt (paragraph 174);
- (f) the practice of the courts in requiring a breach of a court order to be proved beyond reasonable doubt should be confirmed (paragraph 175).

(23) Certain Rules of the Supreme Court which provide for committal in the event of breaches of specific court orders should be revoked, and all cases of disobedience which may be dealt with by contempt procedure left to the general provisions of Order 45, rule 5 (paragraph 180).

(24) The grounds for a motion to commit for disobedience to a court order should wherever possible be set out in detail in the supporting affidavit (paragraph 181).

(25) *Ex parte* committal orders in England and Wales should in every case include a direction that the contemnor is to be brought up before the judge making the order (or another judge if he is not available) at the earliest opportunity (paragraph 182).

(26) The right of private individuals to initiate proceedings for contempt both in England and Wales and in Scotland should continue, without prejudice to the powers of either the Attorney General or Lord Advocate to take proceedings at his own instance should he consider it proper to do so in the public interest (paragraph 187).

(27) In all contempt proceedings which a private individual seeks to institute, other than those for the enforcement of a court order made in his favour, he should be required to serve notice of these proceedings on the Attorney General or Lord Advocate as the case may be (paragraph 187).

(28) In cases of contempt in the face of the court—

- (a) the judge should always ensure that the contemnor is in no doubt about the nature of the conduct complained of, and give him an opportunity of explaining or denying his conduct, and of calling witnesses (paragraph 32);
- (b) before any substantial penalty is imposed there should be a short adjournment, with power to remand the contemnor in custody. The judge should have power to obtain a background report on the contemnor, and the contemnor should be entitled to speak in mitigation of sentence (paragraph 33);

- (c) for the purposes of defending himself and of making a plea in mitigation the contemnor should be entitled to legal representation, and the court should have power to grant legal aid immediately for this purpose where appropriate (paragraphs 32 and 33);
- (d) if the contempt also amounts to a criminal offence, the judge should consider referring it to the prosecuting authorities to be dealt with under the ordinary criminal law, and should so refer it in serious cases unless reasons of urgency or convenience require that it be dealt with summarily (paragraph 34).

(29) Magistrates in England and Wales should be given power to impose penalties for contempt in the face of the court, subject to the limits proposed in recommendation 37 below (paragraph 37).

(30) Bankruptcy Registrars in the High Court in England should be given the same powers as county court judges to punish contempts in the face of the court (paragraph 38).

(31) For the purposes of section 41 of the Criminal Justice Act 1925 (prohibition on use of cameras in courts and their precincts) a map or plan should be displayed wherever practicable indicating the boundaries of the precincts of the court (paragraph 41).

(32) Regulations should be made governing the unofficial use of tape-recorders in court, and of recordings obtained thereby. Breach of the regulations in court should be punishable as a contempt (paragraph 43).

(33) There should be created a right of appeal to the Court of Criminal Appeal in Scotland by way of Note of Appeal from a finding of contempt in a criminal trial on indictment (paragraph 198).

(34) In superior courts both in England and Scotland the power to fine should remain unlimited but the power to imprison should be limited to a maximum period of two years. All courts should in addition have appropriate powers to deal with mentally disordered offenders (paragraphs 201-2 and 206).

(35) The powers of judges in county courts to impose penalties for contempt in the face of the court (under section 157 of the County Courts Act 1959) should be increased to a fine of £150 or three months' imprisonment (paragraph 204).

(36) The powers of sheriffs in Scotland to impose penalties for contempt in the face of the court should be limited to a £150 fine or three months' imprisonment (paragraph 207).

(37) Both in England and Scotland the powers of magistrates and justices of the peace to impose penalties for contempt in the face of the court should be limited to a £20 fine or seven days' imprisonment (paragraphs 205 and 208).

(38) Powers of both sheriffs and magistrates in Scotland and of magistrates in England to certify more serious cases of contempt in the face of the court to the High Court of Justiciary or the Inner House of the Court of Session and the Divisional Court respectively should be given or confirmed as the case may be (paragraphs 205 and 208).

(39) All sentences of imprisonment for contempt of court in England and Wales should be for fixed terms, but the power to review a case and order release before the full sentence is served should be retained (paragraph 172).

(40) Prison regulations in England and Wales should be amended to require notification to be given to the Official Solicitor of prisoners committed for contempt by county courts for fixed terms of less than six weeks, in the same way as for other contempt prisoners (paragraph 190).

(41) The machinery for the enforcement of fines in the High Court and Restrictive Practices Court in England and Wales should be replaced by a system on the lines of that provided by the Criminal Justice Act 1967 (paragraph 188).

NEW ZEALAND REPORT

Summary of recommendations

- (a) A statutory definition of contempt of court in relation to publications should *not* be enacted. Instead the approach to definition should be by way of exclusion.
- (b) It be enacted that it should not be a contempt of court to publish material which relates to matters in issue in civil proceedings when that material does not include any direct reference to the proceedings and publication takes place prior to the setting down of the action for trial or the fixing of a date which is intended to be the date of hearing in the Magistrate's Court.
- (c) In the case of criminal proceedings in both the Magistrates' and Supreme Courts the law of contempt should cease to apply after the time for giving notice of appeal has expired.
- (d) In the case of civil proceedings the law of contempt should cease to apply from the date of delivery of the judgment, or when there is a jury, from the date judgment is given.
- (e) When an appeal is brought, the law of contempt should again apply so as to prevent any direct discussion of the issues arising in the particular appeal or the decision the appellate court should reach. It should cease to apply from the date of delivery of judgment of the appeal.
- (f) It be enacted that it should not be a contempt of court to publish the proceedings on an interlocutory application or the reasons for a decision made in the course of such proceedings unless the judge orders otherwise.
- (g) It be enacted that the publication of a fair and accurate report of the pleadings of all parties to a civil action shall not be a contempt of court.
- (h) A provision similar to section 11 of the Administration of Justice Act 1960 (United Kingdom) be enacted.
- (i) It be enacted that the question whether there was a risk of prejudice shall be determined in the light of the known or ascertainable facts at the time of the publication and not at any time thereafter.
- (j) It be enacted that it is a defence to contempt proceedings to show that the publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith.
- (k) A defence of general public discussion be enacted in a form similar to that enunciated by Chief Justice Jordan in *Ex parte Bread Manufacturers* and approved in *A.G. v. Times*.
- (l) It be enacted that an editor or other person responsible for the control of a publication or a broadcast shall not be liable unless he approved publication of the offending article or was on duty at the time it was prepared for publication.
- (m) There be no extension of editorial responsibility to executives or officers of a company who have not personally been a party to, or connived at, a contempt.
- (n) Consideration should be given to making it possible for a charge of contempt to be brought either by a motion supported by affidavits or by indictment. In the former case the courts should not have power to impose a term of imprisonment.

JUDICATURE AMENDMENT

ANALYSIS

Title	86b. Limitation on time of application of law of contempt in respect of publications
1. Short Title	86c. Defence of innocent publication or distribution
2. New provisions relating to contempt of Court	86d. Defence in cases of editorial responsibility
<i>Contempt of Court</i>	86e. Other defences in proceedings for contempt
86a. Limitation on meaning of 'contempt of Court' in respect of publications	86f. Determination of risk of prejudice

DRAFT OF A BILL INTITULED

An Act to amend the Judicature Act 1908

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Judicature Amendment Act 1978, and shall be read together with and deemed part of the Judicature Act 1908* (hereinafter referred to as the principal Act).

2. New provisions relating to contempt of Court—The principal Act is hereby amended by inserting, after section 86 but before the subheading "*Interest on Money*", the following subheading and sections:

*1908, No. 89

Amendments: 1958, No. 40; 1960, No. 109; 1961, No. 11; 1963, No. 133; 1965, No. 62; 1966, No. 67; 1968, No. 18; 1968, No. 59; 1969, No. 86; 1970, No. 72; 1972, No. 130; 1973, No. 8; 1973, No. 69; 1974, No. 57; 1976, No. 134; 1977, No. 32

“Contempt of Court

“86A. Limitation on meaning of ‘contempt of Court’ in respect of publications—(1) No person is guilty of a contempt of Court, on the ground that he has published any matter intended or likely to prejudice the conduct of a civil proceeding pending or imminent, by reason only that—

“(a) Before the proceeding is set down for trial, he publishes any matter relating to the proceeding (being a matter that does not contain a direct reference to the proceeding); or

“(b) In the case of an interlocutory proceeding where no order has been made prohibiting publication of the details of the proceeding or of the reasons for any decision in the proceeding, he publishes those details or reasons; or

“(c) In any case where all the pleadings of the parties to the proceeding have been completed, he publishes a fair and accurate report of all of those pleadings.

“(2) In this section, the setting down of a proceeding for trial includes, in relation to any Court other than the Supreme Court, the fixing of a date on which the proceeding may be heard.

“86B. Limitation on time of application of law of contempt in respect of publications—(1) No person is guilty of a contempt of Court, on the ground that he has published any matter intended or likely to prejudice the conduct of a civil proceeding pending or imminent, where—

“(a) The publication is made after the date of judgment; and

“(b) At the time of the publication, no party has filed a notice of appeal in respect of the proceeding.

“(2) In this section, ‘the date of judgment’ means—

“(a) In relation to a proceeding that is tried before a Judge or any other judicial officer alone, the date on which judgment is delivered; and

“(b) In relation to a proceeding that is tried before a Judge and jury, the date on which judgment is given; and

“(c) In relation to a proceeding by way of appeal, the date of delivery of the judgment on appeal.

“86c. Defence of innocent publication or distribution—

(1) Where a person is charged with a contempt of Court on the ground that he has published any matter likely to prejudice the conduct of a civil proceeding pending or imminent, it shall be a defence to the charge if he proves that at the time of publication (having taken all reasonable care) he—

“(a) Did not know; and

“(b) Had no reason to suspect—
that the proceeding was pending, or was imminent, as the case may be.

“(2) Where a person is charged with a contempt of Court on the ground that he has distributed a publication containing any matter referred to in subsection (1) of this

section, it shall be a defence to the charge if he proves that at the time of distribution (having taken all reasonable care) he—

“(a) Did not know; and

“(b) Had no reason to suspect—

that the publication contained or was likely to contain such matter.

“86D. Defence in cases of editorial responsibility—(1)

Where a person is charged with a contempt of Court on the ground that he is the editor of a publication containing any matter intended or likely to prejudice the conduct of a civil proceeding pending or imminent, it shall be a defence to the charge if he proves that—

“(a) He was not the author of the publication; and

“(b) He did not specifically approve the publication; and

“(c) He had taken all reasonable steps to ensure that the content of the publication would be examined and approved by a responsible person before it was published; and

“(d) At the time of publication, he was absent from duty as an editor, and was unaware of the content of the publication.

“(2) In this section, ‘editor’ includes a person who is responsible for the control of the content of a publication.

“86E. Other defences in proceedings for contempt—

(1) Where a person is charged with a contempt of Court on the ground that he has published any matter likely to prejudice the conduct of a civil proceeding pending or imminent, it shall be a defence to the charge if he proves that—

“(a) The publication was made in good faith; and

“(b) The publication was a fair and accurate report of any proceeding conducted in open Court; and

“(c) The publication was made contemporaneously with or within a reasonable time after the proceeding referred to in paragraph (b) of this subsection.

“(2) Where a person is charged with a contempt of Court on the ground that he has published any matter likely to prejudice the conduct of a civil proceeding pending or imminent, it shall be a defence to the charge if he proves that—

“(a) The publication was made in the course of a discussion of public affairs, or of a denunciation of a public abuse (whether real or supposed); and

“(b) In publishing the matter, he did not intend to prejudice any party to that proceeding.

“86F. Determination of risk of prejudice—Where a person is charged with a contempt of Court on the ground that he has published any matter intended or likely to prejudice the conduct of a civil proceeding pending or imminent, the issue whether there is any risk of prejudice to the course of justice shall be determined on the facts known or ascertainable at the time of publication.”

CANADIAN WORKING PAPER

Summary of Principal Recommendations

A complete draft of all the offences against the administration of justice will be presented in our second Working Paper dealing with the statutory offences presently found in the *Criminal Code*. Somewhat archaic expressions like “scandalizing the court” or even “misbehaving in court” should disappear.

However, before this is done, it is extremely important for the Commission to obtain the reaction of the public and of the legal profession to the outline of the proposed reform of the law of contempt of court, as well as to suggested legislative definitions of the offences.

So that this paper might be more easily used, we thought it useful to include here a list of its principal recommendations.

A. GENERAL RECOMMENDATIONS

1. That the totality of offences against the administration of justice be included in legislation and that the common law offence of contempt of court referred to in s. 8 of the *Criminal Code* thereby disappear.

2. That the customary forms of contempt of court known as misbehaving in court, disobeying a court order, scandalizing the court, obstructing justice, and attempting to influence the outcome of a trial be defined in the *Criminal Code*.

3. That these new statutory offences and those presently included in the *Criminal Code* be grouped together in a single Part of the Code dealing with offences against the administration of justice.

4. That the new texts be drafted in simple language, clearly expressing the rules found in the cases and practice, yet remaining flexible enough that the courts can adapt them to the particular circumstances of each case.

5. That a *mens rea* of intent or recklessness be required for all codified forms of contempt of court.

6. That the law contain the principle that the ordinary procedure remain the general rule, except for cases of misbehaving in court.

7. That the law nevertheless recognize the exceptional possibility of having recourse to a new summary procedure more compatible with basic rights, when the interest of justice so requires.

B. SPECIFIC RECOMMENDATIONS

Misbehaving in court

8. That an offence dealing with courtroom misbehaviour be created to be defined as follows:

Anyone who, by disorderly, insolent or harmful behaviour, disturbs or disrupts the normal conduct of judicial proceedings in the presence of the court is guilty of an offence.

9. That the principle be recognized that any judge, magistrate or justice of the peace may make any necessary orders to suppress disorder in his court, or warn or expel anyone who disrupts a hearing, subject to the provisions of s. 577 of the *Criminal Code*.

Disobeying a court order

10. That the existing offence of disobeying a court order contained in s. 116 of the *Criminal Code* be retained.

11. That the specific offences of disobeying interlocutory orders to testify, to take the oath, etc. contained in the *Criminal Code* (ss. 472, 533(1), 633, 636, etc.) be retained.

C. SCANDALIZING THE COURT

12. That an offence be created, to be defined as follows:

Anyone who insults a judge in the exercise of his functions, or who attacks the integrity, independence or impartiality of the judicial process is guilty of an offence.

13. That the specific defence of truth of the facts and of public interest to disclose them be recognized as a valid defence to a charge of scandalizing the court.

14. That a trial for scandalizing the court be presided by a judge other than the one involved and that it may proceed by way of direct preferred indictment signed by the Chief Justice of the court to which the judge concerned belongs and be heard by the Chief Justice or any other judge to whom it is referred by him.

D. OBSTRUCTING JUSTICE

15. That the existing offences contained in s. 107 *et seq.* of the *Criminal Code* be retained.

E. ATTEMPTING TO INFLUENCE THE OUTCOME OF A TRIAL

16. That an offence of attempting to influence the outcome of a trial be created, to be defined as follows:

Anyone who, wilfully or through recklessness, publishes or allows to be published anything that constitutes a serious risk of obstructing or influencing the impartial development of a judicial proceeding is guilty of offence.

17. That ignorance of the fact that a trial is pending, the burden of proof of which is on the accused, be recognized as a valid defence to the charge of attempting to influence the outcome of a trial.

18. That in criminal matters, a trial be considered pending from the moment the information is laid until the date at which judgment on the sentence becomes final.

19. That in civil matters a trial be considered pending from the moment it is set down for trial until the date at which judgment becomes final.



BERMUDA

1979 : No. 17

**THE ADMINISTRATION OF
JUSTICE (CONTEMPT OF COURT)
ACT 1979**

[Date of Assent 25th June, 1979]

[Operative Date 25th June, 1979]

WHEREAS it is expedient to make further and better provision to ensure the maintenance of dignity and order in courts and tribunals and to ensure obedience to their orders:

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

1. This Act may be cited as the Administration of Justice (Contempt of Court) Act 1979. Short title.

2. In this Act unless the context otherwise requires — Interpretation.

“civil proceedings” shall include proceedings before a tribunal;

“court” includes the Court of Appeal for Bermuda, the Supreme Court and a court of summary jurisdiction;

“court of summary jurisdiction” includes a special court;

“judicial proceeding” includes any proceedings in which evidence may be taken on oath before a court or tribunal including interlocutory proceedings;

“officer of the court” includes a barrister and attorney present during a sitting of a court or tribunal;

“tribunal” means a tribunal, other than a court, before which evidence may be taken on oath.

Beginning
and end of
proceedings.

3. (1) For the purposes of this Act judicial proceedings shall be deemed to begin —

(a) in criminal proceedings when an accused person has been arrested or charged before a court or a summons requiring his attendance at a court has been issued; and

(b) in civil proceedings when the date of the trial or hearing of the proceedings has been fixed.

(2) For the purposes of this Act judicial proceedings shall be deemed to end —

(a) in criminal proceedings —

(i) in the case of a conviction when sentence has been passed or the accused person has been otherwise dealt with;

(ii) in the case of an acquittal when the accused person has been released or discharged;

(iii) in a trial when no verdict is recorded when the prosecution states that there will be no further prosecution in relation to the same facts; and

(iv) in the case of the accused being found unfit to plead at the time of recording such finding;

(b) in civil proceedings on the conclusion of the trial or interlocutory hearing at first instance.

Power of court
to punish for
contempt in
the face of
the court.

4. (1) Subject to subsection (6) when a court is satisfied that a person has been guilty of contempt in its face it may order that he shall be detained until the next sitting of the court, but for no longer than forty-eight hours, or released on bail on such security as it shall think proper to appear before it at the next sitting.

(2) At the next sitting after making of an order under subsection (1) the court may —

(a) if the offender purges his contempt to the satisfaction of the court order his release;

(b) punish the offender by committing him to prison for a period not exceeding thirty days or by imposing a fine on him not exceeding five hundred dollars or

**No. 17 THE ADMINISTRATION OF JUSTICE (CONTEMPT OF COURT)
ACT 1979**

requiring him to give security for his good behaviour;
or

- (c) prefer a bill of indictment against him charging him with an offence under this Act or under the Criminal Code or may order his summary trial for the offence.

(3) An order for a summary trial under subsection (2) shall be deemed to be an information for the purposes of section 3 of the Summary Jurisdiction Act 1930.

(4) If any person released on bail under subsection (1) fails to appear at the time ordered the court may order his arrest and so soon as convenient after his arrest he shall be brought before the court and dealt with under subsection (2).

(5) A court may, on the application of any person committed to prison or ordered to pay a fine under subsection (2) suspend or remit such punishment on such terms and conditions as it may specify.

(6) A court of summary jurisdiction shall not take action under this section if it can act under sections 36 and 37 of the Magistrates Act 1948.

5. (1) If any person disobeys or fails to comply with an order of a court the court may, on its own volition or on the application of the Attorney-General or of any person affected by the disobedience or failure to comply, order him to be arrested and brought before the court or may issue a summons requiring his attendance before the court at a date and time specified in the summons.

Failure to
obey or
comply with
order of a
court.

(2) If any person fails to obey a summons issued under subsection (1) the court may order him to be arrested and brought before the court.

(3) When any person is brought before a court pursuant to subsection (1) or (2), the court on being satisfied that such person has disobeyed or failed to comply with an order of the court, shall have the same powers in respect of such person as are provided in subsection (2) of section 4.

(4) The powers of the court under this section may be exercised from time to time in respect of any person disobeying or failing to obey the order until such time as he obeys or complies with such order.

6. (1) Subject to subsection (2) an appeal shall lie against an order made under subsection (2)(b) of section 4, whether the order has been made pursuant to section 4 or section 5 as if it

Appeals.

were a criminal conviction and the statutory provisions relating to the release of an offender on bail pending a criminal appeal shall likewise apply.

(2) Notwithstanding subsection (1) no appeal shall lie against an order made by the Court of Appeal whether acting in its original or appellate capacity.

Power of a
tribunal to
report
contempt
to Supreme
Court.

7. (1) Where any person is guilty of contemptuous conduct in the face of a tribunal the person presiding may order his arrest by a police officer and shall forthwith report the conduct to the Supreme Court.

(2) When a report under subsection (1) is made to the Supreme Court it shall order the offender to be brought before it and, after hearing such evidence as it considers necessary shall, if it is satisfied that there has been contemptuous conduct, deal with the offender under subsection (2) of section 4.

(3) When a person is arrested under subsection (1) and cannot immediately be brought before the Supreme Court he shall within twenty-four hours be brought before a magistrate, or a police officer entitled to release persons on bail by virtue of section 462 of the Criminal Code, who may release him on bail or may order his continued detention until he can be brought before the Supreme Court.

Definition
of spoken
or written
contempt.

8. Words written or spoken not in the face of a court or a tribunal which do not impugn the character or conduct of any person before whom a judicial proceeding was or is being held shall only be deemed to be contemptuous if they create a risk that in a judicial proceeding the course of justice will be impeded or prejudiced.

Innocent
publication
and
distribution.

9. (1) A person shall not be guilty of contempt of court if at the time he spoke or wrote the words complained of, having taken all reasonable care, he did not know or had no reason to suspect that the proceedings had begun as provided in section 3.

(2) A person shall not be guilty of contempt of court on the ground that he has distributed a publication if at the time of distribution, having taken all reasonable care, he did not know that it contained any contemptuous matter and had no reason to suspect that it was likely to do so.

(3) The burden of proof of any fact tending to establish defence afforded by this section to any person shall lie upon that person.

**No. 17 THE ADMINISTRATION OF JUSTICE (CONTEMPT OF COURT)
ACT 1979**

10. (1) The publication of information relating to proceedings held in camera shall not of itself be regarded as contempt of court except in the following cases, that is to say —

**Publication
of information
relating to
proceedings
in camera.**

- (a) where the proceedings relate to the wardship or adoption of a person under sixteen years of age or wholly or mainly to the guardianship, custody, maintenance or upbringing of such a person, or rights of access to such a person;
- (b) where the proceedings are brought under Part V of the Mental Health Act 1968 or under any provision of that Act authorizing an application or reference to be made to a mental health review tribunal or to a court;
- (c) where the information relates to proceedings or part of them held in private for reasons of national security;
- (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;
- (e) where a court, having power under section 6(10) of the Constitution to do so, expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in camera shall not of itself be contempt of court except where the court, having power under section 6(10) of the Constitution to do so, expressly prohibits the publication.

11. The publication of a fair and accurate report of judicial proceedings held in open court contemporaneously with those proceedings shall not be contempt of court notwithstanding that other similar proceedings may be outstanding.

**Publication
of a report
of proceedings
when similar
proceedings
outstanding.**

12. (1) In addition to the author, the editor and publisher, if any, of any written publication shall be deemed to be responsible for any matter contained therein.

**Responsibility
for written and
broadcast
publications.**

(2) Where proceedings for contempt of court have been commenced against any broadcasting organization such organization shall, on the application of a court or of any party to the proceedings, specify who in the organization at the time of the

publication had editorial responsibility. Such person shall be deemed to have the same responsibility as the editor of a written publication.

Directors
and partners
with no
knowledge
not guilty.

13. In any case where a company or partnership is guilty of contempt no director or officer of the company or partner in the partnership shall likewise be guilty if he can show that he had no knowledge of the contempt and that in the ordinary course of business he could not have been expected to have such knowledge or if he can show that the contempt was committed contrary to his expressed wishes.

Punishment
for contempt
of court.

14. Subject to the other provisions of this Act any person who —

- (a) wilfully insults any person before whom a judicial proceedings is being held or any officer of a court or tribunal during the sitting of a court or tribunal or during such time as the person or officer is present on the premises where the court or tribunal is sitting or is going to or returning from such premises;
- (b) wilfully interrupts the proceedings of a court or tribunal or otherwise misbehaves in the premises where the court or tribunal is sitting;
- (c) while a judicial proceeding is being held makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person concerned with such proceeding in favour of or against any party to such proceeding or calculated to lower the authority of any person before whom such proceeding is being held; or
- (d) publishes without permission of the court a report of evidence taken in any judicial proceedings held in camera,

is guilty of a misdemeanour and is liable, on conviction by a court of summary jurisdiction to imprisonment for a term not exceeding twelve months or to a fine not exceeding two thousand dollars or to both such imprisonment and fine or on indictment to imprisonment for a term not exceeding three years or to a fine not exceeding five thousand dollars or to both such imprisonment and fine.

Failure of
witness to
attend.

15. (1) If any witness who has been summoned to give evidence before any court fails to attend at the time and place appointed, it may issue a warrant to arrest him and bring him before the court.

No. 17 THE ADMINISTRATION OF JUSTICE (CONTEMPT OF COURT)
ACT 1979

(2) If any witness who has been summoned to give evidence before a tribunal fails to attend at the time and place appointed and the tribunal is not empowered to compel the attendance of witnesses, the tribunal may report the circumstances to the Supreme Court and a judge on receiving such report, and hearing in chambers a member of the tribunal if he considers it necessary, may issue a warrant to arrest the witness and bring him before the tribunal.

(3) A court may punish a witness failing to attend the court at the time and place appointed in a summons in the manner provided in subsection (2) of section 4 and the Supreme Court may so punish a witness failing to attend a tribunal.

(4) An appeal shall lie against an order made under this section and the provisions of section 6 shall apply to any such appeal.

16. (1) If any witness, during any judicial proceedings, without offering a lawful excuse, refuses to give evidence when required or refuses to be sworn or affirmed, or having been sworn or affirmed refuses to answer questions properly put to him the court may order, unless he consents to give evidence, or to be sworn or affirmed, or to answer questions put to him, as the case may be, that he be detained in custody for any period not exceeding seven days, and may issue a warrant for his arrest and detention in accordance with the order.

Refusal of
witness to
give evidence
etc.

(2) If the person so detained, on being brought up again during the proceedings, again refuses to give evidence or to be sworn or affirmed, or having been sworn or affirmed to answer any questions put to him the court, if it thinks fit may again direct that the witness be detained in custody for a like period, and so again from time to time until he consents to give evidence, or to be sworn or affirmed or to answer as aforesaid.

(3) If any witness during proceedings before a tribunal without offering a lawful excuse refuses to give evidence when required, or refuses to be sworn or affirmed or refuses to answer questions and if the tribunal is not empowered to make the witness give evidence, be sworn or affirmed or answer questions, the tribunal may report the circumstances to the Supreme Court which may after hearing the witness, make an order as if the refusal had been in proceedings in a court.

(4) Nothing in this section shall limit the power and authority of a court under sections 4 and 5.

THE ADMINISTRATION OF JUSTICE (CONTEMPT OF COURT) No. 17
ACT 1979

(5) An appeal shall lie against an order made under this section and the provisions of section 6 shall apply to any such appeal.

Repeals.

17. The following provisions are repealed —

Section 17 of the Supreme Court Act 1905;

Section 5 of the Evidence Act 1905;

Sections 9 and 10 of the Summary Jurisdiction Act 1930; and

Section 133 of the Criminal Code.

**Amends the
Criminal
Code.**

18. The Criminal Code is amended —

A. By the addition in section 118 of the following expression immediately after the expression “to be done” in paragraph (c) “or that has been done”;

B. By renumbering subsection (2) of section 125 as subsection (3) and by the addition of the following subsection —

“(2) Any person —

(a) who gives, confers, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for any person, because such person gave false testimony or withheld true testimony in a judicial proceeding; or

(b) who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or for any person because he has given false testimony or withheld true testimony in a judicial proceeding,

is guilty of a misdemeanour, and is liable to imprisonment for a term not exceeding three years.”; and

C. By the addition of the following two sections immediately after section 125.

125A. Any person who —

(a) threatens, intimidates or restrains;

(b) uses violence to or inflicts injury on;

No. 17 THE ADMINISTRATION OF JUSTICE (CONTEMPT OF COURT)
ACT 1979

- (c) causes or procures violence, damage, loss or disadvantage to; or
- (d) causes or procures the punishment of, or loss of employment of,

a person for or on account of his having appeared or being about to appear, as a witness in a judicial proceeding is guilty of a misdemeanour and shall be liable on conviction to imprisonment for a period not exceeding five years.

125B. Any person who insults a person for or on account of his having appeared or being about to appear, as a witness in a judicial proceeding is guilty of a summary offence and shall be liable on conviction to imprisonment for a period not exceeding twelve months.”.

REVIEW OF LEGAL ACTIVITIES OF THE COMMONWEALTH SECRETARIAT

Memorandum by the Commonwealth Secretariat

Introductory

The very great importance to the Commonwealth Secretariat of Meetings of Commonwealth Law Ministers is demonstrated in full measure by the expansion in the range of our activities which has taken place since Law Ministers last met at Winnipeg in August 1977, in the light of decisions taken there. The broadening of activity has only been possible (given our determination to remain small in size and the fact that it has been achieved without any increase in staff) by the successful implementation of a catalytic approach to the Secretariat's role. It has been brought about by a friendly, if determined, exploitation of existing Commonwealth institutions in the legal field, and the undoubted goodwill of numerous lawyers, both inside and outside Government, throughout the Commonwealth. It would, however, be misleading to think that our ability to enter these additional fields is an indicator of some previously spare capacity: our resources have always been tightly stretched, and continue to do so.

2. Since Winnipeg, the Secretariat has concluded "observer status" with both The Hague Conference on Private International Law and UNIDROIT, in Rome. In this context we have organised three well-attended regional meetings on aspects of intra-Commonwealth legal arrangements, a summary of which appears as LMM(80)17. These were held in St. Kitts (April 1978), Western Samoa (April 1979) and Kenya (January 1980), and were adjudged by participants from no fewer than 38 Commonwealth jurisdictions as making a worthwhile contribution to the development of Commonwealth co-operation in a number of key areas of concern. They have advanced the work of Professors Keith Patchett and David McClean to the point where certain policy decisions now fall to be made by Ministers. Elsewhere we have drawn attention to the magnificent way in which these two Professors have continued to serve the Commonwealth, and we would note here that they gave up considerable time and expended considerable energy in preparing the documentation essential to the success of the regional meetings, and also attended the workshops where their scholarship and their ability to express sophisticated concepts in simple terms won the admiration of all those privileged to participate. The meetings were only made possible by the ability of the CFTC to contribute towards the cost of attendance by representatives of developing Commonwealth countries.

3. The Secretariat has also established links with INTERPOL, in Paris, and ways to enhance co-operation with this active and useful organisation are discussed in LMM(80)2. Also arising out of Winnipeg, and from prior discussions when Ministers met at Lagos in 1975, is the proposed scheme for the transfer of convicted offenders, cir-

culated as LMM(80)8. The recognition at Winnipeg of the importance of compensation for victims of crime, too, has led to the preparation of LMM(80)9.

4. A major venture over the period under review has been the commissioning of a study of possible responses to the phenomenon of "white collar" crime. In 1977, Ministers noted the need for new and more sophisticated approaches to the problem of its detection and successful prosecution, and invited the Secretary-General to explore the possibility of enlarging mutual assistance and co-operation between Commonwealth countries in view of the significant international element often found in large-scale corporate crime. This report is before the meeting as LMM(80)2, and suggests that the Legal Division might have a role in fostering mutual assistance and co-operation in this important area.

5. Not yet ready for distribution, but expected at an early date, is a major study of innovations made in Commonwealth jurisdictions to combat the vexed question of delay in criminal proceedings.

6. Also discussed at Winnipeg was the independence of the judiciary, and the important role for the courts themselves in promoting the despatch of legal business. In this regard, informal initiatives made at the time of the Winnipeg meeting have, thanks to the efforts of Sir Garfield Barwick and the generosity of the Australian Government, resulted in a meeting of Commonwealth Chief Justices which is to take place in Canberra on 27 and 28 May 1980.

7. In promoting co-operation between bodies charged with law reform throughout the Commonwealth, we have recently produced a pilot issue for publication which will readily show the action taken to implement law reform proposals. This brings together this information for the first time, and we have found most gratifying the response with which the pilot issue has met.

8. These activities have been taking place in addition to the day-to-day calls which are made on our resources.

Commonwealth Law Bulletin

9. *The Commonwealth Law Bulletin* continues to be our prime vehicle for disseminating information concerning legal developments throughout the Commonwealth. It is now a well-established landmark on the legal scene, and is widely used both within and without the Commonwealth. Again, such a venture could never have come to fruition without the continuing help and support both of Law Ministers and of their senior staff. For this we are most sincerely grateful, but nowhere is it more vividly illustrated than in the *Bulletin*. Material sent from our correspondents is edited and collated by the Legal Divi-

sion and the *Bulletin* appears to a rigid timetable four times a year. Proofs for the April issue will be passed and returned to the printers even as the Barbados Meeting begins, and copies will be awaiting Ministers on their return home. The *Bulletin* has continued to increase in scope and content. Since Winnipeg, special sections on International Legal Developments, on the Legal Profession and on Ombudsmen have evolved, and we are now confident that the material is presented in its most appropriate manner. We are, however, conscious of the fact that as the *Bulletin* expands it risks becoming less readable and less easy to use. We are therefore scrutinising material very closely before including it, but at the same time recognise that Commonwealth jurisdictions cover a very broad spectrum of stages of development, and that this of necessity must be reflected.

10. Increasing interest is being shown in the *Bulletin*, and the number of subscribers continues to grow. The print-run for each issue now stands at 1650, and this year we were able to send out a 42 page index for 1979 together with the January 1980 issue. A number of highly complimentary reviews of the *Bulletin* have appeared, for instance in the *Australian Law Journal* and the *New Law Journal* (UK). The material we publish is frequently used by other Commonwealth publications.

11. Increasingly, too, the judicial decisions noted in the *Bulletin* are being referred to in court judgments, the most recent we have seen being a criminal case in Canada reported only a few days ago. We mention this to illustrate the fact that interest in the judicial decisions is by no means confined to smaller jurisdictions with modest libraries.

12. The *Bulletin* also now serves most usefully as an exchange publication, enabling us to receive at no cost a large cross section of Commonwealth material, not to mention a number of legal textbooks for review.

Legislative Drafting

13. An acute shortage of experienced law draftsman continues to be experienced in almost every jurisdiction. The shortage is felt with particular severity in developing Commonwealth jurisdictions, as increasingly the law has been looked to as a vehicle through which to promote economic advancement and real change. We have therefore continued our efforts to augment training facilities for law draftsmen which exist in such Commonwealth countries as Australia, Canada and the United Kingdom. We would at once acknowledge the very real contribution made by these three jurisdictions through the Australian Legislative Drafting Institute, the Canadian Legislative Drafting Course and the Overseas Government Legal Officers' Course in alleviating this perennial problem. All three courses provide for lawyers from developing Commonwealth countries, and a large number of jurisdictions have benefited from the generosity of these governments. A recent development has been the institution of a post-graduate course in legislative drafting at the University of the

West Indies at its Barbados campus. The first intake of post-graduate students was made in September 1979, and again it is planned to make places available to developing Commonwealth countries from outside the Caribbean when regional commitments permit.

14. Through the Commonwealth Fund for Technical Co-operation we have been able to hold a number of ad hoc legal drafting courses, details of which appear in Annex I. These show that in 1978 and 1979 a total of 74 trainees attended from 17 different countries. For 1980, a further course is to be held in Nairobi and such has been the demand for places that we have only been able to offer one place on the course to each of 12 jurisdictions. The attendance at the 1980 course will bring to 184 the number of trainees who have attended the legal drafting courses since they began in 1974/1975, from some 33 different jurisdictions. It is hoped to hold two further courses during the next two years.

15. It is clear from the response we received for the places on the latest course that the demand for training in legislative drafting will continue for the foreseeable future, and this despite the number who have benefited from places at one or other of the Commonwealth countries. Law Ministers will be aware of the variety of reasons why many lawyers do not remain throughout their careers in the field of legislative drafting, the attraction of private practice and of advancement within government service being but two.

16. It has been with considerable regret that the CFTC has had to reduce the number of training courses it has been able to finance. The average cost of the course for twelve trainees for five to six months is now £30,000, including travel, subsistence and the emoluments for the Director. This decision has been inescapable, linked as it is to a significant reduction in money terms to the income of the Fund in respect of some key donor countries. Until the finances of the Fund improve, the support it is able to give to legislative drafting courses, so as to other areas of need, must inevitably be reduced.

17. We know, too, that Law Ministers will wish us to place on record our most sincere appreciation of the services so splendidly rendered of the three Course Directors, Mr. Justice V. C. R. A. C. Crabbe (Ghana), Mr. O. M. de Alwis (Sri Lanka), Mr. V. N. Bhatia (India). That the courses have proved successful has been due in no small measure to their enthusiasm and their ability to impart to trainees the benefits of their very great experience of drafting. Thanks in full measure are due, too, to the host governments—Ghana, India, Kenya, Nigeria and Sri Lanka—for their assistance and support.

Other Technical Assistance

18. We have been able to arrange, through the auspices of the Commonwealth Fund for Technical Co-operation, for legal technical assistance to be given to a large number of developing Commonwealth countries, as set out in Annex II. It will be seen from the tabulation of the projects that they cover virtually every aspect of legal activity, but that

there is a preponderance of legislative draftsmen. Also referred to are surveys of the legal needs and resources carried out in three regions of the Commonwealth.

19. The shortage of legal draftsmen has been highlighted in the two surveys so far received from the consultants, which are at present being prepared for printing and circulation. The third is expected soon. The question has also been raised by our colleagues in the CFTC who are concerned that the legislative draftsmen they have been able to provide had not, in many cases, appeared to have been able to train counterparts with the result that at the end of the term of each appointment there is either a request for an extension or for a replacement. In times of increasingly scarce resources, too, our colleagues query whether maximum benefit is being derived from these resources, particularly where a law draftsman is provided full time to a small jurisdiction.

20. The surveys also illustrate that small jurisdictions must tackle the same full range of legal activity, both domestic and international, that confront larger jurisdictions, but must do so with very many fewer legal personnel and in particular, in the absence of specialists in particular fields. The Government legal resources in these countries appear to be significantly overstretched, with the result that there is little or no time to be devoted to overhauling and keeping up-to-date the general fabric of the law.

21. The suggestion has been made that consideration be given to exploring the possibility of regionalising legal technical assistance to the smaller jurisdictions, so that resources can be underpinned on a regional basis by a compact legal unit with a drafting capacity to enable it to assist local draftsman with legislation of particular difficulty or complexity. Perhaps in such a way the skills of local lawyers could be developed, and attention could also be given by the unit to reform of the law in non-controversial areas and to consolidations for which those jurisdictions do not have the resources. Some guidance from Ministers will be appreciated as to whether this tentative concept should be taken up with other international aid organisations, who we know share both our concern and our desire to enhance the level of appropriate assistance, with a view to ascertaining whether such units might be appropriate, and if so might be jointly funded.

Technical Assistance Group (CFTC)

22. The Secretariat has been able to meet the needs of many Commonwealth governments for specialised consultancy services through the Technical Assistance Group (TAG), a multidisciplinary team maintained by the CFTC on its headquarters staff. The Group's particular expertise is in natural resource development. It assists Governments on request to devise legal and fiscal arrangements that satisfactorily protect national interests and is ready if required to support Governments in negotiations with foreign investors. The Group has developed particular expertise in the legal as well as the economic and fiscal aspects of oil and hard-rock mineral ex-

ploitation and is building up expertise in the area of fisheries agreements and related issues in the context of the declaration of 200-mile Exclusive Economic Zones off the shores of island and coastal states. The Group has also provided other legal and constitutional advice.

23. The advisory teams have since 1977 responded to requests to help draft mineral legislation from the Governments of Swaziland, Tanzania, Kiribati, Tuvalu, Cyprus and the British Virgin Islands as a framework for them to use in conducting negotiations with multinational mining companies. In some of these countries the preparation of this legislative framework has been associated with advice during negotiations on specific mineral projects. TAG has assisted the Government of Papua New Guinea in reviewing its mining legislation by providing a detailed brief on the legal and policy issues involved, backed up by comparative legal material drawn from other Commonwealth countries.

24. In Tanzania, TAG has provided assistance in the drafting of legislation for oil as well as hard-rock minerals, in negotiations with a German firm interested in exploring uranium anomalies and similarly in negotiations with a Dutch firm interested in prospecting for oil. In this, the work of TAG's senior legal adviser has been supplemented by economists and geologists. TAG has provided legal and other support to the Government of Tanzania in the development of an off-shore oil-drilling appraisal programme for which finance has been requested from the World Bank and other international agencies. TAG has advised the Government of Solomon Islands on off-shore petroleum development and has helped draft the necessary legislation. The Governments of Grenada and the New Hebrides have also received TAG advice on the legal aspects of petroleum development.

25. In support of its project activities, TAG continues to undertake research on the legislative and fiscal regimes and agreements affecting mining in Commonwealth countries. Following the publication of the results of such research on the mining industry in African Commonwealth countries in October 1978, TAG, in association with the UN Centre on Transnational Corporations, conducted a workshop in Botswana on mining legislation and mineral resource agreements, at which senior officials from eight Commonwealth and four non-Commonwealth countries in Africa exchanged experience and discussed common problems encountered in negotiating with major mining companies. TAG is in the process of preparing for Commonwealth Governments further data covering the mining industry in selected Pacific, Caribbean and Mediterranean countries.

26. TAG has commissioned a comparative study of law and policy relating to petroleum development. The study which has been circulated to Commonwealth governments outlines the relevant developments in the relations between governments and transnational oil companies and analyses the various legal and policy issues involved in petroleum exploration and development.

27. TAG advisers followed up earlier assistance given to the Government of St. Kitts in 1976 in reaching an agreement with the private shareholders of the Island's single sugar factory with an involvement in negotiations with landowners over compensation for acquiring their sugar estates. In Kiribati, TAG is providing assistance to the Government in negotiations for the acquisition of the freehold of two coconut producing islands at present in private hands.

28. TAG has also provided advice to the Government of Tuvalu and Kiribati in their independence talks with Britain.

Publications

29. Since August 1977, the Legal Division has produced the following publications—

- a) Commonwealth Law Bulletin (published quarterly, in January, April, July and October).
- b) Law Reform in the Commonwealth: Law Reform Proposals and their Implementation (Pilot Issue: October 1979);
- c) The Hague Conventions on the Service of Process, the Taking of Evidence and Legalisation—Explanatory documentation for Commonwealth Jurisdictions (prepared by Professor J. D. McClean);
- d) Recognition and Enforcement of Judgements and Orders and the Service of Process within the Commonwealth—A Report of a Working Meeting held at Basseterre, St. Kitts, April 1978;
- e) The Recognition and Enforcement of Judgements and Orders and the Service of Process within the Commonwealth—A Report of a Working Meeting held at Apia, Western Samoa, April 1979;
- f) Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth—A Report of a Working Meeting held in Nairobi, Kenya, January 1980;
- g) The Use of Paramedicals in Primary Health in the Commonwealth: A Survey of Medical-Legal Issues and Alternatives (prepared by Mr. John Paxman, Dr. F. M. Shattock and Professor N. R. E. Fendall);
- h) Report of a Combined Medical-Legal Workshop, held in Barbados, June 1979
- i) Media Reaction to the Report of the Royal Commission on Legal Services
- j) Law Reform in the Commonwealth—A Report of the 1977 Meeting of Commonwealth Law Reform Agencies;
- k) Selected Memoranda prepared for the 1977 Meeting of Commonwealth Law Ministers at Winnipeg;
- l) The quarterly Newsletter of the Commonwealth Legal Education Association;
- m) Legislative Drafting: Manual and Bibliography (Manual prepared by Mr. R. M. M. King) (Revised edition, January 1978).

30. In addition, TAG has arranged for the preparation and publication of—

Petroleum Development: Law and Policy, a comparative study (prepared by Kamal Hossain and published by arrangement by Frances Pinter Ltd.).

Other Activities

31. The day to day affairs of the Commonwealth Secretariat and of the CFTC, continue to generate a significant legal workload which is all attended to within the Legal Division.

32. We have become increasingly conscious of ways in which the Legal Division can combine with other functional divisions, within the Secretariat on matters of common concern. Medical-legal issues arose at a meeting of Commonwealth Health Ministers held in Wellington, New Zealand in November 1977. These gave rise to two Medical-Legal Workshops, held in Barbados in June 1979 and Malawi in October 1979. Again, participation by the developing Commonwealth jurisdictions was made possible by the support of the CFTC. The issues discussed included such matters as the use of paramedical staff, the control of advertising inimical to health, medical termination of pregnancy and legislation on medical drugs. Some seventeen jurisdictions attended, and all those participating adjudged the interdisciplinary approach to common problems as highly beneficial, and decisions were taken to continue medical-legal dialogues on a regional basis. The reports of the two meetings have attracted a wide readership, and a study on abortion laws in Commonwealth countries, circulated at Winnipeg Meeting and which formed the basis for discussion sessions at the workshops, has since been republished in both French and English in the *International Digest of Health Legislation*, and subsequently as a publication in its own right by the World Health Organisation. We have seen our role in these workshops as being supportive to our colleagues active in the field of health, and are looking forward to the outcome of the next Meeting of Commonwealth Health Ministers to be held in Geneva this coming May.

33. We have also embarked on joint interdisciplinary projects with the Science Adviser within the Commonwealth Secretariat, principally in the field of environmental law. The possibility of joint training programmes for local government officials has been the subject of discussions with our Applied Studies in Government Division, but has encountered budgetary constraints. Our International Affairs Division has a specialist international lawyer on its staff who has been taking a close interest in developments in the Law of the Sea Conference. The Legal Division was able to support the International Affairs Division by providing the Secretary to the Commonwealth Observer Group which observed the recent elections in Zimbabwe.

34. The International Affairs Division has been handling the question of the proposed Government Human Rights Commission, suggested by the Government of The Gambia and presently being

studied by a Working Party established by the Commonwealth Secretary-General at the request of Commonwealth Heads of Government when they met in Lusaka in 1979. The report of this Group is expected later in the year.

35. The Legal Division continues to receive a steadily increasing flow of inquiries from jurisdictions around the Commonwealth for information on a wide variety of legal topics. These requests are dealt with as a matter of the highest priority. It will be appreciated that the Secretariat has only a very modest holding of legal material, and our ability to respond to requests lies almost wholly in the high degree of co-operation we receive from officials in Government law offices around the Commonwealth. The prompt and efficient way in which they respond to our requests and come so readily to the assistance of their Commonwealth colleagues is testimony, if testimony were needed, of the strength of the Commonwealth legal brotherhood. Again, we would like to pay tribute to the unstinting efforts of these officials, who are too numerous to mention by name but whose assistance has been, and will always be, as invaluable as it is indispensable.

36. In addition to official international and national bodies active in legal fields we continue to liaise closely with such non-governmental organisations as The Institute of Criminology (Toronto), the Australian Institute of Criminology (Canberra), the International Ombudsman Institute (Alberta), the International Ombudsman Committee of the International Bar Association (U.S.A.), the International Planned Parenthood Federation (London), the Commonwealth Magistrates' Association (London) and the Commonwealth Legal Bureau (Auckland). Our quarterly meetings with the Commonwealth Legal Advisory Service of the British Institute of International and Comparative Law also continued.

Staff of the Legal Division

37. The size of the Legal Division has remained unchanged for the last five years. It comprises a professional staff of four (Cyprus, India, New Zealand and Nigeria) and secretarial support (Malaysia, Sri Lanka (2), and Tanzania).

Future Activities

38. It is not anticipated that Law Ministers will wish substantially to alter the pattern of our legal activities

which has now been clearly established and has received the endorsement and support of successive meetings of Commonwealth Law Ministers. Within the limits of our human and physical resources, we will endeavour to tackle whatever additional responsibilities Law Ministers may suggest. In addition to the suggested role which the Secretariat might play in co-ordinating Commonwealth activity to combat international white collar crime and with INTERPOL made in LMM (80)2, it may soon be decided by Governments that the Legal Division should become associated with Commonwealth initiatives to combat international terrorism and trafficking in drugs, initiatives which were taken at the Commonwealth Heads of Government Regional Meeting in Sydney in 1978 and which are at present the subjects of working parties within the Asia/Pacific region.

39. The question also arises from a paper prepared by the Government of Canada, LMM (80)15, as to whether the Legal Division ought to explore the possibility of making use of modern technology for the retrieval of law reform material and other relevant legal data in order to enhance the use that can be made of comparative material throughout the Commonwealth. This would appear to be a logical extension of our present responsibilities, and the informal inquiries which we have made suggest that as the cost of computer time has been falling rapidly in recent years, cost may not be as intimidating as might be first thought.

40. A highly-successful inaugural meeting of Commonwealth Law Reform Agencies was held in 1977, shortly before Law Ministers met at Winnipeg. At our suggestion a second meeting is to take place in Lagos this August, so as to coincide with the presence there for the Commonwealth Law Conference of a large number of persons active in the field of law reform.

Appreciation

41. So many individuals and organisations have been of considerable assistance and support to us in the period under review that these cannot all be listed here. However our most sincere thanks must go to Commonwealth Law Ministers themselves, for the help, support, encouragement and guidance they have given us, and with whom we look forward to working in the years ahead.

DETAILS OF THE SECRETARIAT'S LEGAL DRAFTING COURSE

1978**Asia Region****4th Asian Legislative Drafting Course (Colombo, Sri Lanka), 3rd May, 1978—15 December, 1978**

Bahamas	1
India	2
Malaysia	1
Nigeria	3
Sri Lanka	4
Uganda	1

Africa Region**2nd East African Legislative Drafting Course (Nairobi, Kenya), 4 May, 1978—15 December, 1978**

Botswana	1
Grenada	1
Kenya	2
Malaŵi	1
Sudan	2
(not sponsored by CFTC)	
Tanzania	3
Uganda	1

Africa Region**5th West African Legislative Drafting Course (Accra, Ghana) 10 April, 1978—22 December, 1978**

Ghana	1
Nigeria	8

14 Countries	32 trainees

GRAND TOTAL 12**1979****Asia Region****5th Asian Legislative Drafting Course (New Delhi, India) 30 April, 1979—15 December, 1979**

Bangladesh	3
India	6
Sri Lanka	6

Africa Region**3rd East African Legislative Drafting Course (Nairobi, Kenya), 8 May, 1979—15 August, 1979**

Belize	1
Cyprus	1
Ghana	1
Kenya	4
Malaŵi	1
Nigeria	3
ZAPU, (Zimbabwe)	1

Africa Region**6th West African Legislative Drafting Course (Lagos, Nigeria), 1 August, 1979—21 December, 1979**

Nigeria	15

12 countries	42 trainees

17 different countries	74 trainees

**LEGAL TECHNICAL ASSISTANCE ASSIGNMENTS
PERFORMED FOR COMMONWEALTH DEVELOPING
COUNTRIES UNDER THE COMMONWEALTH FUND
FOR TECHNICAL CO-OPERATION**

- Notes: (1) A number of the projects listed below have been completed but many are still in operation, or under consideration or awaiting recruitment to enable them to proceed. The list does not include the legislative drafting training courses described in Annex II, but does include other assistance provided under the Education and Training Programme of the CFTC.*
- (2) The reference to TAG in the second column means that the project was undertaken by the Technical Assistance Group of the CFTC (in association with other countries, where indicated).*

Country assisted and description and duration (if relevant) of Project	Nationality of Consultant
African Region Study of harmonisation and modernisation of industrial property law (3 weeks) Seminar on harmonisation of industrial property laws, Kenya Legal consultant for survey on legal needs of East, Central and Southern African Commonwealth Countries, Mauritius and the Seychelles (5 months) Regional meeting on the reciprocal enforcement of judgements etc., Kenya	TAG and Kenya New Zealand
Asia, & South Pacific Region Planning meeting on para-legal training programme, Fiji Regional workshop and seminar on constitutional and legal aspects of decentralisation, Papua New Guinea Regional Meeting on the reciprocal enforcement of judgements, Western Samoa Basic training course on legal and industrial metrology, India	
Barbados Adviser, international law and treaties (2 years) Adviser, administrative law (6 months) Adviser, training of para-legal personnel (3 months)	India Britain Canada
Belize International law consultant Law Revision expert (2 years)	Britain Britain
Botswana Legal consultant, Shashe project (5½ months) Legal expert, Jwaneng diamond project Legal Draftsman (2 years)	Britain Britain Ghana
British Virgin Islands Legal Draftsman (3 days)	Britain
Caribbean Region Regional meeting on the reciprocal enforcement of judgments, St. Kitts-Nevis-Anguilla) Medical-Legal Workshop on health legislation and practice, Barbados	

Country assisted and description and duration (if relevant) of Project	Nationality of Consultant
Caribbean Region (contd.)	
Caribbean Community Secretariat	
Legal Draftsman (1 year)	Jamaica
Legal draftsman (4 weeks)	Britain
Legal consultant on harmonisation of laws (2 years)	Guyana
Legal draftsman (12 days)	Britain
East Caribbean Common Market Secretariat	
Adviser, tax law (1 year)	Australia
Adviser on tax laws (1 year)	Australia
Fiji	
Principal Legal draftsman (6 months)	Britain
The Gambia	
Legal training (1 year) (Nigeria)	
Legal draftsman (2 years) (Ghana)	
Legal training course (1 year) (Nigeria)	
Training attachment for clerk of Court (6 months) (Sierra Leone)	
LL.B. degree course (4 years) (Nigeria)	
Hong Kong	
Adviser in weights and measures legislation (11 weeks)	Britain
Study visit in apprenticeship legislation (2 months)	Australia
Kenya	
Legal draftsman (4½ months)	Britain
Study visit to law libraries in Nigeria, Zambia (3 weeks)	
Lesotho	
Registrar-General, Department of Law (2 years)	Sri Lanka
Senior Crown Counsel/Solicitor (Litigation) (2 years)	Britain
Malawi	
Legal adviser	New Zealand
Parliamentary draftsman (2 years)	Britain
Papua New Guinea	
Research lawyer (1 year)	Britain
Supreme Court judge (1 year)	Britain
Review of Organic Law of Provincial Government (18 weeks)	Kenya
Legal draftsman (1 year)	New Zealand
St. Kitts-Nevis-Anguilla	
Legal draftsman (1 month)	Britain
Legislative draftsman (2 years)	Britain
St. Vincent	
Legal draftsman (2 years)	Britain
Seychelles	
Constitutional adviser and draftsman (8 weeks)	Canada and Barbados

Country assisted and description and duration (if relevant) of Project	Nationality of Consultant
Sierra Leone Legal draftsman (3 months)	Britain
Singapore Training attachment in trade mark law and practice (6 months) (India)	
Solomon Islands Legal draftsman (3 weeks)	Britain
Adviser to special committee on provincial government (4 weeks)	Kenya
Treaties and conventions adviser (6 months)	Britain
Constitutional adviser	Kenya
Swaziland Study tour of Ministries of Justice and Prisons (2 weeks) (Kenya, Malawi and Tanzania)	
Tanzania Legal consultant (1 year)	Australia
Advice on mining legislation (1 week)	Australia and Britain
Trinidad and Tobago Consultant in legal metrology (10 months)	Britain
Tuvalu Assistance with economic and legal aspects of pre-independence negotiations (2 weeks)	TAG
Uganda High Court judge (2 years)	Britain
Western Samoa Insurance legislation adviser (2 weeks)	Sri Lanka
Senior legal officer (Land registration) Attorney-General's office (1 year)	New Zealand
Zambia Parliamentary draftsman (2 years)	Ghana
Master's degree course in law specialising in the legal aspects of the trade and investments (2 years)	Tanzania

FREEDOM OF INFORMATION LEGISLATION

Memorandum by the Commonwealth Secretariat and a paper prepared by
John McMillan, of the Australian Ombudsman's Office

In their Declaration of Commonwealth Principles made at Singapore in 1971, Commonwealth Heads of Government affirmed the "inalienable right of (their peoples) to participate by means of free and democratic political processes in framing the society in which they live".

2. In recognition of the fact that the availability of appropriate categories of information lies at the heart of this democratic political process, a number of Commonwealth governments have proposed measures designed to increase the level of information available to the public while at the same time seeking to avoid the creation of impediments to sound administration. In some Commonwealth juris-

dictions legislation is either pending or has been enacted to this end.

3. The paper is designed to highlight some of the issues on which Ministers may wish to share their ideas and experience, and does not purport to canvass all of the enactments and proposals made in Commonwealth jurisdictions. In the light of discussions, a further study could be prepared which might analyse in detail the different drafting approaches that can be adopted, and take account of differing constitutional frameworks and governmental structures into which any Freedom of Information statute must fit.

FREEDOM OF INFORMATION LEGISLATION

By John McMillan, BA, LLB (Hons)
of the Australian Ombudsman's Office

This paper surveys briefly some of the issues that arise in the debate, now frequently occurring in many countries, over whether freedom of information legislation should be enacted for the purpose of facilitating a greater degree of openness in government and for guaranteeing the right of individuals to inspect government documents. The paper is only of an interim nature, designed to highlight without critical analysis some of the main issues that arise. In particular, the paper notes the developments that have occurred in many countries, states the main arguments for and against enacting freedom of information legislation, and examines on a comparative basis some of the more important provisions of the freedom of information statutes.

International Developments

2. History now shows that freedom of information legislation is not suited to any one constitutional or governmental scheme, but instead is appropriate to any political system in which it is sought to ensure, on the one hand, a greater measure of accountability on the part of those in a decision-making capacity, and, on the other hand, an enhanced opportunity for public participation in the operation of government. Consequently, statutes have now been enacted or proposed in countries where there is a separation of the Executive and the Legislature, where there is a Westminster arrangement with a parliamentary executive, and where neither scheme exists but elements of both are present.¹

3. The earliest open records legislation dates back to Sweden, in 1776. The present law called the Freedom of the Press Act, was enacted in 1949, and is unique to the extent that it is one of the four Acts which together comprise the Constitution. Whilst this law outlines the main principles of the open records scheme, the detailed provisions on exemptions and procedure are contained in an ordinary Act, called the Secrecy Law. Legislative schemes somewhat similar to that in Sweden, yet nowhere as rigorous in their requirement of openness, were enacted in Norway and Denmark in 1970, and in Finland in 1971.

4. In Europe, consideration of the issue has not been confined to the Scandinavian countries, and at least three other countries have made some advance. In The Netherlands a law on Openness in

Administration was approved in 1978; in France a statute inspired by the United States Act was enacted in 1978; and in Austria there is a Federal Ministries Bill, pursuant to which the Federal Chancellery has issued guidelines setting out broadly the procedures and exemptions that should be observed in making information available to the public. As well, both the Council of Europe's Legal Affairs Committee and the Human Rights Commission have looked at freedom of information proposals.

5. Probably the most well-known statute is the Freedom of Information Act which was enacted in the U.S. in 1966 and which commenced operation in 1967. The Act has since been amended twice, in 1974 and 1976, on each occasion with a view to strengthening its provisions. The history of the Act is starred among other things by a number of congressional enquiries that have exhaustively examined most aspects of its operation. In particular general hearings on the Act were held in 1972, and from 1978 there have been hearings on such things as the application of the Act to business data, and the law enforcement and security agencies. Major assessments of the Act have also been prepared by such agencies as the General Accounting Office. Another matter of contextual significance is that the Act has in recent years been supplemented by other statutes that have extended the concept of openness into different areas—for instance, the Privacy Act 1974, the Educational Rights and Privacy Act 1974 (applying to some educational institutions), and the Federal Advisory Committee Act 1972 and the Government in the Sunshine Act 1976 (both requiring some agencies to have open meetings). Lastly, the Federal experiment has now been followed in all States, with each having some form of open records legislation.

6. The interest shown in freedom of information by Commonwealth countries is of somewhat recent origin. By now the furthest advanced is Australia, to the extent that a Freedom of Information Bill has been introduced into the Australian Parliament by the Attorney-General (in June 1978), and is awaiting debate. Prior to this, two reports discussing the form that legislation could take were published in 1974 and 1976 by an interdepartmental committee convened by successive governments, and a Bill was published in 1976 as a Minority Report by one of the members of the Royal Commission on Australian Government Administration. The present Bill has also been the subject of a lengthy report, published in 1979 after extensive public hearings were held by the Senate Standing Committee on Constitutional and Legal Affairs. An announcement is soon expected from the Government as to which of the Committee's 100 or so recommendations it is prepared to accept.

7. The development of freedom of information proposals in Canada somewhat parallel Australian developments. In 1973, a private member's Right to

¹ For a fuller discussion of foreign developments and citation of other references see J. McMillan, "Making Government Accountable: A Comparative Analysis of Freedom of Information Statutes—Parts I, II and III", *New Zealand Law Journal*, vols. 11, 12 and 13, June-July 1977 pp. 248-256, 275-280, 286-296; Canada, Commission on Freedom of Information and Individual Privacy, *Public Access to Government Documents: A Comparative Perspective* (Research Publication 3, Dr. D.C. Williams, Chairman), The Commission, Ontario, November 1978; I. Galnoor, *Government Secrecy in Democracies*, Harper & Row, New York, 1977.

Information Bill, and a set of Government guidelines entitled "Notices of Motion for the Production of Papers", were referred for consideration to the Standing Joint Committee on Regulations and Other Statutory Instruments, which held hearings in 1974-75 and tabled a report in December 1975 endorsing in principle the concept of freedom of information legislation. Later, in June 1977, a Green Paper on freedom of information was published by the Government; it too was the subject of a further report by the Committee in June 1978. A Freedom of Information Act was first introduced into the Parliament by the Clark Government in October 1979, although the bill lapsed with the subsequent dissolution of the Parliament.

8. Further advances have been made at the Provincial level in Canada. Acts were passed in Nova Scotia in May 1977 and New Brunswick in June 1978 (proclaimed in January 1980). Private members bills have also been introduced in most of the other provinces. Lastly, in Ontario a "Commission on Freedom of Information and Individual Privacy" has been operating since March 1977, and to date has published 13 research publications which examine in considerable detail a large number of freedom of information and related issues.

9. In the United Kingdom, legislative activity has in the main been directed to amendment of the Official Secrets Act. Revision of the Act was first proposed in the Report of the Franks Committee in 1972, and later in a White Paper published in July 1978. A Protection of Information Bill to amend the Official Secrets Act was introduced in November 1979, yet was later discarded after critics claimed that details of the Fourth Man, Anthony Blunt, could not have been made available to the public under the legislative revision that was proposed. The only legislation proposing a guaranteed right of access to documents by individuals has been introduced by private members, in January 1979 by Mr. Clement Freud, M.P. (Liberal), and in November 1979 by Mr. Michael Meacher, M.P. (Labour). The first lapsed with the dissolution of the Parliament, while the latter did not reach a second reading.

Arguments for Freedom of Information Legislation

10 This section of the paper examines the arguments that are generally put for greater openness in government, and for guaranteeing public access to government documents by means of legislation. The first three sub-sections deal with the arguments for openness, as they apply to the political system, to the operation of the civil service or Government Administration, and to the enhancement of public participation in democratic processes; the last sub-section examines why legislation is argued to be the best means of ensuring openness.

(a) Openness and the political system—the right to know

11. In most literature the arguments for greater openness are phrased in the language of political

theory and are commonly premised upon "the right to know". The spirit of this ideal is best captured in the remark of James Madison, one of the U.S. constitutional fathers:

A popular Government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

In short, according to this argument there can be no democracy without freedom of information. Secrecy impedes the political education of the community. The electoral judgments cast by voters are not fully informed; people are not always aware of the critical choices that face their society; the opportunity for individuals to make a meaningful response to political initiatives or inactivity is undermined; and a political climate flourishes in which citizens apprehend government, not with responsibility and a sense of enquiry, but with malevolence and distrust. Seen as part of or in conjunction with the right to a political education, the right to know is commonly united with the cry for freedom of the press. The best-known example of this union is the Swedish Freedom of the Press Act, a constitutional document which creates a public right of access to government documents as one of the elements necessary to ensure freedom of the press and an informed public: the Act reads, "to further free interchange of opinion and enlightenment of the public, every Swedish national shall have free access to official documents...". A similar declaration linking press freedom and the right to know was a resolution adopted by the U.N. General Assembly at its first session in 1945, declaring that "freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations was consecrated".

12. This form of argument, that fulfilment of the public's right to know results in better government, is difficult to establish empirically, and often is hard to appreciate. Election and control of governments, and management of a society, are more complex and sophisticated matters than the argument suggests. However, the difficulty in evaluating the right to know subsides in part when it is linked to the doctrine of accountability. The central goal of any democratic system of government is political accountability, and secrecy—it is claimed—can be fatal to accountability. Informed judgment and appraisal by Parliament, Press and public alike is a difficult, if not fruitless, task where government activities and decisions, the thinking or evidence that supports or undermines them, and the options available, are concealed from external scrutiny. For instance, where secrecy prevails policies on a country's defence or foreign relations can be entrenched before public appraisal occurs; the priorities in a country's budget can be published as a virtual fait accompli with no realistic opportunity for revision in the light of public and Parliamentary debate; and long-standing programmes can be irretrievably scrapped before there is any public comment.

(b) *Openness and the Government Administration*

13. The principle of accountability has special relevance as it appertains to the Government Administration, in particular because most subject areas of government activity are effectively freed from the reach of that principle. In part this arises, as only a few issues will ever be of electoral or political importance. But it arises in the main when public officials in most States are invested with a vast number of discretionary powers that can affect most aspects of community life—powers to grant and refuse benefits, privileges, subsidies and concessions; to control imports and exports; raise wages; fix prices; assess and levy taxes; impose manifold conditions, obligations and liabilities; control the quality, appearance and placement of public utilities, houses, streets and amenities; affect the employment of the work force; and determine even such matters as the edibility of food. Whatever the statutory framework, the function of the judiciary, or the constitutional system—whether there is a separation of the Executive and the legislature; accountability along Westminster lines of Ministerial accountability; or a one party State—there is a physical improbability of complete political control over the repeated exercise of these powers. Even regarding decisions which a government makes (either pro forma, or in substance and in fact) the government may have to rely heavily on pre-emptive research by public servants which chooses problem areas, defines the problem, presents options, and selects facts—determinations or assessments (possibly even value judgments) with which many outside the public service might disagree, given the chance so to do. If these administrative processes were largely open to public scrutiny, undoubtedly a degree of accountability may be introduced that could presently be lacking.

14. There are, it is true, in many States, mechanisms which supplement the function of political and Parliamentary processes in controlling administrative action. Yet even control by the judiciary and administrative tribunals, review by Parliamentary committees, Royal Commissions, and committees of enquiry, and scrutiny by the Press, are processes that are themselves largely dependent upon the existence of available information. There is, in addition, in some States, an Ombudsman who can investigate the complaints of individuals, but however successful, the Ombudsman can never be an agent for public participation in the affairs of government—an additional benefit that openness might generate.

(c) *Openness and the community*

15. The mechanisms of accountability that have been mentioned impose a form of control that is essentially negative in character—the very notion of answerability itself largely assumes imputation of blame after an event. There is no guarantee from the outset that there will either be positive controls over the allocation of resources, or an opportunity for public participation in the formulation of policy. Openness, it is argued, is the best method for ensuring this, since the preconditions for public participation include awareness of when a matter is

being considered and is approaching a determinative stage, and knowing the case that has to be met or supported (as the case may be). Openness can facilitate public participation in other ways. For instance, government departments in most States are still the largest social laboratories; if members of the public possessed the facts, results, analyses, ideas and evidence arising in this forum, they could be better enabled to detect problems or to substantiate submissions or arguments that may be put. As it is often said, information is power—“knowledge will forever govern ignorance”.

16. Another aspect to the argument for community participation is that, besides being a democratic ideal, it is also a practical need. On a sociological analysis, the policy-making ranks of most civil services stand apart from the remainder of the population. Typically, those ranks include a high preponderance of males, who are university educated, are above the population average in age, are reasonably well paid, and are urban dwellers (usually grouped together in the one city). This sector, it is argued, cannot represent or consider empathetically the interests of other groups, like rural dwellers, women, ethnic minorities, new settlers, the poor, industrial workers, the handicapped, single mothers, or the uneducated. Only a participatory system, which must perforce be an open system, can properly accommodate these pluralistic interests in a society.

17. Probably the best evidence that the influence of individuals and public groups can grow apace with their relative access to government information is afforded by experience under the United States' Freedom of Information Act. Numerous examples are available to illustrate how groups using the Act to uncover Government research that has not been properly acted upon, have had a dramatic impact on the development of policy. Government information, for instance, has been a significant weapon in public interest programmes to force Red Dye No. 2 (a carcinogenic agent) off the market; to halt the distressing annihilation of dolphin populations; to force correction of automobile defects; to introduce consistency and natural justice into the parole system; strengthen regulation of meat and poultry processing; to expose inactivity by government agencies charged with corporate regulation, oversight of trade practices, and regulation of new drugs; to reform the national security and law enforcement agencies; to ground the Concorde; and to compel changes in a research project in which the National Institutes of Health was comparing the effectiveness of full and partial mastectomies without telling the women who would undergo surgery which group they would be in.

18. Another force which should derive much benefit from more open government is the Press. The extent to which major stories and revelations in many States are based upon leaks is one pointer to the enhanced role that could be played by the Press if they had regular access both to reports, studies and other documents that may presently be secret, and to

the unexpurgated text of happenings that are presently leaked or selectively released to them. Examples are again available from the U.S. of how journalists have used the Freedom of Information Act to obtain such things as details of the F.B.I.'s secret counter-intelligence programmes, and government reports on conditions in nursing homes and on Medicare compliance.

(d) *Implementing open government*

19. The proposition that an open system of government is desirable is one that commands widespread agreement in a number of countries. There is not the same measure of agreement on how this policy is best implemented. Essentially three different approaches can be adopted:

(i) Present arrangements can be left much as they are. Political officers and public servants would retain their discretion to decide when and what to release, however administrative practices could be revised—for instance, preparation of White and Green papers and informative departmental submissions to Parliamentary committees; rehabilitation of the information units in departments; relaxation of some of the express restrictions on disclosure, and expansion of the range of officers with authority to release information to the public; and encouragement of senior officers to be more available to the Press and in public forums to explain government policies and departmental initiatives. The principal vehicle of reform would be a change in attitude on the part of political officials and public servants; political forces, media pressure, and public criticism would be the sanctions against secrecy.

(ii) Administrative guidelines can be drafted, specifying the categories of information that should be disclosed or withheld and the procedures to be followed when information is requested. The only substantial difference between this proposal and freedom of information legislation is that the administrative guidelines—though they might be expressed to be binding—would in the ultimate be interpreted and enforced by the Administration. This difference may be disguised, by provision for appeal from a refusal to a Minister (in a Westminster type system) or even to an Information Commissioner with advisory powers: however, the fact remains that administrative discretion would be preserved. Reference can also be made to the fact that this system has been tried, seemingly without success, in Canada and the United Kingdom. In Canada, in February 1973 all departments and agencies were issued (pursuant to a Cabinet directive) with guidelines requiring that all government papers, documents, and consultant reports be produced to Parliament pursuant to any Notice of Motion for the Production of Papers, except where the papers fell within the scope of 16 enumerated exemptions. The guidelines also came to be used in determining what information should be disclosed in response to a Parliamentary question or a citizen's request. It seems the guidelines have not been regarded as adequate by many Parliamentarians and members of the public who have voiced insistent demands for stronger legislative measures to be implemented, nor

apparently by either the Trudeau or the Clark governments, which both published proposals for freedom of information legislation. In Britain the guideline is in the form of a directive to departments, in July 1977 by the head of the Civil Service, now Lord Croham, advising them to implement new practices to facilitate openness. *The Times* (18 March 1980) published details of a survey carried out monitoring the effect of the directive on departments under the Callaghan Government; it found that in 35 departments 836 items were released, "most of which would have been published without the introduction of Labour's much vaunted open government policy", and only 8 per cent of which "carried out the directive's instructions to the letter".

(iii) Legislation is the final option. The salient feature of a Freedom of Information Act is that a person denied access to a document can appeal the refusal to an impartial body that is independent of the Administration. The rulings of the appellate body—which may be a court, a specialist tribunal, or even an Information Commissioner or Ombudsman—bind the Administration.

20. Supporters of legislation argue that it is the only *guarantee* that government processes will be exposed to greater public scrutiny and participation. They argue that, no matter how firm the undertaking either by politicians or by senior administrators to practice greater openness, the danger is perpetual that promises will become rhetoric when it appears prudent to avoid controversy. Political pressure, media comment and public opinion are said to have done little in the past to dislodge the ingrained and institutional disposition for secrecy that is found in most Administrations. They point out, moreover, that there is a gulf between official and public attitudes regarding how much should be disclosed. To allow one side—the Administration—to be the sole and final arbiter in this dispute is to violate the fundamental principle of natural justice, according to which a dispute between two parties should ideally be settled by a third and independent party.

21. Another feature of legislation is that it can establish practices that must be observed, even by the unwilling. To this end freedom of information legislation can reverse the current presumption in favour of secrecy: citizens would have a legal right to government documents without first having to prove any special interest; and the burden of justifying non-disclosure could be cast upon the Government Administration. Depending upon the form of the legislation, other legal rights could also be created: time limits within which requests must be answered could be imposed; indexes of documents available to the public could be required; publication of the internal and hidden law of agencies could be commanded; and unimpeachable access to specified classes of documents can be conferred. Legislation alone seems the means for producing an active commitment to open government of that sort.

Countervailing interests

22. Although there is as much variety in the form of freedom of information statutes as there is in the

political and constitutional schemes of the countries that have adopted it, there is on the other hand a much higher degree of commonality in the arguments that have been advanced, either in opposition to open records legislation, or in favour of tempering its provisions. The form in which the arguments are put of course varies depending upon the precise provisions of the freedom of information scheme in question, so the general arguments will only be examined briefly at this stage.

(a) *Administrative convenience and cost*

23. It is often argued that freedom of information legislation will intrude on the efficiency of the administrative process, in particular by diverting staff resources away from programmes that could benefit the public at large, and towards the handling and satisfaction of requests that may solely concern individuals. A chief example given in this argument is the fact that in the U.S., agencies like the F.B.I. and C.I.A. have had to reassign a large number of officers to freedom of information inquiries—as many as 400 in the case of the F.B.I. (6 per cent of staff). In so far as this argument raises a question of inadequate administrative resources, the problem might arguably be solved in part by the allocation of more funds and staff. The reality, however, is that in most States there is a present concern with the size of the public sector, and when new programmes are introduced governments usually opt for rearrangement of existing staff resources rather than the engagement of new staff. One aspect of this argument that is not easily solved by employment of additional staff, is that requests in some areas must be examined by senior or specialised staff who have the experience to understand the interests that could be damaged by disclosure. Examples are documents relating to national security or to foreign relations. Another could be documents relating to the regulation of corporate activities; here, the officials who might have to examine requests for documents are the same officials who, in whatever other time is available, must carry out the investigations of the corporations that in many cases might be making the document requests.

(b) *Policy-making processes*

24. Another aspect of the administrative process that could be affected by too much openness is said to be the free and frank interchange of opinions between public officials—a metaphoric expression of the argument is that public officials cannot operate effectively in a fish bowl. The argument is also phrased well by the U.S. Supreme Court:

“the frank discussion of legal and policy matters in writing might be inhibited if the discussion were made public (and) human experience teaches that those who expect public dissemination of their remarks may well temper candour with a concern for appearances ... to the detriment of the decision-making processes”

(*National Labour Relations Board v. Sears, Roebuck and Company* (421 U.S. 132(1975)))

(c) *Nature of public service*

25. In countries which have embodied in their constitutional system the convention of a pro-

fessional public service, a further variant of the preceding argument is put. It is argued that too much openness could imperil some aspects of that convention, namely that public servants are appointed on merit, and not because they are politically trustworthy; that they are expected to provide impartial advice to any Government, to carry out policies in the manner directed (in some systems by a Minister, and in others by a statute), and—in a Westminster arrangement, where it may be necessary to preserve the authority and responsibility of the Minister—to be anonymous to some degree; and that the public must have faith in individual public servants, and trust that they will approach every issue with an open mind. It is argued that too much openness, particularly of the advice, opinions or recommendations of officials, could imperil this independence and lead to a situation in which the public identifies officials with certain views. A by-product of this could be an attempt (particularly by Ministers in a Westminster system) either to influence or govern the advice which officials will give, or even to secure the appointment of officials whose views, if published, would not be embarrassing.

(d) *Confidence in Government*

26. Although any Freedom of Information Act has exemptions from disclosure, it is argued, even so, if the Administration no longer controls the disclosure of information, officials and outsiders alike will be reticent to commit information to government files—officials may be less candid in recording their views; private businesses, individuals and other governments may not voluntarily submit information to the government; police informers may be stifled; and the community generally may distrust the ability of government to preserve personal privacy.

(e) *Westminster traditions*

27. In countries with a Westminster type Government, it is often argued that freedom of information legislation is an expedient more suited to countries like the United States of America that have a system in which the legislative and executive arms of government are completely separated, and the Executive is expected to be directly and openly answerable both to Congress and to the people. It is argued that accountability by way of a Parliamentary executive, and the conventions of individual and collective Ministerial responsibility, are in their own setting a sufficient form of accountability; further, that an additional legislative requirement of openness could destroy the authority of Ministers by exposing officials to external scrutiny and accountability. The other argument that is put is that it is inconsistent with the notion of Westminster Government that a court, and not Parliament and its Ministers, should ultimately decide what information has to be released.

(f) *Public benefit*

28. Lastly, it is argued that, whatever benefits could flow to the community at large from increased openness, freedom of information legislation will not be the catalyst to this end. The benefit of any legis-

lation would accrue primarily to those who use it, and they will not be average members of the public but special interest groups. For instance, the greatest users of the U.S. Act in respect of some agencies are said to be businesses spying on each other, and law firms acting for their clients. Similarly, even though some members of the public are likely to use legislation (either individually or through community groups) they are likely to be among the informed, articulate and educated members of the public, who are already able to protect their rights to some extent. It is also said that the Press (who can use such legislation and disseminate the findings to the public at large) are likely to rely instead for their information on accustomed practices, like leaks and departmental and political contacts. Another variant of the public benefit argument is also advanced, namely that the public is already "snowed" with vast quantities of government information, which tends to bore or infuriate them; what they want is not more information, but better government.

Variants in a Freedom of Information statute

(a) Scope of legislation

29. The first matter to be determined is the range of authorities to which an Act should apply. All existing and proposed statutes apply at least to most of the agencies of the executive arm of government (with occasional exceptions for bodies like commercial enterprises). Beyond this there is variation—for instance, the Swedish Act applies as well to Parliament, the Synod of the Church, and the courts; the Australian proposed Act does not apply to Parliament or the courts; while the U.S. Act has the same exclusions, and in addition does not apply to the Office of the President.

30. Next there is the range of documents subject to the legislation. The most restrictive is the Australian proposed Act, which only applies to documents created after the Act commences operation (subject to two small exceptions); an Australian Senate Committee recently recommended relaxation of this prohibition so that an individual could gain access to his own records, however old, and general access to pre-existing records would be phased in according to a schedule written in the legislation. A variant on this approach was the Canadian proposed law, which was retroactive for five years, and even beyond unless access would unreasonably interfere with the operation of the relevant institution. At the other end are the U.S. and Swedish laws, which apply to all documents possessed by agencies—though in the U.S. submissions have been made in recent Congressional hearings by some agency officials to the effect that access to pre-existing law enforcement documents should be suspended for a number of years.

31. Lastly there is the range of people who use the Acts. Only citizens can request documents under the Swedish law; Canada broadened this to include permanent residents and corporations; in Finland "It is up to the authority to decide to what extent foreigners shall have access to official documents";

while anyone can avail of the U.S. Act, or the proposed Australian law.

(b) Making a request

32. Most of the statutes recently proposed in different countries follow the approach in the U.S. Act, which requires that a person make a request for records "which (a) reasonably describes such records and (b) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed". There are some textual variations to this—the Canadian proposed law required that the request be in writing and "provide sufficient detail to enable an experienced employee of the institution to identify the record"; while the Australian proposed Act requires a person to "provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency ... to identify the document". Each of these laws also prescribes the time limit within which a decision whether to withhold or disclose the document must be made. In the U.S. it is ten working days after receipt of the request, although the period may be extended for another ten working days in "unusual circumstances", which is defined in the Act to include circumstances where it is reasonably necessary to the proper processing of a particular request to obtain the record from a separate field facility, to obtain a voluminous amount of separate and distinct records, or to consult with another agency (or another component of the agency) having a substantial interest in the determination of the request. The proposed Canadian law set a time limit of 30 days, with provision for extension in circumstances similar to those in the U.S. Act. The proposed Australian law allows a period of 60 days, and an extension could only be obtained after an appeal has already been instituted by the applicant to the appellate tribunal; an Australian Senate Committee has recommended that the Act provide for a reduction of this 60 day time limit to 45 days two years after the Act commences operation, and to 40 days four years after commencement. By contrast, the same procedural detail is not contained in any of the Scandinavian laws. The approach in these statutes is, by and large, to declare what documents are public, and then to require that a copy of the document shall be made available to a person upon request, or that the person be "apprised of the contents of the document".

(c) Determining a request

33. There is also a difference among countries as to which officer or level of officer will make the decision whether to release a document. The U.S. Act does not contain any directions on this matter, and it is left to each agency to devise its own administrative system. Consequently, in some agencies (notably law enforcement agencies) only a small number of senior officers usually have authority to release a document in response to a request, while in other agencies this power is delegated widely—for instance, in the Department of Health, Education and Welfare only 16 officers have authority to decide that a document will not be released, while every officer has authority to disclose.

In the Swedish law the official who is entrusted with the care of a document has a duty to deliver it if it is not exempt from disclosure. Usually the official who must make this decision will be a subordinate official, though in doubtful cases the official may refer the request to his agency for decision "provided that this is possible without undue delay". In both the Canadian and Australian laws the responsibility is nominally cast upon the head of the agency, but in each there is provision for him or her to delegate that function to other officers.

34. A new procedural complication that has been introduced, e.g. by the proposed Australian law, is to confer power upon an agency to refuse access to a document on procedural grounds—for instance, access to a non-exempt document may be deferred "where it is reasonable to do so in the public interest or having regard to normal and proper administrative processes", and a request that seeks all documents of a specified class, that contain information of a specified kind or relate to a specified subject matter, may be refused if answering it "would interfere unreasonably with the operations of the agency."

(d) *Costs and charges*

35. The simplest laws in this respect are the Scandinavian laws, since they do not provide for any charge to be levied when access is granted. It now seems customary in new statutes to provide that fees can be charged when access is given. This practice stems mainly from the U.S. Act, which provides that each agency shall adopt a schedule of fees that is uniform for all units of the agency, and that "such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication." To ensure that this requirement does not discourage individual members of the public from making requests, the Act was amended in 1974 to provide that fees can in some instances be waived: "Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public."

(e) *Exemptions*

36. It is accepted in all existing and proposed statutes that the same areas of government activity require protection—principally defence, national security, foreign relations, law enforcement, trade secrets, personal privacy, and to some extent, the internal deliberative process of the agency. Beyond this there is a marked diversity in the detailed manner in which the exemptions are defined, though in general it could be said that the statutes follow one of two approaches. Either the exemptions define, in varying degrees of specificity, the types or classes of documents to be protected, or they state the interests which need protection by non-disclosure. There are difficulties with each approach. One difficulty with the first approach is that within each general class of documents there will be many exceptions where

material could safely be released. Another difficulty is that the more specific the list is, the longer and less manageable it becomes. With the second approach, the prime difficulty is that it relies for its success upon a benevolent interpretation of interests by judges and administrators alike. Furthermore, it provides little actual guidance on whether a particular document should be released; prevarication and delay may thereby be encouraged.

37. A few introductory comparisons will indicate the variations that exist. The Swedish secrecy law has as many as 250 different exemptions, some defined by reference to protected interests, others by reference to categories of documents. Many contain a time limitation on the life of the exemption, which varies from 70 years in some cases to two years in others, while some documents are only protected until the occurrence of a particular event (for instance, documents prepared for auditing or inspection activities until the audit or inspection has been held). Most of the other existing or proposed statutes contain a much smaller number of exemptions, and breadth can thus be a problem. In Denmark, for example, documents can be withheld out of consideration to "the public's economic interests" or "where secrecy is required by the special character of the circumstances". In Norway, access can be refused "because publicity will thwart public regulation and control measures or other necessary requirements or prohibitions, or endanger their accomplishment". The U.S. Act contains only nine exemptions, though some of these incorporate by reference other standards—for instance, the security classification system is incorporated by reference, and so too are the rules developed by the courts for determining what documents connected with the deliberative processes of an agency are exempt from discovery in civil law proceedings. It is also necessary to look beyond the U.S. exemptions to the decisions of the courts interpreting the Act, as these place a substantial gloss upon vaguely worded exemptions, like that protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The proposed Australian law seeks to qualify the breadth otherwise existing in some exemptions, for instance by requiring that documents of a particular description are only exempt if disclosure "would have a substantial adverse effect" on the protected interest; or that disclosure of a particular type of document would also be "contrary to the public interest". The proposed Canadian law adopted a slightly different approach designed to limit the scope of an exemption, by stating the particular interest to be protected, and then in effect giving examples of the types that could be encompassed by that interest—for instance the exemption protecting the economic interests of Canada gives as examples information relating to the currency, coinage or legal tender of Canada, information relating to the regulation or supervision of financial institutions, and information concerning a contemplated change in the rate of bank interest, tariff rates, taxes or duties or concerning the sale or acquisition of land or property.

(f) *Review and appeal*

38. Here again a number of variations are possible. An Act may provide for internal review of a refusal to disclose (either as an interim or a final form of review), review by a court, review by a specialist administrative tribunal, or investigation of a refusal by an Information Commissioner or Ombudsman.

39 The U.S. Act has two tiers in the appeal structure. First, a person may seek an internal review of a decision, and this must be completed within 20 days of the appeal being lodged; and thereafter a person may appeal a denial to a federal court. The courts have power to review any refusal and determine whether the refusal is permitted under one of the exemptions; in addition the courts have other powers, including power to make an award of legal costs in favour of an appellant "in any case ... in which the complainant has substantially prevailed and power to refer to the Civil Service Commission circumstances which "raise questions whether agency personnel acted arbitrarily or capriciously" with respect to a withholding. A similar appeal structure is provided for in the proposed Australian Act, though here the appeal goes to a specialist body called the Administrative Appeals Tribunal which hears appeals against administrative decisions; the Tribunal does not have power to make an award of legal fees in favour of an applicant. There is in addition in Australia a Federal Ombudsman, who it is anticipated will have some powers to investigate refusals to disclose, subject to one major exception that he has no jurisdiction to investigate a decision made by a Minister. The proposed Canadian law went further in this respect, by actually creating an Office of Information Commissioner, who would have power not only to investigate a refusal, but also to appeal of his own motion to the Federal Court, to appear before the Court on behalf of a person who independently lodged an appeal, or to intervene in the hearing of any such appeal. In other Canadian jurisdictions where freedom of information legislation has been proposed an even greater role would be given to the Ombudsman or Information Commissioner. Legislation enacted in New Brunswick in June 1978 provides that an appeal may be made to the Ombudsman or to a Judge of the Supreme Court, while a bill proposed by the Prince Edward Island Government provides for the appointment of an Information Commissioner with a power to order release as the sole avenue of appeal. In Sweden also a refusal may be investigated by the Ombudsman, or appealed to the appropriate administrative tribunal. One factor common to the Swedish and Australian laws is that Ministerial decisions have a special importance. In Sweden a denial which is made by a Minister cannot be appealed to a tribunal, though in practice Ministers make few decisions under the statute. In Australia a decision of a Minister cannot be appealed if the Minister issues a certificate stating conclusively that a document is exempt on the ground that it relates to defence, national security, international relations, Federal/State relations, is a cabinet document, or is a document obtained from another Government. It is

generally anticipated in Australia that Ministerial decisions will not be rare.

(g) *Internal Law and Publication*

40. A central feature of the U.S. Act, that was copied in the Australian proposed law, is the provisions requiring the indexation and publication of various categories of information. First, under the U.S. Act, material must be published in the Federal Register which would notify the public of the structure of agencies and the way in which they handle matters concerning the public—for example, matters that are included are a description of the organisation of the agency, the methods whereby the public may obtain decisions, a statement of the general course by which functions are channeled and determined, and rules of procedure.

41. Different rules apply to what might loosely be called the internal law of agencies—the interpretations formulated by agencies of the legislation they administer; the staff manuals, rule books, and other instructions provided for the guidance of officers when exercising their official and statutory duties; the reasons for decision given in the exercise of statutory powers; and the rules of policy applied by agencies in administering schemes that may affect the public. Some of this internal law in the U.S. has to be published (and indexed), other parts of it have only to be indexed and made available for inspection. Substantive statements, policies and interpretations of general application have to be published, whilst other statements, policies and interpretations which have been adopted, in addition to the orders made in individual cases, have only to be indexed. The enforcement requirement for this part of the Act is that a person shall not be adversely affected by a rule, policy or interpretation which is not published or indexed in accordance with the Act, unless the person has actual or timely notice of the terms thereof.

42. A broadly similar approach has been adopted in the proposed Australian Act. The main differences are first, that the material to be published on the structure of agencies will appear annually in an existing publication, called the *Government Directory*, and will include in addition a description of the main categories of documents held by an agency. The Australian Senate Committee that reviewed the Bill recommended that the range of matters be expanded, with an emphasis upon publication of items that would facilitate public access to agency facilities and the utilization of participatory mechanisms that presently exist. As to the internal law of agencies, the range of information required to be indexed and made publicly available is if anything defined more narrowly than in the U.S. Act. Moreover, indexation is required annually, compared to three-monthly in the U.S. Act.

43. Although there are no provisions in the Scandinavian laws dealing separately with publication and internal law, there are provisions that achieve a somewhat similar purpose. For instance, in the Swedish law it is provided that diaries, journals and registers (for instance, of docu-

ments possessed by an authority or of decisions made and cases handled by it) are official, and thus public, when they are ready for entry or posting.

(h) *Archival Rules*

44. Since it is accepted that some documents must initially be withheld from public access, the question arises as to when access should ultimately be given. Most countries prefer to adopt a set archival limit, by which time most documents which are initially withheld are released. It is possible to contain the archival limit in the freedom of information statute, or in separate legislation. For instance, most of the exemptions in the Swedish law state the period for which they are effective—with periods of two, five, ten, 25 and up to 70 years being stated. In the United States, the exemption protecting documents relating

to defence or foreign policy incorporates by reference the security classification system which is established separately by an Executive Order. This system provides that most documents will be declassified by the age of six years, and documents requiring protection for a longer period are presumed to be available within 20 years, unless a very senior officer makes a determination that the document must remain secret for an even longer period. In the proposed Canadian law the only exemption specifically incorporating its own time limit was that protecting the deliberative processes of government, and here a 20 year period was prescribed. In Australia a Separate Archives Bill was introduced into Parliament simultaneously with the Freedom of Information Bill; it preserves the existing 30 year rule that presently is imposed by executive decision.

RECOGNITION AND ENFORCEMENT OF JUDGMENTS AND ORDERS AND THE SERVICE OF PROCESS WITHIN THE COMMONWEALTH — MULTIPLE DAMAGES JUDGMENTS

Memorandum prepared by the Government of Australia

This paper raises an important issue for consideration in relation to the rules of law in Commonwealth countries (whether at common law or under legislation) as to the recognition and enforcement of certain foreign judgments in civil proceedings.

2. That issue is whether judgments for multiple damages in private proceedings should be treated as penal or civil for the purpose of recognition and enforcement. A judgement for multiple damages is a judgment arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment is given (See s.5(3) of the United Kingdom Protection of Trading Interests Act).

3. The significance of the issue arises chiefly in the field of United States Antitrust Laws. Under those laws criminal proceedings in the strict sense may be taken by the United States Government in respect of their violation. In addition, however, private proceedings may be instituted for the recovery of treble damages in respect of any injury to business or property sustained as a result of anything forbidden in the antitrust laws (s.4 of the Clayton Act).

4. The overall purpose of the provision conferring the right to treble damages upon private plaintiffs is to enable United States antitrust laws to be enforced more effectively. Plaintiffs exercising that right are referred to in the United States literature on the subject of antitrust enforcement as "private Attorneys-General" (see Antitrust Law Developments 1975 p. 254). The right conferred is thus penal in purpose and effect.

5. The problem concerning the international recognition of such judgments cannot be dissociated from the extremely wide extraterritorial jurisdiction assumed by United States courts in antitrust proceedings. As stated in the "Antitrust Guide for International Operation" issued by the United States Department of Justice on 26 January 1977, "Where foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place." (page 6). This doctrine of jurisdiction—the "effects doctrine"—has been objected to by other countries as being contrary to the rules of international law.

6. The position is that companies incorporated and carrying on business in the international market outside the United States may find themselves the subject of treble damages suits in that country. Judgments may be given in those suits notwithstanding that the conduct of the defendants is extra-territorial and that the companies concerned have

been carrying out the legitimate trade policies of their governments.

7. The Australian Government has recently been concerned with proceedings of that character brought by Westinghouse Electric Corporation in Illinois against 29 United States and foreign uranium producers in respect of uranium marketing arrangements entered into outside the United States. Four of the defendants are Australian companies.

8. As a result of such proceedings—

- (a) Australian defendants are facing a potential judgment of hundreds of millions of dollars;
- (b) Such a judgment against the companies concerned would have a considerable impact upon Australia's national interest;
- (c) The alleged uranium marketing arrangement by non-United States producers was consequential upon an embargo imposed by the United States Government prohibiting the importation of uranium into the United States for enrichment for domestic use there so as to protect U.S. producers. The United States at that time constituted 70 percent of the world's market.

Details of the Westinghouse proceedings are attached.

9. Faced with this situation the Australian Parliament enacted the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 in March of last year. The Act provides that where the Attorney-General is satisfied that a foreign court has exercised jurisdiction or powers in a manner inconsistent with international law of comity or where he is satisfied that it is desirable in the national interest that judgment should not be enforced in Australia he may by order in writing declare that that judgment should not be recognised or enforced in Australia or that it should be enforced to the extent only in such amount as indicated in the order. On 6 June 1979 the Attorney-General made an order that the judgment entered in the Westinghouse suit should not be recognised or enforceable in Australia.

10. The experience of Australia in the Westinghouse suit is mentioned in order to indicate the difficulties with which exporting countries within the Commonwealth may be faced when confronted with a request for recognition or enforcement of a treble damages antitrust judgment in a foreign court against their exporters.

11. So far as Australia is concerned, the Foreign Antitrust Judgment (Restriction of Enforcement) Act would preclude enforcement of the

Westinghouse judgment in Australia but the companies concerned have assets in other countries including those within the Commonwealth. Accordingly the need could arise in other Commonwealth countries to determine whether a judgment in the Westinghouse suit is to be treated as penal or civil for enforcement purposes.

12. In the United Kingdom, the Protection of Trading Interests Act has recently been enacted. Under that legislation no recovery is allowed in respect of a foreign judgment for multiple damages (s.5(2)(a)). In certain circumstances a United Kingdom defendant to a foreign multiple damages judgment may recover back the amount awarded against him not attributable to compensation (s. 6(2)). In introducing that legislation on 15 November 1979 the Secretary of State for Trade (Mr. Nott) said—

“We regard this civil sanction—I refer here to triple damages—as being penal rather than compensatory, and consequently consider that in international dealings at least these proceedings should be subject to the legislation that we would regard as appropriate to criminal proceedings. In fact, they are subject to no such limitations. The plaintiff is given what appears to us to be an unfair advantage.”
(Hansard p. 1536).

The general legal position

13. The common law conflict of laws rule is that enforceability is denied to a foreign “penal” judgment. That principle is reflected in the United Kingdom Judgments (Reciprocal Enforcement) Act 1933 which provides for registration of foreign judgments and the various statutes applying in Commonwealth countries based upon that Act.

14. The question is whether multiple damages judgments are to be regarded as penal. In *Huntington v. Attrill* (1893) A.C. 150 the Privy Council approved the following statement by the Supreme Court of the United States in *Winsconsin v. The Pelican Insurance Company* (1888) 127 U.S. 265:

“The rule that the courts of no country executes the penal laws of another applies not only to sentences for crimes and misdemeanours but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.”

The Privy Council considered that that would apply whether the proceedings were instituted by the state or by an official authorised by the State, or by a common informer, who it saw as acting in the interest of the whole community.

15. A multiple damages suit would not in terms fall within this description of penal judgments. It is perhaps arguable that a multiple damages suit would be construed as bearing more similarity to the situation of a common informer because of its enforcement element.

16. Nevertheless the position is at least doubtful and under a strict application of *Huntington v. Attrill* a multiple damages judgment would not be regarded as penal. In *S.A. Consortium General Textiles v. Sun & Sand Agencies Ltd.* [1978] 2 A.E.R. 339 at 354-5 Lord Denning commented that a “penalty” under the United Kingdom Foreign Judgments (Reciprocal Enforcement) Act 1933 referred to “a sum payable to the State (sic) by way of punishment and not a sum payable by way of exemplary damages”.

17. In the United States some authorities tend to support the view that two thirds of a judgment for treble damages under the antitrust laws would be held to constitute a penalty— see *Kline v. Caldwell, Banker & Co.* 508 F.2d. 226 (9th Cir. 1974), *Lyons v. Westinghouse Electric Corp.* 222 F.2d. 184 (2nd Cir. 1955) and *Rogers v. Douglas Tobacco Board of Trade Inc.* (1957) Trade CAS. 68, 706 (5th Cir. 1957).

18. In the draft Bill for a Foreign Judgments (Reciprocal Enforcement) Bill in respect of money judgments prepared by Professors McLean and Patchett, s.3(3)(b) provides that the Act does not apply to—

“any judgment to the extent to which it provides for the payment of a sum of money by way of exemplary or punitive or multiple damages”.

Conclusion

19. In the Australian view it would be preferable if there were a clear exclusion from the proposed Bill of Professors McLean and Patchett of judgments for multiple damages or any portion of such judgments. The most common case in which multiple damages judgments are given is under United States antitrust laws which, as mentioned, may be applied extraterritorially in conflict with national economic policies of other countries. If a plaintiff chooses to exercise the right to multiple damages and in effect act as a “private Attorney-General” he should not, under the guise of civil proceedings, be entitled to reciprocal enforcement of the judgment obtained. If he wishes to have that advantage he should be obliged to limit his action to a claim for loss actually sustained.

ATTACHMENT

THE WESTINGHOUSE PROCEEDINGS

1. The genesis of the Westinghouse uranium litigation lies in a 1964 decision of the United States to prohibit the enrichment of foreign uranium for use in U.S. domestic reactors. This had the effect of closing the United States market to foreign uranium producers. This embargo, the continuation of which was announced by the United States Government on 13 October 1971, forced the burden of adjustment of supply and demand to be carried by non-United States uranium producing countries.

2. Also in October 1971 the United States Government announced its policy to approve the release of 50,000 tons of U_3O_8 from the United States stock pile onto domestic markets which further depressed the price obtainable. By 1972, there was a gross oversupply of uranium in terms of demand and prices had dropped to as low as \$4.50 per pound.

3. The exportation of uranium from Australia has been subject to control, through the Customs Act 1901, by the Australian Government since 1961. From 10 April 1967 the control has formed an integral part of a wider uranium market policy. In the light of the U.S. embargo, that policy was that its uranium producers should engage in discussions with uranium producers of other countries, outside the United States, to achieve the stabilization of prices in the world market which, as a result of the United States Government decisions, excluded the United States market.

4. In the late 1960's and early 1970's the Westinghouse Electric Corporation (Westinghouse) entered contractual arrangements for the supply of nuclear power plants. As an inducement for these contracts they included provision of fuel supply at low prices. By 1974 Westinghouse had a commitment for the supply of 60 million lbs of U_3O_8 at low prices. Westinghouse, however, had not entered purchase or supply arrangements for the uranium supply commitments it had entered into and thus had sold "short" this very large quantity of U_3O_8 . Following a steep rise in uranium prices in 1974, Westinghouse notified its customers in 1975 that it was unable to fulfill the uranium contracts under the "commercially impracticable" clause of the U.S. Uniform Commercial Code. Subsequently, proceedings were instituted against Westinghouse by sixteen U.S. and three Swedish electric power utilities for breach of supply contracts. United States Courts have however ruled that Westinghouse had not sustained its burden of proving that it was excused from performing its contractual obligations by commercial impracticability or force majeure. As a consequence Westinghouse has now settled thirteen of these suits out of court. It is estimated that the total cost of settlement of the nineteen suits will reach well over one billion dollars.

5. In July 1976, a Grand Jury was empanelled by the U.S. Government to examine whether a case existed for criminal prosecution of parties alleged to have been involved in the uranium marketing cartel. The Grand Jury did not return any indictments. However, the Antitrust Division of the Department of Justice, after a full study of the matter, filed only a misdemeanour charge against one United States company. Indeed, on 24 January 1980, in the course of discussing the alleged cartel and the Justice Department investigation, U.S. Assistant Attorney-General Shenefield said, "It is an undoubted fact.... that the cartel had its genesis in a major anti-competitive action by our own Government in walling off a major portion of the world's market to businessmen who had therefore sold into our market", and "I think it is also fair to point out that the governments of certainly Canada and South Africa and Australia see uranium as being one of their major national resources and took steps following our own governments's anticompetitive acts to try and save an important national industry".

6. On 15 October 1976, Westinghouse commenced antitrust civil proceedings, claiming treble damages, in the U.S. District Court for the Northern District of Illinois against 29 defendants 20 from the United States and nine foreign defendants. In that action Westinghouse sought treble damages under the Sherman Antitrust Act of 1890, in relation to alleged uranium marketing arrangements which had been entered into by the defendants in 1972 outside the United States and which were alleged to have damaged Westinghouse.

7. Four Australian companies were among the nine non-United States defendant corporations which declined to enter any appearance. As the Australian Government understands it, the defendants have been advised that there are serious jurisdictional objections to the proceedings against them and that by appearing, they might be regarded, under the law of countries where they have assets against which enforcement might be sought, as having voluntarily submitted to the jurisdiction and thereby waiving those objections for the purposes of any enforcement proceedings. In particular, it appeared that upon the basis of judicial authority in the United Kingdom, even an appearance merely to contest jurisdiction could produce the same result as an unrestricted appearance for the purposes of enforcement proceedings in those Commonwealth countries where United Kingdom legal precedents are regarded as relevant. Faced with claims involving hundreds of millions of dollars (an amount referred to in relation to defaulting defendants by Judge Prentice Marshall hearing the case) they were advised, notwithstanding the strength of their case on the merits, not to appear.

8. On 3 January 1979, Westinghouse was granted a default judgment against the nine non-appearing defendants, for an amount to be determined, on the grounds of their non-appearance in the proceedings. Assessment of damages against the non-appearing defendants was originally set down for 10 December 1979 but was stayed pending appeal by the contesting defendants to the United States Court of Appeals on

the grounds that such assessment would prejudice their fair trial on the merits.

9. On 15 February 1980 the Court of Appeals ruled that the question of damages should await the resolution of the issue of liability as to all parties. (The trial on the merits is currently scheduled to commence in September 1981).

THE ZAMBIAN LEGAL AID SYSTEM: HOPE FOR JUSTICE

by The Hon. Frederick M. Chomba, S.C., M.P.,
Minister of Legal Affairs & Attorney-General of Zambia

Introduction

The basic principle behind the establishment of legal aid in almost all countries where the scheme operates is the provision of legal services for the poor and helpless, the disadvantaged members of the society: to enable them to defend themselves in both criminal and civil matters, or institute actions against offending parties. In other words to bring them, at least in theory, on par with other members of the society as far as availability of legal services is concerned. We shall see if in fact this idea is realised by the present system obtaining in Zambia, after we have examined the history of legal aid in Zambia, its present operations and determining its inadequacies, if any.

Historical Background

2. It has always been in the discretion of the High Court or a committing court to assign a lawyer to defend a person who was to be tried before the High Court on a criminal charge if such a person was unable to provide a lawyer at his own expense. An Ordinance of 1945 extended the exercise of this discretion to cases triable in the subordinate courts.

3. Then came the Poor Persons Defence Ordinance of 1957 which made it mandatory, where the means of the applicant were not such as to enable him to provide himself with a lawyer for legal aid to be provided at the expense of the State, if such a person was committed for trial in the High Court upon a charge of the following species of offences:

- treasonable offences;
- offences against morality;
- murder;
- manslaughter;
- forgery and similar offences.

4. Legal aid was also discretionary in appeals and other offences triable in the High Court and subordinate courts.

5. Notwithstanding the above, legal aid was only provided where it was mandatory to do so where the offence charged was punishable by death—principally due to meagre financial resources to meet the increased demand of its services. Before the passing of the Legal Aid Act 1967, however, no provision had ever existed for legal aid in civil cases or for the granting of a defence certificate as of right in cases other than those triable in the High Court. Thus the Legal Aid Act of 1967 revolutionised the entire system.

The Legal Aid Act 1967

6. In 1965 a Cabinet sub-committee was appointed under the Chairmanship of the then Minister of Justice, to consider the introduction of a scheme for legal aid in both civil and criminal matters.

7. The recommendation of the sub-committee was for the establishment of a Department of Legal Aid and the provision of legal services by salaried officials in the full time employment of the Government to such persons as qualified for legal aid. This scheme was approved in principle by the Cabinet and a Director of Legal Aid was appointed in October, 1966.

8. There was, as expected, some initial criticism of the proposed arrangements mainly from the society representing the legal profession. This criticism was based mainly on the doctrinaire concept that the employment of defenders and prosecutors by a 'common master' was objectionable in principle, and on arguments advanced that the provision of legal aid services under a scheme operated by private practitioners but financed by the State would better meet the requirements of the persons who would benefit by legal aid.

9. The provision of the Act, however, went a long way in allaying any fears that there might be any improper interference with the operation of the legal aid services. There was also ample scope for private practitioners to participate in providing the services contemplated under the Act.

10. One other feature of the proposed legal aid scheme which had received some criticism was the use which was proposed to be made of 'unqualified' persons that is to say persons who were not trained lawyers. It was felt that by affording such persons a limited right of audience in the courts for the purpose of the legal representation of accused persons, the standard of legal aid provided to accused persons and litigants would be lower than that available to persons who had the means to provide such services at their own expense. This provision of the Act was in the main intended to facilitate the extension of legal aid to a wide range of cases triable in the subordinate courts which was not for the time being feasible if representation in those countries was confined to fully qualified practitioners having regard to the limited number of practitioners in the country. This matter was, however, cautiously approached from the very beginning and when the Legal Aid Bill was introduced into Parliament the then Vice-President gave the House an assurance that the use of "unqualified" persons to do any legal work was a purely temporary measure and would be abandoned as soon as fully qualified Zambian lawyers were available. In the event no extensive use has been made of these "unqualified" Legal Aid Assistants and this aspect of the scheme as originally contemplated has been phased out.

11. Now, however, under arrangements with the Law Practice Institute of the Council of Legal Education, newly qualified Zambian law graduates

acquire practical experience by serving part-time as Legal Aid Assistants under the supervision of experienced lawyers. This has proved to be beneficial to both the students and the Department of Legal Aid. One may venture to say that the Law Association of Zambia, through its members, can assist in alleviating the problem of the unqualified lawyers by accepting some briefs from the Legal Aid Department free of charge. In some countries where there is no Department of Legal Aid, free legal service for the poor is undertaken almost entirely by the country's Law Association.

Present system in operation

(a) Administration and representation

12. The Legal Aid Act, 1967, provides for the appointment of a Director of Legal Aid and other professionally qualified officers whose function it is to grant legal aid under the terms provided for in the Act in civil and criminal cases and to provide the services of a practitioner in all such cases, a discretion being reserved to the Director to engage the services of a private practitioner to undertake the representation of any person who has been granted legal aid, in which event the practitioner would be entitled to payment of appropriate prescribed professional fees.

13. It is expressly provided by s.3 of the Act that the fact that assistance is by way of legal aid does not affect the relationship between, or the rights of, practitioner and client or any privilege arising out of such relationship. Therefore, the Director of Legal Aid and Legal Aid Counsel are in precisely the same position as regards the provision of services to the client as if they were private practitioners, the only distinction being that they look to the State and not the litigant to pay them for services rendered, which is by way of salaries rather than by way of fees.

14. As a further guarantee of the exercise of independent judgment and discretion both in the administration of the Act and in the provision of professional services, the Act further provides in s.4(3) that in the exercise of his functions the Director shall not be subject to the direction or control of any person or authority.

15. This provision of unfettered discretion has contributed to a great extent in the fair administration of justice in this country. For example, legal aid has been granted by the Director to litigants in cases of preventive detention and unlawful imprisonment and arrest by law officers of the State. Further, a person who is a party in any civil proceedings to which the State is also a party, may under s.13 apply to the Court for a special aid certificate which will entitle him to representation by a practitioner appointed by the court whether or not application has been made to, or has been refused by, the Director of Legal Aid. In granting such an application the court takes into account two considerations, namely whether or not the applicant satisfies the conditions under which legal aid may be granted, and secondly that it is in the interests of justice that

the applicant should be represented by a practitioner than the Director. In the ordinary run of the mill cases where the State is vicariously liable in civil proceedings applicants have applied for legal aid and have received legal representation in the ordinary way.

(b) Criminal matters

16. The Legal Aid Act provides:

- (a) legal aid in respect of all offences triable in the High Court, which provision is mandatory;
- (b) legal aid in all specified (considered the more serious) offences triable in the subordinate courts, which provision is also mandatory; and
- (c) legal aid in all other offences triable in the subordinate courts, which provision is discretionary, each application being considered on its merits.

17. Where a person is charged with an offence for which the provision of legal aid is mandatory, and it appears to the court after enquiry that the means of that person are insufficient to enable him to employ a lawyer on his own account, the court shall issue a legal aid certificate which entitles the accused person to the provision of legal services by the Director of Legal Aid. Where the provision of legal aid is not mandatory the court may in its discretion issue a certificate or the applicant may apply to the Director of Legal Aid, who may, in his discretion, grant legal aid to the applicant.

(c) Appeals

18. The Director grants legal aid in appeals to the High Court and to the Supreme Court whenever it appears that there are arguable grounds for such appeals. On appeal either in the High Court or in the Supreme Court, the court may, if it considers that a point of law of public importance is likely to rise, issue a legal aid certificate to an unrepresented appellant. The Director has then no option but to grant legal aid to such appellant.

19. It is the duty of legal aid counsel to give advice on appeal to any applicant who is applying for legal aid and to prosecute any appeal against conviction in any such case and also in any case where a legal aid counsel has represented an accused person at his trial, where in the opinion of counsel there are reasonable grounds for appealing.

Appendix 'A' provides the details of the jurisdiction and functions while Appendices 'B' and 'C' show the volume of work handled for the year ending December, 1978.

(d) Civil Litigation

20. Legal aid is provided for in all civil cases whenever it appears that the applicant would benefit from the services of a practitioner in any such case or matter affecting him and being a party to such proceedings and it is otherwise in the interests of justice that the applicant should be represented. Application for legal aid is made either to the Director or to a District legal aid committee. Legal aid is available on a means qualification, the applicant receiving either free legal aid or legal aid

supplies on the payment of a contribution towards the cost of the proceedings, according to his means.

21. In order to protect the rights of a person who might otherwise be deprived of assistance because of ignorance, and in the absence of an extensive machinery for the diversification of the services throughout the country, the Director is enabled by virtue of the provisions of s.12(3) of the Act, on his own motion to invite any person to apply for legal aid.

22. A bulk of the cases which are handled in this respect are usually actions arising out of the Fatal Accidents Acts. Widows and bereaved parents are assisted in recovering damages after their husbands, breadwinners, or children have died. Divorces and other matrimonial causes are also handled by the Directorate.

(e) The Local Courts

23. A legal practitioner is not as a rule allowed to appear in local courts, which principally exercise jurisdiction in African customary laws of the country.

24. The otherwise wide scope of legal aid in this country has therefore been restricted by the exclusion of the local courts from the operation of the Legal Aid Act. Legal aid is thus confined to matters and causes in the High Court, the Supreme Court, the subordinate courts and Tribunals before which a lawyer may represent a client. The extension of the legal aid scheme to local courts is rendered unnecessary by virtue of the very summary nature in which proceedings are conducted in those courts, and secondly because, by and large, the legal practitioners in the country are not necessarily qualified in customary laws. However, there is admittedly a need for reform to assimilate aspects of customary law to the inherited common law. This is particularly evidenced in the field of family law and related fields where a wide measure of relief at present available in the subordinate courts and the superior courts, is unavailable to the mass of the population because of the exclusion of the customary law has not kept pace with the growth and transformation of our society. The scope of legal aid activity in this field will go hand in hand with the movement for the reform of the law in this direction.

Legal aid in operation

25. The legal aid scheme commenced operation with a nucleus professional staff consisting of the Director and two other professional officers. This staff has grown progressively to a present establishment of eleven professional officers including the Director.

26. A legal aid office was opened in Lusaka in July, 1967 and a regional office in Ndola in August, 1967, while in January, 1971 Livingstone and Kitwe offices were opened, though the latter was closed in 1972. The expansion programme of the Department has been blocked by initial and recurrent under staffing and by inability to recruit suitable personnel for professional posts, mainly because of competition for recruits and the attractions offered by private practice.

27. The provision of legal aid by virtue of the mandatory provisions of the Act proved sufficient to tax the limited resources of the Department and in 1968, just about a year after the Act was brought into operation, the services provided in the criminal field had to be curtailed by the reduction of the categories of specified offences. The difficulties arose mainly from the geographical isolation of many of the towns and districts for which coverage was necessary. The reduction of the categories of specified offences was a step which was taken with reluctance and Government had agreed to review the position as soon as qualified Zambian lawyers were available to facilitate the opening of sub-stations throughout the country.

28. In order to meet in part the difficulties presented by the geographical isolation of many areas of the country a practice has developed whereby special days are set apart for the hearing of legal aid cases at provincial centres and legal aid counsel now make regular periodic visits to these centres to represent persons who have been granted legal aid in the subordinate courts. This practice has now become established by the issue of a judicial circular at the instance of the Chief Justice.

Advice to clients

29. Application for legal aid may result in advice to the applicant without subsequent court action. This is particularly relevant in cases before the Local Court, where the appearance of counsel, is barred by law. In such a case, the applicant, be it in a criminal or in civil case, is advised orally and sometimes in writing and this may be with or without contribution, depending on the means of the applicant. Similarly, applicants in matters before subordinate courts, the High Court and the Supreme Court may also be advised accordingly.

30. This is also particularly relevant where the applicant elects so to do or where he wishes to save money, that is to say, if he is qualified for contribution at all. This category of applicants is, however, rare.

Financial aspects of legal aid

31. The running of the Department of Legal Aid is wholly financed by the Government and its funds are boosted only to a small extent by contributions and costs awarded in civil proceedings.

32. The original purpose of legal aid is to provide legal services to those who would otherwise not be able to get them. But where an applicant is in a position to contribute to the cost of the aid, he is required to do so in accordance with the Act and the Legal Aid Regulations.

33. The system of contribution is based on a means test. It may also be mentioned that the scheme extends to both citizen and non-citizen alike, provided that the non-citizen is resident in Zambia.

Inadequacies of the scheme

34. It must again be stressed that the Department of Legal Aid is at present operating under severe pressure occasioned principally by the shortage of pro-

fessional staff and lack of sufficient financial means to expand. Some of the constraints have been lack of transport, the brain drain from the Legal Aid Department to private practice and the limited number of legal aid offices in the country.

35. This situation is the greatest setback in the Legal Aid Department where, like a public house, people come and go as it pleases them. However, the Government is aware of these problems and is considering introducing improvements.

Final reflections

36. The legal aid scheme is no doubt unique and bold attempt to provide justice for all in Zambia. It is therefore an institution to be proud of and credit goes to the party and Government of Zambia for being among the very first in Africa to introduce the system.

37. It aims at the gradual elimination of the disparity between the availability of a lawyer for the well-to-do and the indigent.

38. In the context of the manpower resources which existed at the inception of the scheme, it was an ambitious undertaking but a logical step in the development of Zambian institutions. The basis of a workable system has been laid.

39. Expansion has been delayed for reasons which have been indicated in this paper.

40. At present no person is unrepresented in a trial before the High Court and with very few exceptions in trials before that court the accused persons are legally aided. Criminal appeals in the High Court and the Supreme Court are pursued by legal aid counsel in all appropriate cases.

41. In criminal trials in the subordinate courts the future expansion of legal aid activity appears to lie in

the establishment of a system of duty counsel who will be available to the Court whenever it appears that the services of counsel will in any way advance the administration of justice, and in the more extensive use of the discretion to grant legal aid in these courts.

42. The provision of legal aid in civil matters was regarded as particularly pressing because of the demonstrable extent of under-privilege in this area which existed before the passing of the Legal Aid Act.

43. The operation of the legal aid scheme has had the salutary side effect of educating the citizenry regarding their right to seek redress whenever actionable wrongs have been done to them. Before the introduction of the scheme actionable wrongs went unpunished because of pervasive ignorance of the existence of that right.

44. The process of rapid modernisation and industrial expansion has brought, and is bringing, an increasing number of people into relationships regulated not by customary law but by statute and the inherited common law. It is in connection with these relationships that the application of legal aid is most discernible.

45. Under the philosophy of Humanism, the Government is encouraging the growth of the principle of equality among the people. One of the guiding precepts of this philosophy is to provide maximum social services which promote people's welfare. I hope that this discussion has adequately shown that Legal Aid is one of the most important professional services a government can provide to all citizens without discrimination. After all, justice should be for all the people. A comprehensive legal aid system ensures that the largest number of persons benefit from its services.

SCHEDULE OF OFFENCES FOR WHICH LEGAL AID IS MANDATORY
CLASS OF OFFENCES FOR TRIAL BY HIGH COURT

Offence	Section of the Penal Code contravened	Offence	Section of the Penal Code contravened
Concealment of treason	44	Preventing escape from wreck	225
Treason felony	45	Internationally endangering the safety of persons travelling by railway	226
Piracy	73	Attempting to injure by explosive substances	336
Attempt by any person to procure abortion to a woman	151	Maliciously administering poison with intent to harm	231
Attempt by woman with child to procure her own abortion	152	Causing death by reckless or dangerous driving	Cap.766,199(1)
Bigamy	166	Aggravated robbery	294
Manslaughter	199	Aggravated assault with intent to steal	295
Murder	200	Demanding property by written threats	296
Infanticide	203	Attempted extortion by threats or accusation	297
Attempted murder	215	Procuring execution, etc, of deeds or valuable securities by threats, violence, restraint or accusation	298
Attempted murder by a convict	216	False statements by company officials	325
Accessory after the fact to murder	217	Casting away vessels, etc	332
Conspiracy to murder	214	Attempts to cast away vessels	333
Aiding suicide	Cap.148,8(c)		
Child destruction	221		
Disabling in order to commit felony or misdemeanour	222		
Stupefying in order to commit felony or misdemeanour	223		
Any prescribed act intended to maim, disfigure, disable or to do grievous harm to any person, or done in resistance to, or prevention of the lawful arrest or detention of any person	224		

SPECIFIED OFFENCES TRIABLE IN THE SUBORDINATE COURTS

Offences or Class of Offence	Section of the Penal Code defining Specified Offences	Offences or Class of Offence	Section of the Penal Code defining Specified Offences
Offences in respect of seditious practices and publications	57	Attempts to commit or procure the commission of any of the foregoing offences is such attempts amount to felonies and if not already specified herein	390
Rioting after proclamation	79	Conspiracies to commit any of the foregoing offences if such conspiracies amount to felonies and if not already specified herein	394
Obstructing proclamation	80		
Rioters destroying buildings	81		
Perjury	104, 105,106		
Fabricating evidence	108		
Rape	132		
Offences against morality	132, 164		
Arson	328, 329,330, 331		
Forgery	348, 351		

APPENDIX B

NEW APPLICATIONS FOR LEGAL AID IN CRIMINAL CASES FOR THE YEAR ENDING 31 DECEMBER 1978

	Applications Received			Applications approved for legal representation at trial or hearing		
	Lusaka	Ndola	Livingstone	Lusaka	Ndola	Livingstone
High Court trials:						
Homicide	207	132	40	207	131	40
Other offences	106	121	21	106	121	21
Subordinate Court Trials:						
Specified Offences	71	124	12	71	123	12
Other Offences	340	48	10	283	43	8
Appeals to the High Court	572	513	79	252	5	10
Appeals to the Supreme Court	217	29	—	70	9	—
Sub Totals	1,513	967	162	989	432	91
Totals	2,642			1,512		

APPENDIX C

NEW APPLICATIONS FOR LEGAL AID IN CIVIL CASES FOR THE YEAR ENDING 31 DECEMBER 1978

	New applications received			Investigations and advice			Under investigation withdrawal, abandoned or refused			Approved for proceeding		
	Lusaka	Ndola	L/stone	Lusaka	Ndola	L/stone	Lusaka	Ndola	L/stone	Lusaka	Ndola	L/stone
Fatal accidents	15	38	1	3	—	—	6	24	1	6	14	—
Personal injuries	17	18	1	1	—	1	9	11	—	7	7	—
Master and servant contract	48	28	8	4	—	—	43	25	8	1	3	—
Other contracts	62	20	9	1	—	—	43	16	7	18	4	2
Divorce maintenance and affiliation	50	31	16	2	—	—	10	8	11	38	23	5
Other civil Matters	124	43	28	9	—	1	82	32	24	33	11	3
Sub Totals	317	178	63	20	—	2	193	116	51	103	62	10
Totals	558			22			360			175		

COMPUTERIZATION OF LEGAL MATERIAL

Memorandum by the Government of Barbados

We are committed to bringing to Barbados the advantages of "jurimetrics" just as Inland Revenue and National Insurance have made use of computers to improve their operations.

Computer Application

Barbados wishes to discuss computer application in the following areas:

- (i) *Statutes and related materials:*
 - (a) Legislative drafting of statutes and statutory instruments;
 - (b) General revisions of statutes and statutory instruments;
 - (c) Assistance in the preparation of access modes to those materials, that is (i) text retrieval; (ii) word retrieval and KWIC indices; storage and maintenances of statutory tables; cross-references, and records of amendments, etc.
- (ii) *Case Law Material*
 - (a) the storage and retrieval of relevant West Indian cases, preferably in full-text form;
 - (b) the development of annotations to statute law from the stored material;
 - (c) the development of a West Indian retrieval bureau for statutory and case law material for judges, legislators, practitioners, law teachers and students.
- (iii) *Property registry systems and similar registers*
 - (a) Land registry systems
 - (b) Chattel registry systems
 - (c) Foreign and domestic company registry systems.
- (iv) *Later Computer Application*
 - (a) Law firm application
 - (i) firm accounting
 - (ii) text processing and control.
 - (b) Legal and social statistical application
 - (i) nature and frequency of criminal and other actions
 - (ii) other data acquired in the administration of justice of a demographic nature
 - (iii) projecting probable social and legal consequences of specific suggestions for variations in the law.

At the present time we view computer applications in terms of priorities. That is to say, it becomes necessary to expend our energies and resources where the most immediate and beneficial results can be obtained most economically. Since none of us live in

isolation what may not be possible for us to achieve alone might be practical in co-operation with others. So we must consider computer applications in those terms also.

Other Concerns

The Canada memorandum mentioned the possibility of a Commonwealth Legal Data Base and a Commonwealth Law Reform Base. Barbados wishes to make some observations in both these matters.

But first it seems necessary to address ourselves to those matters any developing country must look at before committing itself to the technology of the more developed world.

Essentially, a computer puts into the hands of its user the routine, clerical capabilities of millions of servants, depending on the power of the hardware and the sophistication of the software. Its use in legal areas is to help deliver legal services more effectively and efficiently. This should result in lower legal costs to the public and an increase in the volume of legal services delivered.

A developing country has two immediate concerns. Will computer use increase or decrease local employment? Will it make the country captive of the technology of the developed Nations?

The view in Barbados is that the employment sensitivity can be reduced in the community if the data base is compiled locally. That appears to be the most labour intensive area of computer use, as distinct from computer development or improvement. It becomes evident then that a developing country such as Barbados must have at least the human resources to convert material to machine readable form before embracing computerization of the law. Fortunately we have that resource within our community; it needs only to be given an opportunity to increase and be used.

The intellectual or software component associated with the use of computers in law is a more difficult problem for us. It is evident—and the Canadian experience bears out our assumption—that a small community can as easily, and sometimes more economically, develop software than a larger developed country. Two things would seem necessary: the every-day use of computers and the numbers of programmers and other technical personnel available locally. The creation of software, an intellectual achievement, need not be the monopoly of the more industrially developed nations.

From the Canada memorandum it seems that the developed use of computers in the area of legal information in Canada is now a mix of public and private ownership of computer software. We would be inter-

ested in learning how that development might affect us, were we to move to the use of computers.

Would the software of Commonwealth governments be made available freely to one another? To what extent would private operators of computer services permit the use of its software under licence or otherwise? Like any other independent country Barbados would prefer to have local control over the suppliers of legal services by computer application. (This problem will be more familiar as the problem of the transfer of technology from developed to developing nations). The question requires consideration as we move towards a commitment to computer applications for a country's legal data.

The local physical environment must also be considered when considering computers and their use in developing legal services. This is a matter that a developed nation might not even think about anymore, but we must.

To be economical, efficient and effective, the hardware must have a suitable home; that is, it must be in a controlled environment. This means reliable, controllable air-conditioning. If there are frequent or long periods of electrical break-downs a back-up system would seem to us to be imperative.

Both for the manipulation of the computer base, and the safe storage, off-line, of both software and the machine readable data base (that is, in a fixed form on tape, discs or otherwise), the physical environment can be crucial. We in Barbados feel ourselves fortunate in having a suitable physical environment in that regard.

Another environmental concern is the reliability of telecommunication services in a country. The computer hardware may be next door or across the country or outside it. Its location may be a result of economies of scale or the physical environment available for it. In the latter cases, it is essential that telecommunication be used and that they be reliable and within the economic means of the country. Again, we in Barbados are grateful that we have a reliable telecommunication system.

The Barbados Position and Priorities

In terms of what we conceive to be our priorities today, we wish to deal more fully with the computer applications described earlier, that is, statutory and related materials; case law materials; property and other registry systems. We shall discuss them briefly in the order of priorities as we presently see them.

(i) Registry systems

As a country develops it has need to expedite documents of title, etc. through its government operated registry systems—we speak particularly here of the legally related systems for real property, chattels, charges, company incorporation, and such like.

Delays within the system slow transactions and increase the costs of development with the consequence that business becomes more difficult generally. As we are now modernizing our registry systems we are most anxious to apply the advantages

of computers to those systems. The increase of human staff merely slows down such systems when the numbers become large, the data volume great, and speedy pass-through of data is required. (A consideration of the divorce registry system in the Department of Justice in Canada and its volume of work will substantiate that statement).

Therefore, Barbados intends, with all dispatch, to endeavour to have computers used in its registry systems. To that end we need studies done. For instance, can we in that application share time with the hardware used by Inland Revenue or must we acquire additional hardware?

Since Barbados is a member of the Caribbean Community of nations (CARICOM), we might well have to consult with Caricom to see if a joint or co-operative or shared use of hardware can feasibly be developed for these systems so that costs could be spread around and the services extended to neighbouring states.

In our case in any event, we see our first priority as being the development of computer-assisted registry systems. Nor are we unaware of the great difficulty inherent in the development of such systems. Hence our interest in the proprietary rights to software developed elsewhere for systems of this kind.

(ii) Statutory and related Materials

Barbados places a very high priority on the development of computer assisted drafting and publication of its laws. There are sound reasons for this emphasis on statutory material. It is increasingly evident that the State and its development is inhibited by two things in this area.

Firstly in Barbados, as in other developing countries to a like or greater degree, no doubt, the legal resources available to government are insufficient. Too few lawyers handling too many matters results in a decrease in the quality of the legal services delivered to government or in the quantity of those services. Sometimes the pressure on this legal resource may result in both a loss of quality and a loss of quantity.

A country's development is adversely affected when its legislative drafters are unable to produce legislation effectively and on a parliamentary schedule.

And legal opinions supplied to officials of government relating to statutory materials are delayed when access to the material is difficult or unreliable.

We are convinced that one of the practical ways to redress the imbalance caused by the leanness of our legal resources in government is to avail ourselves of the computer's ability to supply routine and massive clerical services. In this way our lawyers are given the time to exercise their professional functions while the "clerks" give them access to the legal materials.

In terms of legislative drafting there is another factor inhibiting the processing of legislation. Again this factor may exist elsewhere in greater or less

degree. The converting of draft legislation into Bills for the legislature involves a printing process. That is, at some point the drafter's efforts are key punched to produce a printed copy for Parliament to work with. Because of modern progress in printing the reliability of older printing methods has been destroyed in many cases without being replaced by a modern ability to adapt to or make use of newer printing methods.

This situation can do great harm to the effectiveness, efficiency and morale of a drafting service—and can leave a government's legislative programme vulnerable to a few, sometimes a surprisingly few, people. To see what others were doing about this problem Barbados sent its Chief Parliamentary Counsel to examine a number of solutions developed in Canada. The purpose was to see if any of those solutions were within the means of Barbados.

We discovered a number of electronic devices and systems being used. The computer application described in the Canada report was one; the text processing equipment used in Newfoundland and Nova Scotia were others, which differed in some significant respects in relation to later computer use of the data bases acquired in each case.

In Barbados's position the text-processing systems of either Provinces could remove our immediate printing problems and they are within our means. It is a tempting short-term solution.

Yet, a developing country, such as we are, is at the outset vulnerable to the servicing resources available within the country. Reliance for legislation on a text processing system that is only put back into service after great delay when it breaks down is a hindrance, not a help. Any needed back-up will likely not be available. Our legislative services would then be dependant on outside service support—not an attractive thought. But it is a possible way out and it would permit us to store and retrieve statutory materials and to print by photocopying, at least. For a developing country that method must be looked at closely.

The economies of scale and uses mentioned in the Canada report would operate as well between Barbados and the Caribbean region. If there were a possibility of time-sharing the use of a computer within Barbados for legislation, or developing a complex of mini-computers and a shared "mother" computer for the region, it would be more advantageous in the long run to both Barbados and the region to concentrate on the development of that kind of an operation.

Our reasons for so thinking are not startling nor self-serving. We think that the law school, the lesser developed countries nearby, our drafting staffs, judges and lawyers would all benefit, if we could organize a complex of a large computer accessible to remote mini-computers or remote terminals.

Not only could a large data base be considered feasible in such circumstances but the quality of the

available legal resources increased. Naturally, no country wishes to have its statutory data base in foreign hands, however friendly, so a system such as we contemplate could avoid that difficulty. Its similarity to the position in Canada is obvious.

We hope, therefore, that studies can get underway quickly to help us put into use in the Caribbean region a practical and economic system of text storage, processing and retrieval of statutory materials in aid of our legal communities and our peoples.

(iii) *Case Law Materials*

This application has a low priority with us, as yet. One only has to realize how difficult it is sometimes to get to our statutory data to understand why this is so.

We are aware that if we can develop computer facilities for the statutory materials, it becomes then a practical matter to think about storing, processing and retrieving case law. Thereafter it becomes at least possible to think about participating in a system of access to similar data bases in the other more developed Commonwealth countries.

(iv) *Later Computer Application*

We would not expect our attorneys-at-law to be any less traditionalists than their Canadian colleagues. Indeed, in observing the recent forward-looking activities of the legal profession in that country we are inclined to think that our attorneys-at-law might at this time be even less enamoured of computers than the average practising Canadian lawyer.

A newer generation of practitioners are coming out of our law schools who might be more tractable to computer assistance in law if they have the opportunity to become familiar with computer use within the law school.

This consequence might be expected after the development of regional computer application to statutory materials in a system involving the law teachers. (The students on the LL.M Course in Legislative Drafting at the Faculty of Law have been introduced to the concepts of computer text processing as part of that Course though no practical means are available now to demonstrate uses in drafting).

Subsequent applications of the computer in the non-government professional sector must of necessity develop more slowly in Barbados.

Summary of Application Consideration

We stress our firm conviction that it is in the national and professional interest of Barbados particularly, and of the other states within Caricom, generally, that we proceed to the use of computers in legal information processing as soon as possible.

Our proposals concerning how this might be done most rapidly and effectively are given later in this response, after we have discussed the role of the Commonwealth Secretariat in the development of legal data bases.

Commonwealth Legal Data Base or Bank

General

Again it is our happy privilege to commend the Government of Canada for its report on this data base. The outline is concise and the problems set out clearly in the report.

We do wish to make a few general observations from our perspective as a developing country.

The Commonwealth Secretariat already provides Barbados, for one, with a great deal of information about statutory materials developed elsewhere in the Commonwealth. This service is not mentioned in the Canada report; Canada would not be expected to be aware of the extent Barbados, and perhaps other Commonwealth countries, call upon the Secretariat to locate law reform and statutory material for comparison purposes.

We are grateful and indebted to the Secretariat for this service. It would only be an extended development of that service if it were to be computerized. But it would make the service more effective and efficient. The economies of such an operation might be in doubt at the moment. With the development of computer assisted drafting elsewhere in the Commonwealth, but economies of such a service could become real enough to make such a service attractive as well as advantageous to developing countries.

In commenting on the Commonwealth data bank we have to observe that if a developing country is to persuade or fling itself from the nineteenth Century, as some of us must, into the 21st Century, as is increasingly necessary, information and technology are the two most important vehicles at its command for the purpose.

In isolation these vehicles may possibly be out of the economic or material reach of many of us. Together, they are not. We will make a proposal at the conclusion of these remarks for the consideration of the Law Ministers of the Commonwealth.

Commonwealth Law Reform:

The computer professional's adage—garbage in garbage out—draws attention to an unfortunate paradox of the modern real world: in the garbage of the rich one may find food for the starving.

We are quick to acknowledge that the adage was not used in terms of law reform reports so much as pointing out that you get from computer data bases no better than you put in. There is no disagreement with that. But we do have two comments to make.

While the Commonwealth countries have all more or less acquired sophisticated legal institutions, we do not all have the same economic or social environments. Our legal institutions operate within and for our individual societies or communities.

Therefore we have a need to know not only what Canada or Australia is thinking in terms of law reform but also what their many political subdivisions are considering. Similarly, there is a need to

know what other less commercialized societies of the Commonwealth are thinking and writing in terms of law reform. The developed jurisdictions did not get to their recommendations without a history of legal, social or commercial development peculiar to them. As a consequence, what they are recommending at a particular time might not be as suitable to another jurisdiction as that being proposed for a less complex society.

Why does a developed or a developing country of the Commonwealth *need* to know what is being done elsewhere? The Canada report answers that question. It is wasteful of the resources of the Commonwealth countries for each of us to be researching similar problems in isolation. Computer programmers refer to this resource wastage as re-inventing the wheel.

The second comment we wish to make on the subject of a law reform base is this. We think it better to let each country judge for itself the usefulness of any law reform information compiled in a data base for Commonwealth use. What has been discarded as a practical solution by one country or jurisdiction may point out a saving solution for a law reform body in another jurisdiction.

It would be a very difficult task indeed for any one to make value judgments of this kind on a data base—that is best done “at home” in each case, in our view.

Once more we must express our appreciation to the Government of Canada for putting this subject and the problems succinctly to the Conference.

Legal Information Services:

The Canada report touched briefly upon another phase of legal information with which, we submit, we are all concerned. This is the fact, which was recognised in Canada by the creation of the Canadian Law Information Council, that the needs of all those concerned with legal information go beyond merely computerizing legal information. It is necessary to have regard to texts on local law, accessibility to local law, educating the public in the administration of justice, the commissioning of studies, the publication of court cases, etc. whether or not any of all of these matters make use of computers. Also some legal materials are more effectively, efficiently and economically stored on microfilm or by other devices. Perhaps, also, all modern storage and retrieval systems should be co-ordinated, interchangeable or integrated into one whole legal information system.

A body of this kind for regions of the Commonwealth might be a useful device to assist in the supervision and harmonization of regional development in those areas.

Perhaps the Minister of Justice for Canada might be persuaded to prepare a report on the background, composition and work of the Canadian Law Information Council. Such a report might be of use to Commonwealth members. If the Minister were good enough to have such a report prepared, the Sec-

retariat might be inclined to circulate it to the Law Ministers for their perusal.

Proposals for Consideration of Ministers

The Attorney-General of Barbados considers it timely and in the interests of the Commonwealth that certain following proposals be put forward by him for consideration at this Conference.

First Proposal

It is proposed that for the purposes of studying and developing computer application to legal information, the Commonwealth be divided into regions.

The regions should be so constituted (in our view) that each one has within it a country with developed experience and technology in computerizing legal information.

The regional studies should be co-ordinated by the Commonwealth Secretariat to ensure compatibility of systems and programmes and the exchange of progress reports, studies and knowledge of pilot projects underway in each region.

It is thought that the Committee might be voluntary and drawn from a select group of lawyers and technicians from each regional grouping, but responsible to the Secretariat for keeping it advised of progress and problems.

Second Proposal

It is proposed that one of those regions be the Commonwealth countries of Caricom and that action be taken as soon as possible to organize and fund two pilot projects in computer application to law; namely

- (a) the use of computer storage of records in property registers and company registers in the states of Caricom, in a regional system, a co-ordinated system or individual systems, as circumstances require; and
- (b) a computer assisted drafting and publication of laws project to comprehend the needs of regional governments in preparing legislation, the needs of the region in the storage and dissemination of statutory information; the needs of the Faculty of Law of the University of the West Indies in the education of lawyers; the needs of the judiciary, public officials, practitioners and the public in obtaining inexpensive and quick access to legislative materials; and the need to develop indigenous expertise in this application of computers to law.

Third Proposal

It is proposed that Law Ministers consider the setting up within the Commonwealth Secretariat

of a data base in machine readable form consisting of

- (a) statutory material from the members of the Commonwealth; and
- (b) law reform reports from the various law reform bodies within the Commonwealth.

To some extent this material is already available in written form within the Secretariat or could be made available by a system of regular delivery of the written matter to the Secretariat.

It becomes necessary to consider and respond to the queries raised by the Canada report in relation to both data bases.

We think the information should be full-text of the printed material. In some cases this may be available already in machine readable form. In other cases, it may be possible to have the originating body use computer facilities to develop machine readable law reform reports.

The printing firms used in other cases may be able to provide machine readable text from the printing process. This would have to be examined.

In all other cases, the keying to convert text to machine readable form might be done in the lesser developed countries under contract from the Secretariat. This would encourage and support computer development even if the actual conversion is then done by scanning equipment elsewhere.

The cost of making and updating the data base when made from written material might be borne by the Secretariat. The machine readable data already made by a country might be donated to the Secretariat. This can be more fully examined when the form of the material and its volume are known. The answer to the other queries would have to be dealt with when the needs and the available facilities are known.

Conclusion

We agree with the Canada report that the computer will affect our lives profoundly in the future; we hope that the Law Ministers will concur with us when we urge co-operation within the Commonwealth to develop, as quickly as finances and circumstances permit, a system to apply computers in the enhancement of our legal information resources.

Moreover, we view this as a realistic way to slow down and reverse the trend whereby developed nations are widening the technological gap between them and the developing countries. It is surely in all our interests to take the measures at hand to achieve both those objectives.

REVIEW OF THE SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS WITHIN THE COMMONWEALTH

Comment by the Barbados delegation

Professor Shearer's Paper on the review of the Scheme relating to the Rendition of Fugitive Offenders within the Commonwealth has been examined by our experts in Barbados and I wish here to give our general views on the issues raised and the suggestions made in that Paper.

At the outset, I may mention—something which has now already been noted in para 4 of Professor Shearer's Discussion Paper, though it was not mentioned in his earlier Paper circulated to Governments last November—that we have recently enacted a new comprehensive legislation on extradition in Barbados—the Extradition Act, 1979—intended to replace the earlier laws applicable on the subject like the U.K. Fugitive Offenders Act, 1881 and the Extradition Acts 1870–1935. One of the objects in enacting this statute was to give legislative effect to the principles relating to the rendition of fugitive offenders within the Commonwealth as formulated in the 1966 Commonwealth Scheme. Since the Commonwealth Scheme itself was to be reviewed shortly at the present Commonwealth Law Ministers' Meeting, we have not yet brought our Extradition Act, 1979 into operation by proclamation—as we would otherwise have done. We have in mind a few amendments to that Act which we would finalise in the light of the discussions at this meeting on the review of the Scheme itself.

As to the *applicability* of our legislation to different parts of the Commonwealth, we have adopted the legislative technique of designating a Commonwealth country to which the Act would apply by subordinate legislation, with the Minister for External Affairs being empowered to make such designation by an Order subject to negative resolution by Parliament. We fully appreciate that in applying our extradition legislation to other parts of the Commonwealth, assurances of reciprocity, as such, should not be strictly necessary. Indeed, as Professor Shearer's Paper rightly points out, to do so may be contrary to the intentions of the Scheme and we would not, therefore, be looking for any assurances of reciprocity before making our Act applicable to other parts of the Commonwealth. We have, however, reserved our right to make special modification orders to deal with the problem of any inconsistencies or incompatibilities arising from the legislation of other countries—a matter which has been recognised as reasonable in Professor Shearer's Paper. The Minister for External Affairs in Barbados is therefore, empowered to make the Act applicable in relation to the return of persons to or from any designated Commonwealth country, subject to such exceptions, adaptations or modifications as may be specified in the order.

Now so far as the '*Returnable Offences*' under the 1966 Commonwealth Scheme are concerned, in the Schedule to our Extradition Act, 1979 we have included all the offences listed in Annex 1 to the 1966 Scheme. But since our Act was intended both to implement the Scheme and generally to accord with current international practice regarding the return of fugitives, we were naturally compelled to extend the list of extradition crimes in our Act to other offences like, acts or omissions endangering the safety of an aircraft in flight or any person on board such aircraft, destroying or rendering any aircraft incapable of flight, hijacking of aircraft or other unlawful acts against the Safety of Civil Aviation specified in Article 1 of the Montreal Convention, 1971, offences against the laws relating to firearms and other weapons and explosives, offences relating to the sale or purchase of securities and commodities or against the laws relating to exchange control and income tax evasion. In terms of Professor Shearer's Paper they fall under both the categories of offences described therein, for which a revision of the Annex to the 1966 Scheme seems to have become necessary. Some of these additional offences are offences created by new international conventions to which Barbados has become a Party; others may be what are described in his Paper as 'other than international offences', which we felt should also now be made extraditable at any rate if the legislation of the other country concerned also recognised them to be so.

In view of this recent experience of ours in drafting our new legislation on extradition, we fully support the suggestion in Professor Shearer's Paper to revise Annex 1 of the 1966 Commonwealth Scheme to add an additional category of "offences established under international conventions to which both the requesting and the requested parts of the Commonwealth are Parties". We note that this suggestion has been supported in all the written comments on his Paper circulated to us from other members of the Commonwealth and indeed, as has been pointed out by some of them, it is imperative to do so for those countries who are parties to international conventions like the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970.

As regards the other suggestion in his Paper to include also a new paragraph in Annex 1 to the 1966 Scheme to cover offences which are not listed therein but are returnable under the laws of both the requesting and the requested parts of the Commonwealth, we are inclined to support that suggestion also to make the list of returnable offences under Scheme conform to current developments in the laws and practice of States. In supporting this suggestion we realize that to a certain extent the inclusion of

such a new provision in the Annex of Returnable Offences may impair the uniformity of application of the Scheme on Commonwealth-wide basis. But it may be remembered that the Commonwealth Scheme, even when it was adopted in 1966, was designed to be no more than a general basis upon which member States of the Commonwealth could enact their legislation and the proposed change should in our view, impart the necessary flexibility to the Scheme when a certain offence like say, violation of exchange control regulations was considered to be an extraditable offence in both the requesting and requested parts of the Commonwealth, though it may not be considered to be so in all the other parts of the Commonwealth at a given time. We would naturally be open to other suggestions on this point but we think that the limited inroad on uniformity involved in the suggestion in para 14 of Professor Shearer's Paper should be preferable as a solution to the problem in hand rather than the suggestion which has been made in some of the written comments to drop the enumerated list of offences altogether in the Annex to the Scheme and in its place say that an offence should be extraditable if it is punishable under the laws of both the requesting and the requested Commonwealth country by imprisonment or other deprivation of liberty for a specified minimum period. If that course is adopted, the revised Scheme would not provide much guidance to any new member of the Commonwealth in enacting its legislation on extradition and it would certainly be a much more drastic blow to the uniformity of application of the Scheme on a Commonwealth wide basis than is necessary as a solution to this problem.

We do not comment at length concerning the observations in Professor Shearer's Paper on the *Double Criminality rule* and the decision in *Gardner's* case in the United Kingdom. In our Extradition Act, 1979 in Barbados we have formulated the relevant provisions of s.4 of our Act on the lines of s.26 of the Extradition Act, 1870 in the United Kingdom rather than Section 3(1) of their new Fugitive Offenders Act, 1967. So the question of the Double Criminality rule being likely to be applied more stringently than was required under the 1966 Commonwealth Scheme is not likely to arise in Barbados.

But, with respect, this seems to us to be a matter calling for amendment or revision of the extradition law in the United Kingdom and some other Commonwealth countries who have enacted legislation on lines similar to section 3(1) of the U.K. Fugitive Offenders Act, 1967—if the Governments of the countries concerned deem it expedient—rather than a matter for review of the Commonwealth Scheme. Clause 10 of the Scheme, as it stands, seems to be quite adequate to make the point that it is the conduct of the accused viewed as a whole or the facts underlying the offence that must constitute an offence under the law of the country in which he is found. That is all that the Double Criminality rule should really call for.

At present our Extradition Act does not explicitly speak of extra-territorial offences but we have in

mind an amendment of the Act to make it clear that the definition of "extradition crime" would extend to extra-territorial offences also, for which courts in Barbados could clearly have jurisdiction under general principles of international law.

Now with regard to the difficulties referred to in Professor Shearer's Paper in giving legislative form to the definition of other offences caught by the *Speciality Rule* and the suggestion in his Paper that the word "other" in clause 13 of the 1966 Scheme be substituted by the word "lesser", I might mention that in our Act we have adopted more or less the phraseology of the Commonwealth Scheme while formulating the restriction on surrender of a fugitive criminal to a Commonwealth country under our Act. We have to be satisfied that the fugitive surrendered shall not be dealt with in that other Commonwealth country for or in respect of any offence committed before his surrender other than the extradition crime for which his surrender was requested or any 'lesser' offence proved by the facts on which that surrender was based. In the reverse case our Act provides that any fugitive offender surrendered to Barbados by a Commonwealth country shall not, unless he has been given a reasonable opportunity of returning to that country, be tried in Barbados for an offence committed prior to his surrender except the extradition crime to which the requisition for his surrender relates or any 'other' offence of which he could be convicted upon proof of the facts on which that requisition was based. We have in mind some amendments to the provisions of our Act on the Speciality Rule in other respects to remove some ambiguities in the existing provisions which have unfortunately crept in.

Anyway, so far as the suggestion in Professor Shearer's Paper to substitute the word "other" for the word "lesser" is concerned, we appreciate the difficulties which may have prompted that suggestion. At the same time, as the Government of Jamaica have pointed out in their written comments in conference document LMM(80)7 we can see some difficulty in simply substituting the word "lesser" in clause 13(b) of the Scheme by the word "other" as that would permit the trial of an extradited offender for a more serious offence than that for which he was extradited, provided it can be proved on the same facts. We would, therefore, suggest that in clause 13(b) the words "or any lesser offence proved by the facts on which that return was grounded" should perhaps be substituted by the words "any other offence proved by the facts on which his surrender was granted if it is also a returnable offence and not a more serious offence in terms of the maximum punishment attached thereto". We fully share the view expressed in Professor Shearer's Paper that, whatever the difficulties in practice in some of the applications of the Speciality rule, it serves a very valuable purpose and it cannot, therefore, simply be abandoned from the Scheme.

Turning next to the issue raised in Professor Shearer's Paper about the *Citizenship of Fugitives*, in Barbados we have not availed of the optional supplementary Provision (2) of Annex 2 of the 1966

Commonwealth Scheme to refuse the return of a citizen or permanent resident of Barbados in extradition, while giving legislative form to that Scheme through our Extradition Act, 1979. The Act is silent on the question of the nationality of the fugitive. But we fully endorse the concern expressed in Professor Shearer's Paper that unless countries, which on constitutional or other grounds, refuse to surrender their own citizens in extradition on the ground of their nationality make adequate provisions in their legislation to give jurisdiction to their own courts to try such persons themselves for offences committed abroad, justice would fail and it should be a matter for common concern to all the Commonwealth countries that a fugitive should not be allowed to escape on grounds of nationality alone.

With regard to the reference in the Paper to the European Convention on Suppression of Terrorism, 1977 and the idea of excluding a number of offences commonly associated with *terrorism* from the concept of *political offences* by amending the existing clause 9 of the Scheme raised therein, we might say that in our Act we have made provision to make some of these offences like 'hijacking' and dangerous acts in relation to aircraft' extraditable crimes. Of course, even for those offences—as for any other extradition offences—the courts and the Attorney-General have the power to refuse extradition if on the facts of a particular case they come to the conclusion that, if surrendered the fugitive would be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions, etc. But whether clause 9 of the Commonwealth Scheme should be amended for this purpose in a future revision of that Scheme is a matter on which we would like to hear the views of other delegations.

Professor Shearer's Paper suggests the addition of a new sub-paragraph to the existing paragraph 3 of clause 9 of the Commonwealth Scheme on '*Other circumstances precluding return*' to refuse or delay the surrender of a fugitive if the state of health or other personal circumstances of the fugitive make it unjust or oppressive or too severe a punishment to return the fugitive immediately or before the expiry of a specified period, as the case may be. It is submitted in the Paper that the words "other personal circumstances of the fugitive" would provide sufficient flexibility to deal with any other cases of an unusual nature—apart from the fugitive's health which was in issue in the New Zealand case referred to in the Paper.

The Paper also draws our attention to the Canadian Fugitive Offenders Bill, 1978 (since lapsed) which ignored clause 9(3) of the Scheme altogether but included instead a new provision to say that the Minister may refuse to order the surrender of a fugitive where it appears to him that the fugitive would be likely to suffer an excessively severe or inhumane punishment for the returnable offence in respect of which his return was requested.

In our Act at present we have not included any provisions on the lines of clause 9(3) of the Com-

monwealth Scheme. But we have under consideration some proposals for an amendment of the Act to preclude the return of a fugitive in certain circumstances when the fugitive is likely to suffer undue hardship by his return and it would, having regard to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return him, or as the case may be, return him before the expiry of a fixed period. At this stage, therefore, all that we can say is that we do see a valid case for revision of clause 9(3) of the Commonwealth Scheme as part of its general review. We agree that the existing sub-clauses (a) and (b) of clause 9(3)—on the trivial nature of the case and on the accusation not having been made in good faith—are unnecessary for reasons indicated in Professor Shearer's Paper. The third sub-clause (c) on the passage of time since the commission of the offence should perhaps be retained and some other suitable new words should be added to take care of considerations like the state of health of the fugitive or the possibility of his suffering undue hardship like an excessively severe or inhumane punishment or trial by some *ad hoc* extraordinary tribunal where he may not receive a fair trial. But we would not, on the whole, favour the inclusion of any wide general exclusion clauses in the Scheme to preclude the return of a fugitive offender.

On the question of *costs* of extradition we have made a provision in our Act that all expenses incurred in respect of any fugitive whose surrender is sought must be paid by the Commonwealth country or foreign State that requisitions his surrender unless other provisions for the payment of expenses have been made by treaty, convention or arrangement applying to that Commonwealth country or foreign State. This does not necessarily mean that we anticipate receiving more requests for extradition from Barbados than we would be making from other countries. But so far as the Commonwealth Scheme is concerned, we feel that it would be better to leave the Scheme as it is on this point—silent—rather than write into it any words to the effect that government legal officers of the requested country would help by representing the requesting country in an extradition matter. With our limited man-power in the Attorney-General's Ministry, we would find it extremely difficult to meet such demand in every case and I am sure many other small countries represented here would feel the same difficulty. We would rather prefer leaving this matter of costs to bilateral arrangements, as and when the occasion arises.

Coming next to the question of *appeals* by requesting Governments, we appreciate the need for a requesting Government to have the possibility of a review of a Magistrate's finding when a Magistrate refuses to commit a fugitive offender for surrender. As has been pointed out already in the written comments of some other Governments, limited procedures for review or revision, especially on a Magistrate's finding on questions of law, exist already in many countries under appropriate provisions of their extradition Acts. However, if other Governments consider it desirable to write into the Scheme any provisions on making special review pro-

cedures available to requesting Governments, balancing those offered to the fugitive, as suggested in Professor Shearer's Paper we would be open to consider any specific proposals.

Finally, we would support the idea of including in the 1966 Scheme suitable provisions on "*consent orders*" whereby committal proceedings can be dispensed with on express waiver by the fugitive with suitable guarantees on the application of the Speciality Rule. If that proposal is accepted, consequential amendments to extradition legislation in Commonwealth countries would become necessary but there should not be much difficulty in incorporating suitable provisions to make this possible.

However, we would prefer the question of *legal aid* in extradition proceedings to be left to be governed simply by the relevant legal aid legislation in the requested country.

In *conclusion*, we welcome a review of the 1966 Commonwealth Scheme on the Rendition of Fugitive Offenders within the Commonwealth at this stage in the light of subsequent experience of different Commonwealth jurisdictions and related developments in the field of extradition law. We hope that as a result of our discussions, we can up-date and improve the Scheme to make it serve as even a more effective basis of co-operation within the Commonwealth in the future than it has been in the past.

REVIEW OF THE 1966 COMMONWEALTH SCHEME RELATING TO THE RENDITION OF FUGITIVE OFFENDERS

Memorandum By The Government Of Uganda

As yet, Uganda has not enacted a law to adopt the 1966 Commonwealth Scheme relating to the Rendition of Fugitive Offenders. However, we have constantly studied this Scheme and we are continuing to do the same to see whether we may, at the appropriate stage adopt it.

As preliminary observations our comments on the review of this Scheme as presented by Professor I. A. Shearer are on the following lines:—

1. *Reciprocal Application Of The Legislation*

In our view, as the terms of the 1966 Scheme are silent on the procedures for its application between those countries that have adopted it, for the sake of uniformity we consider that it would be desirable if a provision could be made for the automatic reciprocal application of the Scheme amongst Commonwealth countries that have adopted it. In the end it would then not be necessary for separate enactments by those states to bring about the application of the Scheme in their respective countries. It would further not be necessary to enact any legislation to define either "Commonwealth country" or a country in which the Scheme operates, hence cutting down on a multiplicity of legislation to be enacted giving effect to the Scheme within these States.

2. *Returnable Offences*

We support any proposal to include offences not listed in the Annex but which are returnable under the laws of both the requesting and the requested states of the Commonwealth. We believe that this would accommodate the desire by some Member States that would wish to see certain other offences included in the Annex. Uganda therefore calls upon the Meeting to consider the inclusion of certain economic crimes as returnable offences under the Scheme. These are crimes that need collective effort to minimize or to combat their occurrences. Such crimes as smuggling, foreign exchange violations, infringement of patents, trade marks and copyrights can only be effectively fought by a concerted and collective action of countries.

3. *Speciality Rule*

While noting some of the advantages mentioned in paragraph 22 of Professor Shearer's paper, there are some practical difficulties that need to be examined—

- (a) In clause 13.1 of the Scheme itself, the Speciality Rule relates to a fugitive "offender who has been returned from one part of the Commonwealth to another part thereof, so long as he has not had a reasonable opportunity of going back to the first mentioned part". It is suggested that this clause assumes that on acquittal or discharge of the prisoner, the prisoner will go back to the state

where he had been extradited from. This may not necessarily be the case. Suppose the prisoner following his discharge or acquittal had a reasonable opportunity of going to a third state (not the state where he had been extradited from) but failed to take such opportunity of going to that state, would the Speciality Rule not apply merely because the opportunity was not of going back to the country where he had been extradited from? For avoidance of doubt, we suggest that the phrase "going back to the first mentioned part" be replaced with the phrase "going to another part of the Commonwealth". This is because it might be possible that such a fugitive offender might not have had a reasonable opportunity of going back to the country where he had been extradited from but rather to another Commonwealth country.

- (b) What duration or time sequence would constitute a reasonable opportunity needs further elaboration especially as the fugitive is in most cases a citizen or a habitual resident of the requesting state. Without any specific guidelines the interpretation of this phrase would vary from state to state or from court to court and in the end it may not serve the interest of any party.
- (c) In clause 13.2 of the Scheme, consideration may be given to include "a returnable offence carrying the same penalty as the offence for which he was returned", as one of the offences for which the returned fugitive offender may be tried in the same manner that a returnable offence of the same nature as the offence for which he was returned is treated. This proposal is made on the understanding that offences of the same nature may not necessarily carry same penalties.

4. *Other Circumstances Precluding Return*

It is agreed that it would seem desirable to add a fourth sub-paragraph to the existing paragraph 3 of clause 9 of the Scheme, but it is asserted however, that such additional condition be confined only to concerns for the health and welfare of the prisoner and to exclude any other personal concerns of the prisoner. This was also the spirit of S.10 of the Fugitive Offenders Act, 1881.

We therefore propose a fourth sub-paragraph as follows:—

- (d) The "state of both the mental and physical health of the fugitive", it would, having regard to all the circumstances...

It is our view that the circumstances in this case is quite precise and its proof calls for a straight forward medical testimony. With respect, Professor Shearer's proposal in particular the phrase, "or other personal

circumstances of the fugitive'', is rather general and wide in scope and its application could run into difficulties. In a way it gives too much protection to the fugitive offender and considering that such a condition is merely to delay rather than a discharge, it should be restricted so as not to prolong or delay the prosecution of the case.

5. *Costs*

The question of costs is considered in paragraph 34 of the paper. In Uganda, extradition proceedings would normally be conducted by the State on behalf of the requesting country. This would be done in the hope that similar assistance would also be rendered by the requested country should Uganda file any extradition proceedings before any of its courts. In other words, Uganda government meets the costs of

extradition applications made within its territory. However, the requesting country would still be free to engage its own lawyer if it so wished.

As to whether the question of costs be written in any revision of the 1966 Scheme, we would prefer to leave this matter to bilateral arrangements between the parties when the occasion arises. A Scheme of this nature should not concern itself with the fine details of costs and disbursements.

6. *Legal Aid*

In any future revision of the Scheme, the question of legal aid to the fugitives should be left open such that it may be made available to the offender under the same conditions as it is provided to the citizens of the requested country.

THE TRANSFER OF CONVICTED OFFENDERS FROM AND TO COMMONWEALTH JURISDICTIONS

Memorandum By The Government Of Uganda

The Government of Uganda notes with appreciation Mr. A. M. F. Webb's paper on a possible Commonwealth approach on the above subject. We shall continue to study this subject with a view to making any contribution we may deem appropriate at a later stage.

As preliminary observations we would like to make the following comments on the paper:—

1. While agreeing in principle that the convicted offender to be considered within the framework of this Scheme must be a citizen of the country to which he is to be transferred, it is pointed out that the provisions of the European Conventions that require a country which adheres to one or other of them to enforce such a sentence on a person ordinarily resident therein (i.e. not necessarily citizen) is a better approach to the problem than the formulation based on the Canadian experience that limits this arrangement to citizens only.

Under the European Conventions, a degree of latitude is given to the offender to decide where he may wish to be transferred if he has to make a choice. This would be the case where the offender is a citizen of country X but may be residing with his family and working for gain in country Y. It is felt that in requesting to be transferred to either country X or country Y as in this example, the offender will pay due regard to a place where he may better serve his remaining sentence and it would not matter whether he is a citizen of country Y or not, so long as his application for transfer is accepted by Y.

The meeting may wish to address itself to this problem at the appropriate time.

2. We emphasize that the rationale of the transfer arrangements as proposed in this paper is the humane considerations on the part of the offender. It is our view therefore that the transfer should apply to all types of offences, but the sending country to reserve the right to refuse to surrender the convicted offender of certain types of offences.

3. It is given in paragraph 22 of Mr. Webb's paper that there are two alternatives to meet the costs of transfer arrangements under this Scheme:

- (a) That the Government of the country in which the offender is convicted, upon his transfer to his home country being agreed with the government of that country, should make the arrangements and pay for his journey on the basis that that government will be relieved of the future cost of keeping the offender in prison, and supervising him on parole; and
- (b) That the government of the country whose national is being repatriated has the greater interest in the wellbeing and rehabilitation of the offender.

A possible third alternative could be the sharing of or the apportionment of the costs of such a transfer between the sending country and the receiving country. We consider this as an appropriate alternative considering that both parties stand to gain by this arrangement. Again the meeting may wish to address itself on this possible third alternative. When negotiating such a transfer arrangement the countries concerned will then choose which of the three alternatives to apply as regards the settlement of costs.

APPEAL AGAINST ACQUITTALS AND SENTENCES

Memorandum By The Government Of Uganda

Generally there is no automatic right of appeal from a Judicial decision. The right of appeal is the creation of a Statute and no party, even the State, has such right unless if specifically provided for by Statute. This is the position in Uganda.

While the prosecution has a right of appeal against an order of acquittal by a Magistrate's Court, the same right is not available where the order of acquittal is that of the High Court. Again this is because of the absence of Statutory provisions for that right.

In Uganda, indictments in the High Court are in respect of very serious offences often carrying a death penalty on conviction and it may be argued, perhaps, that where an accused has escaped the gallows or a long term of imprisonment on acquittal, the dictates of moral considerations militate against subjecting him to a further possibility of doom based on an appeal against the acquittal. This may well be so in jurisdictions based on jury-trials.

In our case, like a number of other Commonwealth jurisdictions, such trials are conducted before a single High Court Judge usually aided by assessors whose advice is not binding on him. He is both a Judge of fact as well as the law. The rationale of there being no appeal against an order of acquittal from a trial by a jury cannot surely be the same as that of a decision of one person deciding both the facts and the law.

It would appear that we, like many other former English dependencies, on receiving our laws from the English common law practices, did accept or were perhaps unwittingly made to accept certain legal practices and laws which would not produce the same justice based on our local practice as it would, say in England.

In the instant practice of no appeal by the State against an order of acquittal by the High Court, it may well even cause a miscarriage of justice.

While in no way attempting to down-play the ability of a High Court Judge's ability to properly evaluate the facts in a criminal case and come to a just decision, we do not think the safeguards available in jury-trial jurisdictions approximate anywhere near a situation like ours where one person is

the sole judge of everything. We have to recognise real human failings in judging factual situations which quite often are based on personal understanding and evaluation of the facts. It is quite understandable of course, and we see the logic of no appeal from a decision by a jury, because such a decision made as it is by the unanimity of twelve persons or so is unlikely to be wrong. Clearly, an acquitted person ought not to be subjected to any further ordeal on appeal in that case. Since our trial practice is different, different considerations have to be borne in mind.

We are of the view that in deciding on a criminal trial, the rights of the accused have to be balanced with the public or community right of bringing to book those who by their conduct transgress the norms of a society or state as embodied in its criminal laws. That is why we argue that where a Judge sitting alone has misconstrued the facts and let go a criminal, the prosecution ought to have a right by way of appeal to challenge that decision. After all, our Court system is a hierarchical one and we see no rationale of making an exception in acquittals in the High Court only, especially so if the case in the first place commenced in the court presided over by one Judge.

In a system like ours, therefore, we think a right of appeal against an order of acquittal on indictment is essential for a balanced and fair administration of justice.

We note of course, that even where there is a right of appeal by the prosecution, in almost all such jurisdictions, it is expressly provided that the appeal has no effect on the earlier acquittal. It is only a matter of a declaration on the issue which is always on a matter of law only and no more. On our part we think this is not sufficient as even a subsequent error disregarding or misunderstanding the court of Appeal's direction will always end up in the accused being let free with no other substantial remedy for the prosecution. We would submit that since, after all the Court of Appeal is never composed of less than three Judges, this Court should have the right of substituting its own decision or at least of ordering a retrial. As the saying goes, we also think that more often than not, "two heads are better than one".

CROWN PRIVILEGE IN THE 1980's A DECADE OF CHANGE

Memorandum By The Government Of Lesotho

Some evidence may be excluded on the ground that its reception would be contrary to some aspect of public policy. If military secrets were to be disclosed in civil or criminal cases then the security of the state would be in jeopardy. The detection of crime would be greatly hampered if the names of informers were disclosed in court. It is for this reason that certain evidence whose disclosure would be contrary to state interest is excluded. This is called State or Crown Privilege.

The objection to disclosure on the grounds of public policy is usually raised by a Government Minister if he is aware that such evidence is about to be disclosed in Court. The objection may be raised in both civil and criminal matters. The objection may also be raised by a witness, parties in civil litigation or a judge presiding in the case.

The law of Lesotho governing the exclusion of evidence on the grounds of state interest is the same as the law of England. In the case of *Duncan v. Cammell Laird & Co., Ltd.* [1942] A.C.624 the

House of Lords laid it down in no uncertain terms that the objection by the Minister to disclose of evidence was conclusive and that the court had no power to inspect the documents in to satisfy itself that the Minister's objection was justified.

The decision in *Duncan* was overruled in *Conway v. Rimmer*, [1968] A.C.910 and today the courts have "a residual power to reject an objection in proper form that the disclosure or production of a document would be injurious or prejudicial to the public interest."

Conway v. Rimmer was decided after Lesotho had attained independence and therefore it is not binding on our courts, but merely persuasive. There is no doubt that if a question of State Privilege came before our courts *Conway's* case would be followed.

Another governing principle is whether there is proof that the Crown privilege is being claimed on grounds that are frivolous or vexatious—that is to say, the claim of the privilege should be *bona fide*.

THE PROMOTION AND DEVELOPMENT OF INTERNATIONAL CO-OPERATION TO COMBAT COMMERCIAL AND ECONOMIC CRIME

Memorandum By The Government Of Lesotho

Crime is terribly increasing not only in the Commonwealth countries but in the world at large. It is increasing in the company offices, on building sites and industrial complexes. There is indeed, a rise in the offences committed within and against bureaucracies as increasing public resources are devoted to development schemes, to agricultural or commercial subsidies.

Murders, armed robberies and rapes are alarming, dramatic and often highly visible. These have to be prevented or vigorously investigated and prosecuted. But in terms of permanent damage to an economy or to the incomes and future welfare of a population, white collar and corporate crime are probably much more serious. Yet corruption, illegal price fixing, fraud in trade practices can fuel inflation, lead to unemployment, impoverish large numbers of people on fixed incomes.

The law, the police and the courts are geared to the more conventional types of offending and are usually quite incapable of dealing with this new challenge. The police are totally inadequate to deal with complicated malpractices hidden away in dovetailing companies and such obtuse accounts that an army of chartered accountants would find difficulty in understanding, let alone prosecuting.

When currency movements and the operations of multi-national corporations are brought into this picture and the armies of lawyers mobilised on both sides, it is obvious that criminal justice services in many commonwealth countries are faced with a serious challenge to their drive and ingenuity. Thus to tackle the problem realistically means not only a revamping of the criminal justice system, but a re-appraisal of business and bureaucracy in terms of crime prevention.

It is therefore important to recognise this burgeoning of commercial and economic crime for the menace which it is to the economy generally and to low income consumers, and taxpayers. It is equally important to initiate action on several fronts with a view to understanding the problem better and re-tooling the conventional criminal justice services to deal with it.

The direction which such action may take, is to pool knowledge and initiate further studies. Economic analyses of the extent, the cost and the impact of this type of crime are urgently required; but the legal studies of the problems involved in dealing with the subject and, in particular investigations of the past defects of law and law enforcement in relation to major prosecutions would be useful. It is important to know how offences arose at what levels in the company organisation, and how responsibility was shared.

There is a need for knowledge of the commercial and economic crime to be brought into training courses, not only for police, lawyers magistrates or judges, but also into training courses for business and management, for accountants and executives.

It is clear that such offences are beyond the capacity of existing police structures. An education in economics, law, banking, accountancy and in the way to conduct investigations into highly sophisticated and legally advised enterprises are obviously necessary. Teams of skilled specialist investigators will be required to successfully investigate and prosecute economic offenders.

We endorse the views expressed by Dr. Barry Rider in his paper. There is a need to reduce criminal activity in this area. The law enforcement authorities should gain ground in the struggle to protect the interests of the international community.

CONFISCATING THE PROCEEDS OF CRIME: RESTITUTION OF STOLEN PROPERTY

Memorandum By The Government Of Lesotho

If a person is convicted of theft or receiving stolen property knowing it to have been stolen, or otherwise unlawfully obtaining any property, such property may be restored to the owner or his representative on application by him to the court.

The difficulty often arises where the stolen property has been sold by the thief and cannot be traced, but the thief is found in possession of the proceeds of the sale. The Courts have held that the law of restitution refers to the stolen property and not the proceeds of their sale and have refused to give such proceeds to the victim.

In some cases involving theft of money the courts have held that the goods bought with the stolen money cannot be given to the victim. On the other hand it is contended that the thief is not legally entitled to the goods he bought with stolen money. It is suggested that the best thing to do would be to confiscate the goods and sell them if they prove to be of no value to the victim. The proceeds of such sale can be given to the victim. It is most absurd to give the goods bought with stolen money back to the accused and then leave the victim to institute civil proceedings. A civil judgment is entirely useless when it has to be executed against a man of straw.

Where a person has been convicted of causing personal injury to some other person, or damage to

or loss of property belonging to some other person the court convicting him may forthwith award him compensation provided such compensation shall not exceed four hundred maluti. This order of compensation can be made only on the application by the victim and it requires that the value of the property or damages claimed should have been well canvassed in the proceedings and the court is entitled to hear further evidence in order to determine the amount of compensation applied for.

There is a provision in our law that an award of compensation made in the criminal trial of the accused person shall have the effect of a civil judgment of that court. After the victim has obtained a civil judgment without actually instituting civil proceedings which are often very costly and time consuming the proceeds of the crime can be executed wherever they may be and in whatever form they may be including savings in bank accounts.

The suggestion that the state should pay compensation for personal injury caused by the criminal acts of other people is a good one because in most cases people who cause such personal injuries are not at all men of means. In those countries where the crime of bodily injury is rampant the taxpayer may have to pay large amount of money and yet there is civil remedy open to any person who has been aggrieved.

APPEALS AGAINST ACQUITTALS AND SENTENCES POSITION IN THE KINGDOM OF LESOTHO

Memorandum by the Government of Lesotho

In the Kingdom of Lesotho the customary courts have been established and created by the Central and Local Courts Proclamation No. 62 of 1938 (Vol. X of 1965). These courts are endowed with civil and criminal jurisdiction. The criminal jurisdiction of these courts is governed and regulated by the warrant of the Minister of Justice with the concurrence of the Chief Justice of Lesotho, and these courts administer the Basotho law and custom—and they can hear all cases criminal save those cases where death of a human being is alleged to have occurred.

2. Any person aggrieved by a decision of a Local Court can appeal as of right to a Central Court and should the Central Court confirm the conviction and sentence, a further appeal as of right lies to the Judicial Commissioner. But there shall be no appeal to the High Court from the decisions of the courts of the Judicial Commissioner except in the following cases:—

- (a) Upon any question of law or of native law and custom reserved by the Judicial Commissioner at the instance of either party or of his own motion; or
- (b) Upon the Certificate of the Judicial Commissioner that it is a fit case for appeal on any other ground which appears to him to be a sufficient ground of appeal:

Provided that nothing herein contained shall in any way affect the right of the High Court to make such an order as may seem just upon the motion of any party aggrieved by the refusal of a Judicial Commissioner to allow an appeal under the preceding paragraphs (Section 28(3) of the Central and Local Courts Proclamation 62/1938.

3. In our jurisdiction the Director of Public Prosecutions may challenge the decision of a magistrate's court in the following circumstances:

- (a) Where a magistrate dismisses the summons or charge at any stage of the proceedings on exception or on the ground that it is bad in law and/or that it discloses no offence. (Section 73(2) of the Criminal Procedure and Evidence Proclamation)
- (b) Where the magistrate has given a decision in favour of an accused on any matter of law. The procedure to be followed here is by way of stated case (Section 73(7) of the said Proclamation).

4. In our jurisdiction the Director of Public Prosecutions cannot apply for review of a sentence or order imposed by a Subordinate Court unless such sentence or order sought is mandatory by law. Our policy is that sentencing is a pre-eminent discretion of a trial judge and each case is to be determined according to its particular facts and circumstances.

5. Section 7(2) of the Court of Appeal Act No. 10 of 1978 provides as follows:

If the Director of Public Prosecutions is dissatisfied with any judgement of the High Court upon a point of law in the exercise of its original jurisdiction, he may appeal against such judgement to the Court (of Appeal); and secondary appeals are provided for under section 8 of the Act No. 10/78 (supra). It reads as follows:

- (1) Any party to an appeal to the High Court may appeal to the Court of Appeal) against the High Court Judgment with the leave of the Judge of the High Court, or, when such leave of the court on any ground of appeal which involves question of law but not on a question of fact nor against severity of sentence.
- (2) For the purposes of this section an order made by the High Court in its revisional jurisdiction, or a decision of the High Court on a case stated shall be deemed to be a decision of the High Court in its appellate jurisdiction.

6. In Lesotho where the Crown appeals against an acquittal on a point of law from the High Court to the court of Appeal and the appeal succeeds, this has no effect on the earlier acquittal though there is no express provision in the Court of Appeal Act.

7. It must be clear that in Lesotho the Crown cannot appeal against a sentence imposed by a trial court, unless the sentence sought is mandatory by law as already pointed out above in paragraph (4).

8. Our law also provides that the Court of Appeal can if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed. In case of an appeal against the conviction, the court of Appeal can either quash the conviction and direct a judgment and verdict of acquittal to be entered or if the interests of justice so require, order a new trial.

THE POSITION WITH REGARD TO THE RENDITION OF FUGITIVE OFFENDERS IN LESOTHO

Memorandum by the Government of Lesotho

The extradition law of Lesotho contains a provision for the designation of countries for the reciprocal rendition of offenders. The list includes all Commonwealth countries but excludes South Africa.

2. Lesotho's law in this regard restricts returnable offences to those which are triable in the Kingdom, i.e. those which are recognised statutory or common law crimes. It is this provision which provides the bar to the recognition of South Africa as a country with which to extradite. For example so-called "mixed marriages" are an offence in South Africa but not in Lesotho. The plethora of wholly political crimes that are common in South Africa constitute another insurmountable barrier in the path of any proposed negotiation.

3. Extradition cases in which Lesotho was a party were:

- (a) the rendition by Lesotho of its citizen to Swaziland; and
- (b) Lesotho's application to Botswana to extradite a Mosotho wanted in connection with several crimes.

4. The following is a brief outline of the salient provisions of this legislation:

(i) *Reciprocity*

Before the provisions of this legislation can be put into operation, there must exist with the requesting state a reciprocal arrangement for the return of fugitive offenders.

(ii) *Double Criminality Criteria Must be Satisfied*

The alleged offence must be an offence according to the law of Lesotho as well, and must be punishable by imprisonment exceeding twelve months.

(iii) *A Request for a Relevant Offence*

The request for the return of a fugitive must be for the relevant offence in terms of the Act, and such request shall not be granted if the offence in respect of which the surrender is sought:

- (a) is of a political character; or
- (b) the application is an attempt to institute proceedings on account of religion, race, nationality or political opinion.

(iv) *No Request shall be granted unless . . .*

No request shall be granted unless the requesting state has made provision in its own law enabling it to arrange with the surrendering state (Lesotho) that the fugitive criminal shall not be tried for any other offence committed prior to

his surrender other than the offence for which he was requested and subsequently surrendered.

- (v) No person shall be surrendered if the court hearing the application for his return is satisfied that he shall in fact be prejudiced in his trial or that he might be detained or imprisoned on account of his race, religion or political opinion.

Returnable Offences

5. The Lesotho Fugitive Offenders Act No. 38 of 1967 came into operation on 1st August 1970. In 1972 the schedule of returnable offences was amended to include "acts committed on board or in relation to aircraft which are declared to be offences by any treaty or other international instrument to which Lesotho is a party".

6. In 1977 the schedule was again amended to include "acts of violence committed in relation to the persons or property of an internationally protected person which acts are declared to be offences by any treaty or other international instrument to which Lesotho is a party".

7. In his discussion paper Professor Shearer raises the question whether in the light of unilateral action by some Commonwealth countries to add certain returnable offences, it would not be advisable to revise the 1966 annex of returnable offences and include a general category of "offences established under international conventions to which both the requesting and the requested parts of the Commonwealth are parties. Lesotho would have no objection to such addition as it would automatically include offences which will in future be created by any international conventions.

Citizenship of the Fugitive

8. The Lesotho Fugitive Offenders Act makes it clear that the surrender of a Lesotho citizen for act committed outside Lesotho is on a discretionary basis.

Where a request for the return of a person claimed has been refused by reason of the fact that the person so claimed is a citizen of Lesotho he can be prosecuted in Lesotho with the approval of the Attorney-General. Under normal circumstances Lesotho Courts would have no jurisdiction for acts committed outside Lesotho but section 13B(1) of the Act provides jurisdiction to the courts for acts done outside Lesotho which constitute an offence for which a citizen would be liable to be returned.

APPEALS AGAINST ACQUITTALS AND SENTENCES

Memorandum by the Government of Sri Lanka

Criminal Jurisdiction is exercised by the Magistrate's Courts and by the High Courts in accordance with the provisions of the Code of Criminal Procedure Act No. 15 of 1979 and the Judicature Act No. 2 of 1978. The Primary Courts exercise criminal jurisdiction in terms of the said Judicature Act.

2. The Code of the Criminal Procedure Act No. 15 of 1979, contains the following provisions in regard to appeals from an acquittal in the Magistrate's Courts.

318. An appeal shall not lie from an acquittal by a Magistrate's Court except at the instance or with the written sanction of the Attorney-General.

319. Where a Magistrate's Court has refused to issue process a mandamus shall lie to compel such court to issue such process, but an appeal shall not lie against such refusal except at the instance or with the written sanction of the Attorney-General.

3. Sections 336 and 337 of the said Code, provide for appeals from sentences passed and acquittals entered by the High Courts when accused persons are tried on indictment.

336. On an appeal against the sentence whether passed after trial by jury or without a jury, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence, and pass other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed and in any other case shall dismiss the appeal.

337. (1) In an appeal from an order of acquittal, the Court of Appeal may reverse such order and direct the accused to be re-tried or find him guilty of the same or a different offence of which the accused person could have been found guilty on the indictment and pass sentence on him according to law.

(2) In an appeal from any other order, the Court of Appeal may alter or reverse or set aside such order or make such order in substitution for the order of the High Court as may be warranted by law.

4. The Attorney-General is given an extended period of time, namely, 28 days, within which he could appeal or sanction an appeal to the Court of Appeal. Any other person who is dissatisfied with any judgment or final order of any Magistrate's Court or of the High Court, has to prefer an appeal within 14 days of such judgment or order.

5. Section 15 of the Judicature Act No. 2 of 1978 gives the Attorney-General a specific right of appeal from an order of acquittal by a High Court and also in respect of inadequate or illegal sentences imposed by the High Court.

15. The Attorney-General may appeal to the Court of Appeal in the following cases:—

(a) from an order of acquittal by a High Court—

- (i) on a question of law alone in a trial with or without a jury;
- (ii) on a question of fact alone or on a question of mixed law and fact with leave of the Court of Appeal first had and obtained in a trial without a jury;

(a) in all cases on the ground of inadequacy or illegality of the sentence imposed or illegality of any other order of the High Court.

6. Hitherto, the Attorney-General had no right of appeal whatever, from a verdict of acquittal entered in a trial by a jury. For the first time, a limited right of appeal from a verdict of acquittal in a trial by jury has been granted by the aforesaid provision of law.

7. It is only the Attorney-General who could appeal or grant sanction to appeal from an acquittal entered in a criminal proceeding. Although the Code itself draws no distinction between the powers of the Court of Appeal to interfere in an appeal from a conviction on the one hand and from an acquittal on the other, yet judicial decisions have interpreted restrictively the powers of the Court in relation to appeals from acquittals. It is an elementary principle that no man should be twice placed in jeopardy for the same offence and an appeal from an acquittal is usually confined to a question of law. It is only in very exceptional circumstances that the Attorney-General would appeal on questions of fact. Justice Akbar in the case of *King v. Mack and Carron* (XI Ceylon Law Recorder 1) stated:

The learned Solicitor-General frankly admitted at the very outset of his argument that he had a heavy burden to discharge in this appeal. He admitted that such an appeal on a question of fact from an acquittal... could only be justified if there had been a palpable misdirection by the District Judge when considering the facts of the case which—to use the Solicitor-General's words—could be demonstrated to be wrong on the very face of the record. Or, in other words, his appeal could only be justified if the misdirection was obvious and had in effect resulted in a miscarriage of justice.

8. The principles which govern an appeal from an acquittal were again emphasised by the Supreme Court in a judgment delivered in 1931:

An appeal from an acquittal is a remedy which has no place in most parts of the British Empire. The general rule is that if a person has been fairly and properly tried and acquitted, he ought not to be put in jeopardy a second time for the same offence. . . . It is obviously not sufficient that the Court should think that there is material on which another Magistrate might come to the conclusion that the accused was guilty. It must, I think, be satisfied that no other conclusion was reasonably possible but that the accused was guilty or that the

Magistrate did not apply his mind to the whole evidence in the case. Per Lyall Grant, J., *Fernando v. Peiris* 33 New Law Reports 71, 72.

9. As regards enhancement of sentences, the procedure that prevailed prior to the enactment of the Code of Criminal Procedure Act No. 15 of 1979, was for the Attorney-General to invoke the revisionary powers of the Supreme Court. The said Code, however, gives a specific right of appeal against sentence. It is well settled that an appellate court will not interfere with the discretion of the trial judge in the matter of sentence, unless the sentence imposed is *manifestly* inadequate or is illegal or the discretion has been exercised on a wrong principle.

10. *Attorney-General v. H. N. de Silva* (1955) 57 New Law Reports 121, was a case where the accused, who was a public officer, pleaded guilty to charges of forgery and the trial judge had ordered the accused to enter into a bond in a sum of Rs. 300/= with one surety to be of good behaviour for two years. The court imposed neither a term of imprisonment nor a fine, having regard to the following facts:

- (a) that the accused was about 22 years of age;
- (b) he would be discontinued from service; and
- (c) his previous good character.

The Attorney-General moved to revise sentence and Basnayake, Acting Chief Justice, in the course of his judgment stated as follows:

This Court has power in the exercise of its revisionary jurisdiction to increase or reduce a sentence, and it is not contrary to the rules which apply to appellate tribunals that it should exercise its independent judgment in a matter which is brought up before it in review and increase a sentence if it thinks it should be increased. Learned Counsel for the respondent urged that the quantum of sentence is a matter for the discretion of the trial Judge and that the Court of Appeal ought not to interfere, unless it appears that the trial Judge proceeded upon a wrong principle. He cited a number of cases

which state the principles which should guide an appellate tribunal in altering a sentence passed by a Court of subordinate jurisdiction. Those cases quite properly lay down the rule that an appellate Court will interfere only when a sentence appears to err in principle or when the subordinate Court has either failed to exercise its discretion or has exercised it improperly or wrongly. (at p. 123).

In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail.

A Government servant would invariably be a person of good character for he would not be in the service if he were not so. The fact that a Government or other servant would lose his employment by the conviction is not a sound reason for not imposing a term of imprisonment where his offence merits it. It is of vital importance that the confidence of the public in the services managed by the State should be preserved. In the same way in the case of a professional man the fact that the conviction would deprive him of membership of the professional body to which he belongs affords no valid ground for not sentencing him to imprisonment for a grave crime involving his honesty or integrity. (at p. 124).

CONTEMPT OF COURT

Memorandum by the Government of Sri Lanka

The jurisdiction to deal with contempt of court in Sri Lanka is purely statutory. Such jurisdiction was expressly conferred on the Supreme Court and the inferior courts by the Courts Ordinance of 1889 and certain provisions of the Criminal Procedure Code and the Civil Procedure Code. The distinction in England between the powers of the superior and the inferior courts of record to punish for contempt, appears to have been followed in our legislation. Broadly speaking, the jurisdiction of the inferior courts is confined to contempts committed *in facie curiae*. Sections 18 and 55 of the Judicature Act No. 2 of 1978, which relate to contempt of court, have now replaced the provisions of the repealed Courts Ordinance. It is the principles of the English law of contempt that have been followed in our courts.

2. Cases of civil contempt often arise in our courts. The question in such cases would be one of mere disobedience by a party to a civil action of a specific order of court or of a failure to observe an undertaking given to court. It is, however, in contempts classified as "criminal contempts" that the element of *public interest* in the due administration of justice becomes a matter of vital importance. It is here that questions of public policy which require a balancing of conflicting interests arise. While the fountain of justice must remain unpolluted, yet freedom of speech and publication should not be circumscribed beyond reasonable limits.

3. In this context, it is right to remind ourselves of the celebrated dicta of Lord Atkin in *Ambard v. Attorney-General for Trinidad and Tobago*, (1936) 1 A.E.R. 704, 709:

But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

4. As far back as the year 1936, there appeared in a leading daily newspaper, an article entitled "Justice on Holiday"—The article is of a sufficiently provocative character to justify quotation in full:

Justice on Holiday

With all this talk of the law's delays it seems an ironical jest that the Supreme Court and the District Courts of Colombo should close for two weeks from Friday,

presumably for the Race Meet in Colombo. This fortnight's relaxation appears to be the special privilege of these Courts, for the other Courts in Colombo and the outstations, as well as the Legal Department, are expected to perform their duties during that period. His Majesty's Judges in England are not off duty for the Derby or for the fashionable Ascot meet. They do not obviously mix up sport with their judicial functions. Here in Ceylon, Public Servants have a surfeit of holidays to make less fortunate members of the public grow green with envy. But when in addition to Christmas holidays, the long Easter vacation, and the other leave privileges the Supreme Court and the District Courts of Colombo close shop during the August race meet, the public has a right to question the propriety of this tradition. It is indeed a tradition of what old bureaucrats would call the halcyon days of the Public Service when Government officials did just as they liked. Now times have changed and especially in the case of the judiciary there is the greater necessity to speed up the administration of justice if the public grievance about the law's delays is to be redressed. But instead of removing the obvious causes which lead to arrears of work the tendency is to talk glibly about the lack of staff and the need for more officers to man the judiciary. The taxpayer is always there to give his money to pay for more Judges, more Commissioners of Assize and other officers. Even in his Budget speech Sir Baron Jayatilake dwelt at length on the law's delays and prefaced his remarks on that point by announcing the increase in the financial provision made for the Supreme Court. Neither more funds nor more personnel for the judiciary will help in preventing delays in the administration of justice as long as the tradition symbolized in the August Race Meet holidays continues. After all what is this great sport for which justice is held up for a fortnight? It may have been sport in the past but to-day it seems to have descended into an orgy of gambling shared by the high and low of the land. It does seem incongruous that the two weeks' intensive operations in spotting the Double and the Treble should coincide with special leave for Courts of law. The sooner the judicial officers and members of the legal profession co-operate to stop this exclusive August holiday the nearer will be the day when there will be no complaint about the law's delays.

5. The Supreme Court issued notice on the editor of the newspaper to show cause why he should not be committed for contempt of Court—It was contended on behalf of the editor that it is "the holidays and not the judges that are being attacked, that it is an onslaught on measures, not on men". These submissions were rejected, the editor was convicted, and Chief Justice Abrahams in the course of his judgment said:

It would be thoroughly undesirable that the press should be inhibited from criticizing honestly and in good faith the administration of justice as freely as any other institution. But it is equally undesirable that such criticism should be unbounded. It was open to the defendant, as to anyone else, to hold and express the

opinion that there are too many court vacations or that they are too long or are fixed at inconvenient times, or that portions of them should at this juncture be sacrificed to the public interest, and had that been all no objection could have been taken in this court.”

6. Many years later, there was a case when a member of the legislature was found guilty of contempt of court by the Supreme Court when he paid a visit to a prison for the purpose of inspection and made the following entry in the Prison Visitor’s Book—

The present practice of appeals of remand prisoners being heard in their absence is not healthy. When represented by Counsel or otherwise, the prisoner should be present at proceedings.

This entry was made in view of a complaint received by the writer that only undefended prisoners are present in court when their appeals are heard. Factually, there was no basis for this complaint.

7. There was an appeal against the conviction to the Privy Council and Lord Radcliffe delivering the opinion of the Privy Council stated—

They have given the matter the anxious scrutiny that is due to any suggestion that something has been done which might impede the due administration of justice in Ceylon. And it is proper that the courts there should be vigilant to correct any misapprehension in the public that would lead to the belief that accused persons or prisoners are denied a right that ought to be theirs. But Mr. Perera (i.e. the appellant), too, has rights that must be respected and Their Lordships are unable to find anything in his conduct that comes within the definition of Contempt of Court . . . Mr. Perera was acting in good faith and in discharge of what he believed to be his duty as a member of the Legislature. His information was inaccurate but he made no public use of it, contenting himself with entering his comment in the appropriate instrument, the Visitors’ Book, and writing to the responsible Minister. The words that he used made no direct reference to the Court or to any judge of the Court, or indeed to the course of justice or to the process of the Courts. What he thought he was protesting against was a prison regulation Finally, his criticism was honest criticism on a matter of public importance. Where these and no other are the circumstances that attend the action complained of, there cannot be Contempt of Court.

CONTEMPT OF COURT

Memorandum by the Government of Bangladesh

The paper prepared by the Commonwealth Secretariat on the law of contempt of court has given some very useful information. It has given a good idea as to the law as is being followed in many commonwealth countries. Some of the recommendations of the Phillimore Committee, as given in Appendix A of the paper, though made in the background of U.K. conditions, have universal appeal and may usefully be considered by any country which is contemplating enactment of an exhaustive law on contempt.

2. It appears from a study of the paper that the law of contempt is in many respect almost uniform in many commonwealth countries. This is perhaps because most of those countries still follow the British Law and practice, modified to the extent necessary to suit their local conditions.

3. There is no denying the fact that the law of contempt is essential to the fair and impartial administration of justice. As has been rightly pointed out in the Phillimore Report the law of contempt is required as a means of—

- (a) maintaining the right of the citizen to a fair and unimpeded system of justice; and
- (b) protecting the orderly administration of the law.

4. The basis of the law of contempt is that those whose duty it is to administer justice must not be interfered with from outside influences. It is to uphold the majesty of law and the dignity of the courts that resort is taken to contempt proceedings. If orders of the courts could be disobeyed with impunity, the confidence of the people in the judiciary will be shaken and the entire legal system will lose its meaning.

5. Sometimes there may be conflict between the right of a citizen to freedom of expression and the power of the court to punish contempt. An enactment with clear provisions defining the jurisdiction of the court and providing for safeguards of the rights of citizens definitely eliminate the causes of such conflict. But even in the absence of such law, a reconciliation between the fundamental rights of a citizen and the law of contempt may be made to a great extent by the court applying the law. Since often the role of the prosecutor and the judge is combined in one person, the Judge should exercise its power to punish contempt sparingly and only in very exceptional cases in the lesser interest of the administration of justice. It is for the judge to strike a just balance between the right of the individual and the interest of judicial administration.

6. In Bangladesh the law of contempt is mainly based in the English Common Law. The only

statutory provisions which substantially deal with the subject are those provided by the contempt of Courts Act, 1926, and certain sections of the Penal Code, Criminal Procedure Code, and Code of Civil Procedure. The defences available to a contemner are not also to be found in any Act or law. The present law on defence is mainly based on judicial decisions.

7. The Contempt of Courts Act, 1926, a British Indian law, was passed “to define and limit the powers exercised by the High Court Division in punishing contempts of courts”. The Act continued in force in Pakistan. Bangladesh inherited this law as an existing law. The Act is not a comprehensive law.

8. The Act provides—

- (1) That the High Court Division shall have and exercise the same jurisdiction, power and authority in respect of contempt of Courts subordinate to it as it has and exercises in respect of itself. (s.2(i)).
- (2) That the High Court Division shall not take cognizance of such contempt where it is an offence punishable under the Penal Code. (s.2(iii)).
- (3) That a contempt of court may be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to two thousand rupees, or with both. (s.2(iii)).
- (4) That the High Court Division shall not impose a sentence for any contempt of itself or of any subordinate court.
- (5) That the accused may be discharged or the punishment may be remitted on apology being made to the satisfaction of the Court. (First Proviso to s.3)

9. Article 108 of the Constitution of the People's Republic of Bangladesh has recognised the already existing power of the Supreme Court to make an order for the investigation of or punishment for any contempt of itself. This power is however, subject to law, and the Contempt of Courts 1926 as mentioned above is such a law on the subject. An appeal lies to the Appellate Division against punishment for contempt by High Court Division (Art. 103).

10. There is no definition of “contempt” either in the Constitution or in any law and no procedure is prescribed in the Contempt of Courts Act, 1926, for the trial and punishment of the offender. In the absence of such procedure the possibility of arbitrary decisions in Contempt proceedings can not be ruled out, though happily such instances are rare.

11. Though there is no definition of "Contempt of Court" in our country we usefully mean by it any Act, conduct or publication—

- (a) which tends to bring the court or a judge into disrespect;
- (b) which tends to interfere with or obstructs the course of justice or the lawful process of the courts; or
- (c) which tends to prejudice parties to a legal proceeding or their witnesses during the pendency of the proceeding.

13. Apart from the Contempt of Courts Act, other statutory provisions relating to contempt of court are to be found in—

- (a) Secs. 480 to 486 of the Cr. P.C. 1898;
- (b) Sections 175, 178, 179, 180 and 228 of the Penal Code.
- (c) Secs. 151 and Or. 21 Rule 32(1), (2), Order 39 Rule I, 2(3), (5); Order 40 Rule I of the Code of Civil Procedure.

14. Section 480 of the Criminal Procedure Code, 1890, confers special powers on all courts—Civil, Criminal and Revenue to deal summarily with five court or to interfere with course of justice *committed by any person in the face of the Court*. This section enables a court to preserve its decorum and maintain its dignity.

15. The section runs as follows:—

When any such offence as is described in sections 175, 178, 179, 180 or 228 of the Penal Code is committed in view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the court on the same day may, if it thinks fit, take cognizance of the offence and sentence the offender to fine not exceeding two hundred taka, and in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

16. Intentional omission to produce a document by a person legally bound to produce it is an offence under section 175 of the Penal Code.

Refusal to take oath when duly required to take it is an offence under section 178.

Refusal to answer questions by one who is legally bound to state the truth is an offence under section 179.

Refusal to sign a statement made to a Court when legally required to do so is an offence under section 180.

An intentional insult or interruption to a Judge sitting in any stage of a judicial proceeding is an offence under section 228. Then offences are punishable with simple imprisonment for terms ranging from three months to six months or with fine extending from five hundred taka to one thousand taka. There may be regular criminal prosecution for such of terms of contempt. But section 480 Cr. P.C. empowers the court to punish such contempt in the

summary way if the offence is omitted in its presence. i.e. during the course of a judicial proceeding.

17. It is to be noted that this section prescribes a summary procedure enabling the courts to punish such contempts; but such procedure is optional. Where the Court considers that an offence described in section 480 need not be tried summarily by it or requires a heavier sentence, it can, after recording the facts and the statement of the accused, forward him to a Magistrate for trial in the ordinary way (S.482).

18. The remedy under S.480 being summary, it is provided for the safety of the accused that the record should be in detail. It is necessary that it should show (1) the facts; (2) the statement of the offender; and (3) the finding and sentence. If the offence is under S.228, then the record must further show (4) the nature and stage of the proceeding interrupted, and (5) the nature of the interruption or insult.

19. Section 485 is a special provision relating to a witness refusing to answer or to produce a document in his possession or power, and does not offer any reasonable excuse for such refusal. The Court can imprison the recalcitrant witness for a term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482.

20. Section 485A is a new special provision incorporated in the Criminal Procedure Code by the Law Reforms Ordinance, 1948. It provides for punishment on a summary trial for contempt committed by a witness by not attending court in obedience to a summons. If any witness being summoned to appear before a criminal court without just excuse neglects or refuses to attend at the appointed time and place or depart from the place where he has to attend before the time at which it is lawful for him to depart, the court may take cognizance of the offence and after giving the offender an opportunity of showing cause and following the procedure prescribed for summary trial, sentence him to fine not exceeding 250 taka.

21. Contempt of Court such as by the publication of comments calculated to obstruct the due administration of justice or to create a substantial prejudice against the parties or to scandalise the courts does not fall within the purview of section 480. The power to punish a person committing such contempt can now be exercised only by the High Court Division under the Contempt of Courts Act, 1926.

22. Section 484 provides that where a person has been punished under section 480, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or jurisdiction of such court, or on apology being made to its satisfaction.

23. Under S.486 the accused in every case of conviction or sentence (under s.480, 485 or 485A), has a right of appeal to the court to which the decrees or orders of such court are appealable.

24. Under the Code of Civil Procedure, 1908, Contempt Proceedings are provided in Section 151, Order 21, Rule 32 (1), (2), Order 39, Rule 1,2(3),5, Order 40 Rule 1.

25. Section 151 provides for inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the Court. In appropriate cases under its inherent power the Court may punish monetarily a person for its contempt.

26. Under Order 21, Rule 32 where the party against whom a decree for the specific performance of a contract or for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in addition to other method, by his detention in the civil prison for a period not exceeding six weeks.

27. Disobedience of an interim injunction granted under Or. 39 can be punished by the High Court Division as a contempt of Court. Under Rule 2(3) Order 39, the Court granting an injunction may, in case of disobedience, or of breach of any term of the order injunction, order the person guilty of such disobedience or breach to be detained in the civil prison for a term not exceeding six months. Before a party can be punished for contempt, it must be established

that the order which is said to have been disobeyed is clear and unambiguous and that the party was not under a bonafide misapprehension as to its scope.

28. Order 40, Rule 1 provides for the appointment of “receiver” for the custody and management of any property. Possession of receiver is the possession of the courts. Hence, where a receiver is appointed of property, the subject of a suit, and the property is forcibly taken possession of by any person proceeding for contempt may be stated against him.

29. All cases in which punishment is awarded in terms of fine or detention in civil prison are appealable under the provisions of section 104 of the Code of Civil Procedure, 1908.

30. We have no contemplation at present to codify the existing law of contempt mainly consisting of judicial decisions in an exhaustive manner, as our neighbour India has done—laying down detailed procedure to be followed in the case of contempt in the face of the court and contempt outside the court and the defences available to the contemner.

31. Our system is working satisfactorily. In most cases contemnors tender apology and the proceedings end in pardon being granted to the contemner. Arbitrary use of the power of the court is very rare in Bangladesh.

SOME INFORMATION ON THE UGANDA LAW DEVELOPMENT CENTRE

Memorandum prepared by the Law Development
Centre for the Government of Uganda

Establishment and functions

The Law Development Centre is the creation of the legislature and as such its activities are governed by the functions assigned to it by the Law Development Centre Act, 1970. These functions are spelled out in s. 2 of the Act in the following terms:

- 2(1) The Centre shall have the functions of,
 - (a) organising and conducting courses of instruction for the acquisition of legal knowledge, professional skill and experience by persons intending to practice as attorneys—in subjects which shall have been determined by the Law Council under the provisions of any law in force;
 - (b) organising and conducting courses in legislative drafting;
 - (c) organising and conducting courses for magistrates and for persons provisionally selected for appointment as such;
 - (d) organising and conducting training courses for officers of the Government and members of the Armed Forces of Uganda with a view to promoting a better understanding of the law;
 - (e) organising and conducting courses for officers and personnel of courts with a view to improving their efficiency;
 - (f) assisting any Commissioner who may be appointed in the preparation and publication of a revised edition of the Laws of Uganda;
 - (g) assisting in the preparation of reprints of Acts of Parliament in accordance with any law for the time being in force;
 - (h) assisting the Law Reform Commission in the performance of its functions;
 - (i) undertaking research into any branch of the law;
 - (j) holding seminars and conferences on legal matters and problems;
 - (k) collecting, compiling, analysing and abstracting statistical information on legal and related matters;
 - (l) assisting in the provision of legal aid and advice to indigent litigants and accused persons in accordance with any law for the time being in force;
 - (m) compiling, editing and publishing law reports for Uganda;
 - (n) publishing periodicals, bulletins, digests or other written material concerned with legal and related matters;
 - (o) disseminating and promoting generally a better knowledge of the law.

(2) The Centre shall have such other functions as the Attorney-General may from time to time specify by Statutory Instrument.

2. As an efficient means of discharging these functions, the Management Committee has created five departments at the Centre. These are:

- (i) The Department of Administration and Finance,
- (ii) The Department of Applied Legal Research,
- (iii) The Department of Post-graduate Legal Studies,
- (iv) The Department of Law, and
- (v) The Department of LDC Publishers.

General Administration

3. The general administration of the Centre is carried out by the Office of the Director. This office is headed by the Director who is assisted by the Corporation Secretary.

4. There are a number of Committees through which decisions at the Centre are taken. The main Committee is the Management Committee which controls overall policy. There are subordinate sub-committees under the Management Committee set up to assist in the execution of policies laid down by the Management Committee.

5. The diagram attached gives the general picture of the Centre administration set up.

Skeleton proposal for training programme at the Law Development Centre

6. The Ministry of Justice has requested the Law Development Centre to expose its Training Programme with the aim of acquiring foreign aid in terms of finance to sponsor the said training programme. In view of the urgency and importance of the request and because the request is made at short notice it is proposed to give a skeleton sketch of the Centre's training needs. This is the aim of this brief. Hopefully details of the sketch will be given in due course when requested to do so by the Ministry.

7. In giving the skeleton proposal consideration was given to the following points.

8. Training requirements for each specialised Department of the Centre. There are four such Departments:

- (a) Department of Post Graduate Legal Studies
- (b) Department of Law

- (c) Department of Research Law Reform and Publications
- (d) Department of LDC Publishers (Press & Bookshop)

9. Training requirements for staff and students at the Centre by Experts from outside the Country.

10. Training requirements for staff under Exchange Programme with Institutions performing similar functions like the Centre special emphasis being given to the Bar Course and to Publication of Law Reports and Law Journals and to the Law Library.

11. Training requirements for acquisition of deeper knowledge of the Law through the Higher Degree Programme (LLM, JSD and Ph.D).

12. Training requirements for acquisition of practical skills from local resources by Professional members of staff (training as Magistrates and/or training as a pupil in the Ministry of Justice or with an experienced Advocate).

13. Training requirements for acquisition of practical skills from local resources by students (appointment of Professional Advisors from practising Advocates, Judges, Magistrates and State Attorneys to conduct lectures, seminars and as Guest Speakers to students).

14. Requirements to enable the Centre to publish legal materials not only for teaching purposes but for the Legal Profession and for public consumption generally.

15. In view of the consideration given above the Centre expects financial and material assistance according to the requirements given here below:

(i) Five experts to impart knowledge to the following:

- (a) An Expert on Bar Associations on Law Societies to impart knowledge and publish materials to the Bar Course for aspiring Advocates and for continuing legal education for Advocates.
- (b) An expert on Legal Aid to establish clinical legal education and to make proposals for a general aid scheme for Uganda.
- (c) An expert on Legal Research Methodology to act as a Research Fellow in the Department of Research Law Reform & Publications.
- (d) An expert on Law Reporting and Editing of Law Journals to establish a proper system of publication of Uganda's Law Reports and Law Journals published by the Centre.
- (e) An expert on Law Librarianship to develop the Centre's Law Library.

(ii) Inservice training through exchange programme whereby a staff of the Centre is exchanged with a staff of an Institution performing similar functions. The training should take six to nine months, preferably one academic year. Proposed Institutions to exchange with are the following:

- (a) Nigeria Law School
- (b) Ghana Law School
- (c) Ontario Post-graduate pre-admission Programme in Canada
- (d) Osgoode Hall Law School in Britain
- (e) Post-Final Courses at the Inns of Court Law School in London
- (f) Trinity College Oxford for training in editing and Law Reporting with African Law Reports section
- (g) Law Library in any Commonwealth country or even in U.S.A. (preferably with one of the Inns of Court in Britain).

(iii) Training for Higher Professional Degrees for staff as this is an Institution of Higher learning and of high academic status.

- (a) 3 to 4 scholarships every year to meet the needs of the professional departments of the Centre.
- (b) One scholarship per year for personnel in Department of Administration and Finance.
- (c) One scholarship per year for personnel in the Department of LDC Publishers (Press and Bookshop).

(iv) Training using local resources—Exchange Programme within Uganda where staff of the Centre acquire practical skills from Courts Practising Advocates and from the Ministry of Justice and where both staff and students of the Centre benefit from experienced lawyers from the Courts Practising Advocates and from Ministry of Justice.

- (a) Financial assistance required to pay for extra inducement so as to support the programme.
- (b) Financial assistance required to collect and publish precedents and materials acquired during this period of training.

(v) Acquisition of knowledge through reading legal materials—need to build up a store of local legal materials through collection of data information and publishing the same.

- (a) Financial assistance for equipment for research and collection of data.
- (b) Financial assistance for equipment to publish information collected.
- (c) Financial assistance to establish a proper system making information so collected and published reach the lawyers and public through a good sales staff and equipment.

16. It is hoped that the skeleton information given above will prove of great assistance to those who wish to know the training requirements of the Law Development Centre. Given a change each of the above requirements can be justified to its minute detail. However what is perhaps of more importance now is to realise that great need for training at the Centre and to appreciate this great need. Once this is done what will be left is to establish a source of assistance to be given to the Centre's training needs and eventually once that source is established the

magnitude and importance of the requirements will determine what share of that assistance the Centre will get to achieve its training objectives and expectations especially if this Institution is to contribute effectively to the development of the profession as required by the Law Development Centre Act.

Areas requiring urgent assistance

17. The Law Development Centre like many Institutions in Uganda has suffered greatly from the eight years of fascism generally and from the adverse effects of the war specifically. The effects of the war can for example be considered under the following headings:

- (a) Disruption of Centre Activities;
- (b) Physical damage caused to Centre buildings;
- (c) Looting of Centre property including books; and
- (d) Other general effects.

18. In conformity with the Government policy of reconstruction and rehabilitation, the Centre too set out its priority programmes for the said purpose. In the process of this programme it is realised, however, that not much can be done without external assistance from developed countries both at Governmental and Inter-governmental levels. For this reason a special appeal is accordingly made for the required

assistance so that the Centre can also achieve its objectives of reconstruction and rehabilitation.

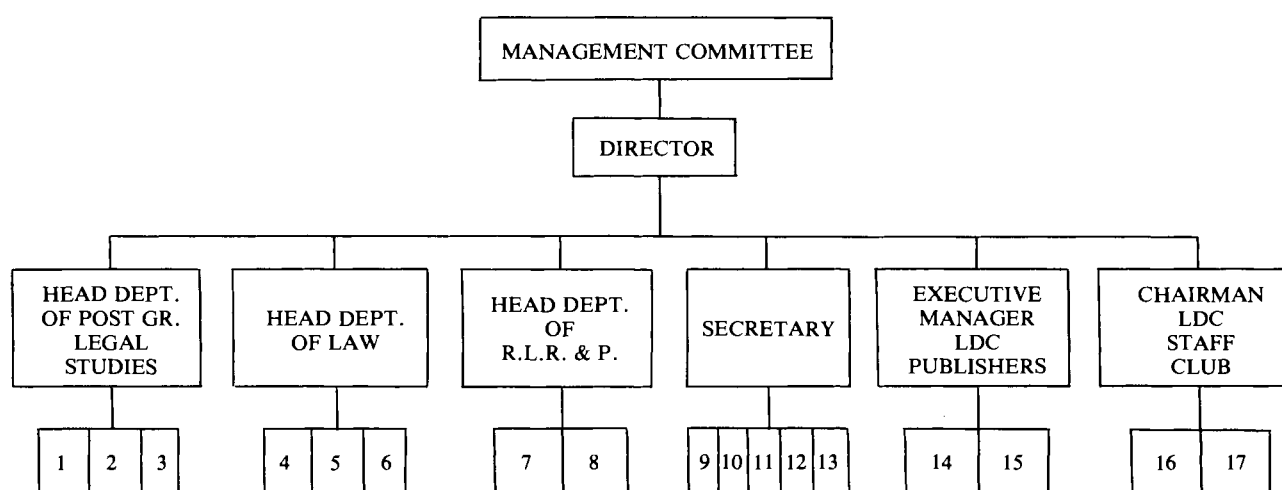
19. Some of the areas in which urgent assistance is required by the Law Development Centre include the following:

- (a) Staff Development Programme—details given above.
- (b) Capital Development—necessity to put up new buildings to cope up with the expanding requirements of the Centre. Most required are Lecture Rooms, offices for staff and hostels for students.
- (c) Provision of legal materials—need for basic textbooks and money to produce local legal material for Advocates and those intending to be so.
- (d) Applied Legal Research and Legal Publications—need for necessary tools for applied legal research and raw materials plus machines to print legal materials like Law Reports, journals and other legal publications.
- (e) Sponsorships and fellowships to International conferences and seminars on matters relating to law and social policy.

20. Further details on the above subject can be obtained from The Director, Law Development Centre, Makerere Hill, P.O. Box 7117, Kampala, Uganda.

LAW DEVELOPMENT CENTRE

ADMINISTRATIVE STRUCTURE CHART



- 1. Practice Commentaries Section
- 2. Legal Aid Section
- 3. Continuing Legal Education Section
- 4. Magistrates Section
- 5. Public Officers Section
- 6. Law for Public Section

- 7. Research and Reform Section
- 8. Publication and Sales Section
- 9. Accounts Section
- 10. Establishment and Registry Section
- 11. Catering & Accommodation Section
- 12. Estates Sections

- 13. Library Section
- 14. Press Section
- 15. Bookshop Section
- 16. Club Section
- 17. Canteen Section

CONTEMPT OF COURT

Memorandum by the Government of Mauritius

Except for a section of The Courts Ordinance giving power to all Courts of Law to punish contempts in the face of the Court and an article of the Penal Code making it an offence to outrage a Magistrate or Judge in public, the written laws of Mauritius are completely silent about contempts of Court.

On the other hand the Legislative Assembly (Immunities and Privileges) Ordinance lists a number of acts, and even omissions, which constitute contempt of the Legislative Assembly and are liable to be severely punished when referred to the Court after a resolution of the House.

The Supreme Court of Mauritius having, by virtue of its constitution, the same powers as the High Court in England, it has never been doubted that it consequently had within its powers the right to safeguard the proper administration of justice, and therefore to punish contempts of court.

Proceedings for contempt may be of a civil or criminal nature and may be stated by any citizen or by the Court itself.

In practice, however, all proceedings for criminal contempt are initiated by the Director of Public Prosecutions by way of a summons to show cause before the Supreme Court.

The Reports abound with decisions for all sorts of contempt. In the recent years, however, the majority of cases brought to Court were directed against the press for what is tersely described as "pre-trial publicity" or "trial by newspaper".

In one of its most recent pronouncements [*DPP v. Cateaux and ors* (1978) S.C.J. 114] the Court quotes with approval what Lord Hardwicke, LC said more than two centuries ago in the *St. James Evening Post* case (1742) that there was nothing "of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the case is finally heard", and held that for a publication to constitute contempt it is not necessary that it should be likely to influence the Court of trial. It is sufficient if it tends to influence the minds of the public, or of the witnesses.

On the question of trial by newspaper, the Court said—

The evil of trial by newspaper is that the function of the Court is resumed without any of the procedural safeguards provided by law. This inadmissible evidence may be disclosed, and parties named in the article have no opportunity to cross-examine and reply. This leads to several mischievous results among which it will be sufficient to quote the following: first, the public is thereby induced to condemn a man who has never had the chance to defend himself; secondly, a witness who feels that the

public is strongly prejudiced against a party may be detained from giving evidence in favour of that party by the fear of incurring reprobation or dislike (see *R. v. Daily Herald* [1932] K.B. 402) thirdly, a witness may commit himself to an inaccurate or exaggerated version which it will be difficult for him to rectify afterwards.

Commenting on the facts of the case in which the newspaper in question had published a resumé of the allegations which a particular witness had made in the past, the Court reflected that "one need not reflect long before one realises how tempting it is for a witness who as the result of a sensational article has jumped from obscurity into the limelight to pose as a star and seek to prolong his adventitious fame by adding even more glamorous embellishments to his story".

It goes without saying that the danger is even greater when a potential witness is paid large sums of money for the exclusivity of his version of the facts.

In another case the appellants challenged their conviction by the Court of Assizes on a charge of manslaughter because some articles and photographs which had appeared in certain newspapers constituted contempt of court and had thus prevented a fair trial, one of the fundamental human rights guaranteed by section 10 of the Constitution. In its judgment the appellate Court said—

We have studied the publications in question and wish to express in no uncertain terms our strong condemnation of such cheap pre-trial publicity. Had those responsible for the publications been brought before the competent Court on a charge of contempt and found guilty, nothing would have saved them from a long term in goal which they would have richly deserved. This observation should serve as a warning to newspaper editors and publishers who might feel tempted to indulge in a practice which must be abhorrent to anyone who understands the importance and solemnity of a criminal trial. As Mr. Blom Cooper rightly pointed out, that was no ordinary trial, the crime had political overtones, and roused violent passions, so that the need to protect the accused from trial by newspaper became even greater than usual. Even the worst criminal is entitled to a fair trial; if therefore we had come to the conclusion that as a result of one-sided comments in the press so much prejudice had been stirred that there was a serious risk that the appellants had not had a fair trial, we should have felt bound to quash the conviction. One of the reasons why this sort of publicity should be sternly discouraged is that an astute criminal might, literally, get away with murder by the simple artifice of getting a paid hack to libel him in the press.

It is in this context of the need to ensure a fair trial that we, in Mauritius, view with concern the wide publicity given to reports of Preliminary Enquiries held in open court. We wonder whether it is not time

to abolish preliminary enquiries and furnish the defence with copies of the statements of witnesses. We have already adopted this practice for those cases of crime which are referred to our Intermediate Criminal Court composed of three trained senior

Magistrates which has now jurisdiction to determine certain classes of crime which were previously within the exclusive jurisdiction of the Court of Assizes sitting with a jury.

THE PROMOTION AND DEVELOPMENT OF INTERNATIONAL CO-OPERATION TO COMBAT COMMERCIAL AND ECONOMIC CRIME

Memorandum by the Government of Singapore

Singapore, as a commercial, trading and financial centre gives full support to the need to regulate economic and commercial crime. The justification for such regulation is compendiously explained by Dr. Rider in paragraphs 6 to 13 of his memorandum and do not call for further elaboration or justification.

Ministers at the last meeting in Winnipeg, in any event, have already recognised the urgency of the problem and the pressing need for recommendations to be made to facilitate and develop international cooperation both in the investigation and prosecution of white collar crime. Dr. Rider in his memorandum has, in Singapore's view, produced recommendations which are feasible and practical as a first step to attain this objective and they have the distinct advantages that they would not call for legislative intervention and would not be costly to implement. Singapore for its part, accordingly strongly favours the adoption of Dr. Rider's recommendation to create a facility for liaison and cooperation within the Legal Division of the Commonwealth Secretariat to deal with white collar crime. This would entail the appointment of a Commonwealth Fraud Liaison Officer (CFLO) whose duties would include liaising with such international agencies as ICPO/Interpol and the discharge of certain other functions that Dr. Rider has enumerated and which are summarised in paragraph 6 of the introduction to the memorandum. To cement closer ties of cooperation with ICPO/Interpol and the Commonwealth Secretariat, we consider it would be useful and instructive for the Commonwealth Secretariat to send observers to relevant ICPO/Interpol meetings and to take other measures of cooperation as Dr. Rider refers to in his Supplementary Paper, Appendix VI. Singapore would be prepared to second police officers for short periods to the General Secretariat of ICPO/Interpol.

Dr. Rider has highlighted the difficulties impeding law enforcement and international cooperation. The difficulties are real and formidable whether they concern the drafting of appropriate laws to deal with economic and commercial crime, for example, the law of criminal conspiracy where an offence is committed in one Commonwealth jurisdiction which has effects in another Commonwealth jurisdiction or the detection and investigation of such crimes or the extradition problems that face a requesting country.

We will confine ourselves to making some general observations on certain points made by Dr. Rider on the evidential aspects of these difficulties. Singapore sees the advantage of including in our law provisions that would enable evidence to be communicated to other Commonwealth police forces to assist them in investigating crimes committed in another Common-

wealth country whether criminal proceedings have already been initiated in that country or are merely in contemplation. We would also consider incorporating in our Evidence Act provisions that would enable statements taken in a Commonwealth country by a police officer to be admitted in court proceedings in Singapore, if, for example, this were part of a Commonwealth Scheme or as a result of bilateral agreement. In this regard it may be mentioned that most Commonwealth jurisdictions in their extradition laws have provided for the reception of testimony given on oath or affirmation in a document or the admissibility of certain documents if such documents are duly authenticated (see for example, section 42 of the Singapore Extradition Act). Again most Commonwealth countries would have provisions that correspond to the UK Evidence on Commission Act, 1885.

Although Dr. Rider has indicated that the proposal by certain UK Department of Trade inspectors that a failure to comply with a demand for information during an inspection into the affairs of a company or into the beneficial ownership of securities should be an extraditable offence, is a controversial one, Singapore's experience in this respect would indicate the desirability of giving such a proposal serious consideration.

On the subject of trial and punishment we would certainly like to hear more about the proposals to devise a new criminal procedure that is better suited to the trial of persons accused of the more complex cases of white collar crime. The implications of allowing a defendant to opt for trial by a Judge sitting with lay magistrates or perhaps even better with assessors such as qualified accountants, do merit further study and we look forward to views of other member nations on the subject. The assessor procedure is used in certain Commonwealth countries but only when dealing with capital cases. It is therefore not an entirely novel proposal. We also would welcome consideration of the introduction of pre-trial procedures which would involve the elimination of vast quantities of non-controversial documents for the trial court to peruse in such cases.

The other major recommendation of Dr. Rider is that a Commonwealth Panel of Experts (CPE) be set up. Members of the Panel would be nominated by Commonwealth Governments and appointed by the Commonwealth Secretary-General. The CFLO (Commonwealth Fraud Liaison Officer) would be a member and act as Secretary to the Panel. We consider this to be a sound proposal that deserves serious consideration and give it our support. Dr. Rider has spelt out the main functions of such a Panel which would include providing expert advice and assist-

ance, the conduct of international inspectors and the discussion and dissemination of information. In the context of international inspectors, Dr. Rider has referred to instances where Singapore has cooperated with other Commonwealth jurisdictions in the rendering of assistance to resolve matters of common concern. He proposes that where two or more Commonwealth jurisdictions are involved in a common or closely related investigation into corporate fraud, it would be a simple expedient to simultaneously appoint the same individual(s) as inspectors to conduct the investigation. Inspectors could, he suggests, be appointed from the CPE. This we feel is a recommendation that is full of practical utility and worth. Its adoption would not be wholly novel as far as Singapore is concerned for I may mention that we already have a provision in our Companies Act (section 210)—which does not appear to exist in any other Commonwealth Companies Act other than Malaysia—dealing with inspections of companies that permits this procedure to be followed. We have, however, not made use of it to date. Evidence taken by a common inspector under oath in one Common-

wealth country could be made admissible in the other Commonwealth country.

The attractions of setting up such a panel as the CPE are obvious and compelling and have been expounded in Dr. Rider's memorandum. We refer in particular to such matters as the impartiality of and availability of expertise in, the appointment of a CPE inspector, the saving of substantial investigation costs and the dissemination of relevant information on matters of common interest to Commonwealth countries.

Finally, we would wish to record my Government's appreciation to Dr. Rider for the excellent work he has done in making such practical, yet imaginative, proposals as a means of tackling the complex problems involved in fighting commercial and economic crime. Although these proposals are, as he points out, not a panacea to all the difficulties involved, they would, if adopted by Ministers, act as a launching pad, as it were, in the battle against organised international corporate crime.

TRANSFER OF CONVICTED OFFENDERS

Written addendum to Guyana's intervention

Countries with Bills of Rights may need to consider possible Constitutional dimensions involved in giving effect to a transfer scheme.

In the case of Guyana and of countries with similar Constitutions, there are specific exceptions in the personal liberty clause and the freedom of movement clause which can accommodate the scheme.

One problem may, however, arise in so far as it may be sought to provide for a granting of clemency by the receiving State to a prisoner convicted abroad, but received by it. Take, for instance, section 90 of the Jamaican Constitution of 1962. This limits the prerogative of mercy to cases of persons convicted of

any offence against the laws of Jamaica. Prima facie that power, as it stands, is not exerciseable in relation to the case of a transferred prisoner. If it is sought to solve the problem by enacting ordinary law to deem the foreign conviction to be a local one, this may be open to the objection that it in effect amounts to an unauthorised amendment of the Constitution.

Perhaps the solution will be either to amend the constitution or to provide by ordinary statute for a clemency scheme similar to but separate from the constitutional one. We do wish to point out that we have not yet considered this aspect of the matter fully, and are consequently merely inviting attention to possible problems and to possible solutions.

©Copyright 1980

Published by the
Commonwealth Secretariat

May be purchased from
Commonwealth Secretariat Publications
Marlborough House
London SW1Y 5HX

ISBN 0 85092 187 2

